An Appraisal of the Implementation of Freedom of Association as a Labour Right: Nigerian Perspective

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Abstract

This thesis aims to appraise the implementation of freedom of association as a labour right in Nigerian law. Freedom of association is recognized as a fundamental or human right of workers both in international law and within the domestic legal systems of most nation states, Nigeria inclusive. This thesis considers the question of the potential benefits and difficulties involved in conceiving of labour rights as human rights, and investigates the influence of human rights discourse and international labour standards on Nigerian legislation and the interpretation of freedom of association by the Nigerian courts. In addition, it considers the suitability of the ordinary courts, specialised labour courts, and alternative dispute resolution procedures to the enforcement of rights to freedom of association within Nigeria. Highlighting the significance of inequalities of bargaining power between workers and employers, accentuated in an era of globalization, and building on Ronald Dworkin's notion of 'purposive interpretation', the thesis argues that the National Industrial Court of Nigeria (NICN) is the forum best suited to the enforcement of rights to freedom of association. In the current political context in Nigeria, this argument assumes a particular significance and even urgency since legislation is currently before the National Assembly which would remove the exclusive jurisdiction which the NICN enjoys in respect of labour disputes.

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Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature ----------

Name ----------

Chapter 1

An Appraisal of the Implementation of Freedom of Association as a Labour Right: Nigerian Perspective

1.0. Introduction

This study appraises the implementation of freedom of association as a labour right under Nigerian law. Freedom of association is guaranteed as a constitutional right in Nigerian law. The first question which this thesis addresses is the *extent* of that constitutional guarantee. What are the precise terms of the relevant articles of the Constitution? Is further provision made for rights to freedom of association (or limitations of those rights) within statute? How have the courts interpreted the Constitution and legislation? Have they been influenced by international labour standards – and, especially, by the notion that labour rights in general, and freedom of association, in particular, are human rights? A second question addressed by the thesis is that of the suitability of the ordinary courts, specialised labour courts, and alternative dispute resolution procedures to the enforcement of rights to freedom of association within Nigeria. Building on the first part of the analysis, the aim here, more specifically, is to consider the suitability of these forums to the enforcement of freedom of association *understood as a human right* and interpreted in line with international labour standards.

In the context of work and industrial relations, freedom of association refers to the right of workers and employers to create and join organisations of their choice freely and without fear of reprisal or interference.[1] It has been defined as "no more than a useful shorthand expression for a bundle of rights and freedoms relating to membership of associations" (in this case industrial associations or trade unions).[2] It is often understood to include the right to collective bargaining, which allows workers to negotiate their working conditions freely with their employers. As a matter of international law, freedom of association rights are universal and apply irrespective of race, creed, religion, gender, occupation, nationality or political opinion. They apply to all workers and employers, including those in the informal economy.[3]

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[1] ILO, Freedom of Association and Development (ILO 2011) 2
[2] Ferdinand von Prondzyynski, Freedom of Association and Industrial Relations: A Comparative Study (Mansell Publishing Limited London 1987) 10,13-14
[3] ILO, Freedom of Association and Development (n1) 2

In recent decades, the International Labour Organisation (ILO) has emphasised the particular significance of freedom of association to developing countries. The guarantee of freedom of association is important, it is said, 'in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate and to achieve fully their human potential".[4] Respect for freedom of association and effective recognition of the right to collective bargaining are intrinsic parts of a broad based conception of development as a process through which individuals and communities enlarge and realize their capabilities.[5]

I begin this introduction by giving further consideration to the context for the study, providing some indication of the history of labour law in Nigeria, and the nature of the economy and the organisation of working relationships. An important question here is that of the size and significance of the informal economy, and the implications for workers employed within the informal economy. I then discuss in more detail the meaning and significance for workers of the right to freedom of association. In the third part, I clarify the objectives and methodology employed in the thesis. Lastly, I outline the structure of the thesis, describing the content and argument of each chapter and its relationship to the argument of the thesis as a whole.

It should be noted at the outset that I focus exclusively, in what follows, on the freedom of association of workers and not on the rights of employers. Having considered the extent to which workers' freedom of association is protected in Nigeria as a human right, in line with international standards, by the ordinary courts, the labour courts, and alternative dispute resolution procedures, I present my main argment which is that the National Industrial Court of Nigeria (NICN) is best suited to this task. In the current context, this argument assumes a particular significance and even urgency. At the time of writing, there is a bill before the National Assembly which seeks to remove the exclusive jurisdiction of the NICN in labour disputes, proposing instead to make it share concurrent jurisdiction with the ordinary courts

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[4] ILO Declaration on Fundamental Principles and Rights at Work, Preamble. See also ILO, Organization, bargaining and dialogue for development in a globalizing world, 279th Session , Governing Body, Geneva, November 2000 , GB.279/WP/SDG/2, Para. 6 http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/sdg-2.pdf

[5] ILO, Organization, bargaining and dialogue for development in a globalizing world, 279th Session , Governing Body , Geneva, November 2000 , GB.279/WP/SDG/2, Para. 6 http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/sdg-2.pdf

(the High Court and Federal High Court).[6] For the reasons given in the course of the thesis, such a move ought to be regarded, it is argued, as retrogressive and at odds with the goal of promoting and giving effect to the rights of Nigerian workers. This is an original argument: the question of the retention of the exclusive jurisdiction of the NICN as a labour court for the enforcement of labour rights has not been much considered or theorised in Nigeria to date, as far as I can discover.[7]

1.1. Setting the Context

1.1.1 *Brief History of Labour Relations in Nigeria*

The development of industrial relations and labour law in Nigeria was influenced by the UK (as the former colonial master). In fact, the first labour statute – the Trade Unions Ordinance – was made in 1938 at the instance of the colonial government. Also the bulk of the extant labour laws in Nigeria were enacted before independence in 1960 by the colonial government, though they have frequently been reviewed and updated over the years.[8]

A fundamental feature of colonial labour policies was the use of coercive practices to control indigenous workers[9] as a means of facilitating the "commercial and economic objectives and interests of the colonial masters".[10] The use of coercion continued even after limited trade union rights had been recognized by the British. The colonial government regarded trade

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[6] See the proposed section 254 C (1A) of the Constitution of the Federal Republic of Nigeria 1999 (Fifth Alteration) Bill 2012. <http://www.nials-nigeria.org/journals/APPENDIX%20B.pdf> accessed 22nd July 2015

[7] While Nigerian labour scholars have focused on the legislative aspect of freedom of association no study has been done as far as I can discover on the gap which this study seeks to fill, to wit: that a specialised labour court rather than the ordinary courts is better suited to enforce labour rights. See Egerton E. Uvieghara, *Labour law in Nigeria* (Malthouse Press Limited, Lagos, 2001) 318-325, 445 Chioma Agomo, 'Legal protection of Workers' Human Rights in Nigeria: Regulatory Changes and Challenges' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing Ltd, UK, 2001) 229 - 257; I. N. E. Worugji and J. A. Archbong, 'Legal Response to Strike in Nigeria: A call for a New legal Regime' (2009) 3 (1), Nigerian Journal of Labour law and Industrial Relations 11, O. V. C. Okene, 'The Right of Workers to Strike in a Democratic Society: The Case of Nigeria' (2007) 19 (1) Sri Lanka Journal of International law 193, Emeka Chianu, *Employment Law* (Bemicov Publishers (Nigeria) Ltd, 2004) 236-238

[8] Marcellus Ikeanyibe Okey and Anthony O. Onyishi , "Global Determinants and Contexts of Contemporary Industrial Relations Policy in Nigeria (2011) Labour and Management in Development Journal 10-12

[9] Kwamina Panford, "The Evolution of Workers' Rights in Africa: The British Colonial Experience", (1996) 14 Boston University International Law Journal 68

[10] Chioma Agomo, 'Legal protection of Workers' Human Rights in Nigeria: Regulatory Changes and Challenges' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing Ltd, UK, 2001) 229,230-231

union activities as de-stabilizing. Perceived as a threat to the colonial regime, trade unions bore the brunt of the colonial government's hostility.[11]

Apart from statutes and laws regulating employment, common law has also played and continues to play an important if not dominant role in regulating the relationship of master and servant or, as it is known in modern times, employer and employee. The common law has developed rules which have become permanent features of the contract of employment. By these rules, certain obligations and rights are implied into contracts of employment in order to give such contract the required and necessary 'business efficacy'.

1.1.2 A Young Democracy

Nigeria is located in West Africa on the Gulf of Guinea between Benin and Cameroon. It shares borders with Cameroon in the east, Chad in the north-east, Niger in the North and Benin in the West. Nigeria is a large country both in terms of geographical area and the size of its population.[12] It has more than 250 ethnic groups, the major ones being Hausa and Fulani in the North, Yoruba in the West and Ibos in the East.

British colonialism created Nigeria, joining diverse peoples and regions in an entity known today as "Nigeria". It became an independent state on 1st October 1960 and as a nation it may be regarded still as young in terms of its general development.[13]
The post-independence political system of Nigeria has been fundamentally affected by two noticeable phenomena: military intervention in politics and the challenges of democratisation. Military intervention began in 1966.[14] Since then, the military has ruled the country at various times (1966-1979 and 1984-1999) for about 30 years in total, while democratic

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[11] For instance, in 1949 when workers at the Enugu Coal Mines of Nigeria went on strike, the British colonial government, in response, unleashed armed police against the striking workers. As a result, workers were killed and wounded simply for exercising their right to strike. See also Kwamina Panford, "The Evolution of Workers' Rights in Africa: The British Colonial Experience" (n9) 68

[12] The geographical area is estimated at 923,768 square kilometres. The population is estimated at 168,834,000, see UnitedNations,'NigerianPopulation'<http://data.un.org/CountryProfile.aspx?crName=Nigeria> 168,834,000 (2012), accessed 2nd June 2015

[13] Tijani Yesufu, *An Introduction to Industrial Relations in Nigeria* (Oxford University Press 1962) 1

[14] Ibikunle Adeakin, 'Military Prerogatives, Authoritarianism and the Prospects for Democratic Consolidation in Nigeria' <www.cpsa-acspa.ca/papers-2012/adeakin> accessed 15th May, 2015

government has existed for only 25 years.[15] The challenges of democratisation include: violations of civil liberties and basic freedoms (individual and communal) from time to time, and a lack of good governance.[16]

The country has been under democratic government since 1999. A new democratic president, Muhammadu Buhari, was sworn in on the 29th of May 2015. Buhari is a former military dictator (1983-1985) who toppled the civilian administration of Shehu Shagari and set up an authoritarian rule marked by some retroactive decrees promulgated on crime,[17] arbitrary arrests, and restrictions on freedom of expression.[18] It is uncertain what he has to offer the people of Nigeria with regards to the promotion and protection human rights.

With respect to past military regimes, it is important to note that the laws which they made (decrees and edicts) did not pass through democratic legislative processes because there were none.[19] Indeed, all the relevant labour laws made during this period were promulgated as decrees which do not effectively protect workers interests.[20] Also sometimes, trade unionists and workers were victims of unlawful government harassment, arrests, and intimidation.[21] Also in military regimes, workers' rights were neither recognised nor protected.[22] Strikes were practically outlawed, while freedom of association and the right to form or to belong to a trade union of one's choice were severely curtailed.[23]

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[15] Ebere Osieke,' The Federal Republic of Nigeria' <www.forumfed.org/libdocs/Global-Dialogue/Book-3/BK3-C07-ng-Osieke-en.htm> accessed 15th May, 2015

[16] Omoleke Ishaq Isola and Olaiya Taiwo Akanbi, "Democratisation process and governance crisis in contemporary Nigeria: A re-examination" (2015) 9(4) African Journal of Political Science and International Relations 136

[17] One of such retroactive Decrees promulgated by the Federal Military Government headed then by Muhammadu Buhari was the Special Tribunal (Miscellaneous Offences) Decree No. 20 of 1984. It was made against drug trafficking within Nigerian. Section 3 (2) (k) of this Decree provided that "any person who, without lawful authority deals in, sell, smoke or inhale the drug known as cocaine or other similar drugs shall be guilty under section 6 (3) (K) of an offence and liable on conviction to suffer death sentence by firing squad. The Decree was hurriedly backdated by one whole year on the basis for which the following persons: Lawal Olujope, Bartholomew Owoh and Bernard Ogedengbe were tried and executed by firing squad on April 14, 1985.

[18] Human Rights Watch,"Nigerian President should Address Abuses" <www.hrw.org/news/2015/05/26/nigeria> accessed 2nd June, 2015

[19] Agomo (n1) 231

[20] For instance the Trade Union Act, 1973; the Labour Act, 1974; Wages Board and Industrial Council Act, 1973; Trade Dispute Act 1976 and Trade Disputes (Essential Services) Act, 1976 amongst others,see Agomo 23

[21] Agomo (n7) 231

[22] Agomo (n7) 232

[23] Agomo (n7) 232

While democratic governments are better than military governments in terms of recognition and enforcement of rights, this is not to say violations of workers' rights never occur, they occur from time to time but in a less egregious fashion. There is a need therefore to constantly remind government of the importance of creating and maintaining strong institutions that can enforce citizens' rights.

1.1.3 The Nigerian Economy

Nigeria's economy can be categorised as a mono-economy as it depends largely on oil, and export earnings from oil production account for over 90 per cent of GDP.[24] The non-oil sector consists of manufacturing, agriculture, telecommunication, finance, tourism, real estate, construction and health.[25] Non-oil (mostly agricultural) products such as groundnuts, palm kernels, palm oil, cocoa, rubber, cotton, coffee, beans, hides skin and cattle dominated Nigeria's export trade in the 1960s. But the discovery of crude oil in commercial quantity shifted the attention from non-oil exports to a "petroleum mono-cultural economy" since the 1970s. While petroleum exports have grown, non-oil exports have declined.[26] Thus the non-oil sector today demonstrates a typical developing African model. About 30 per cent of the GDP comes from agriculture and the manufacturing sector is limited and developing slowly.[27]

The link between workers' rights and a mono economy based on oil may be illustrated by the spate of industrial actions organised by labour unions from time to time, to protest government unilateral changes in the pricing of petroleum products.[28] For instance in 1994, during a strike the National Executive Council of National Union of Petroleum and Natural Gas Workers (NUPENG) formulated a number of demands including workers conditions and reinstatement of democratic and political institutions as well as the immediate release of all

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[24] John Opute, Globalisation and the Emerging forms of Employee Rights in Transformation Economies: The Contextual Issues, < http://ilera2012.wharton.upenn.edu/RefereedPapers/OputeJohn> accessed 19th May, 2015.
[25] Onodugo Vincent A, Ikpe Mauris and Anowor Oluchukwu,"Non-oil Export and Economic Growth in Nigeria:A Time Series Econometric Model" (2013) 3(2) International Journal of Business Management and Research 117
[26] Vincent,Mauris and Oluchukwu .(n25) 17
[27] Opute (n24)
[28] Agomo (n7) 232

detained union officials and other activists.[29] One of the reasons for the workers' industrial action is that a change in oil pricing causes inflation which in turn affects workers' living standards and working conditions. And employers and government hardly provide incentives to cushion the effect.

With respect to government policies, there have been situations where workers have had to contend with government policies which are unfavourable to labour. One such policy is the Structural Adjustment Programme (SAP) introduced between 1985 and 1995. It promoted trade liberalisation, public sector reforms and privatisation.[30] The SAP was geared towards less government involvement in the economy and more private sector participation. The revitalization of the private sector was aimed at attracting the much needed Foreign Direct Investment (FDI) into the country. While it attracted some FDI especially in the oil and gas industry it led to the lowering of labour standards at the same time.[31] One effect of the SAP is that it led to an increase in outsourcing as a means of hiring labour.

1.1.3.1 Informal Work in the Nigerian Economy

i. The Informal Economy

The 2002 International Labour Conference Resolution concerning decent work and the informal economy indicated that there is no universally accurate or accepted description or definition of the term "informal economy", but it can be said to refer to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs.[32]

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[29] Julius O.Ihonvbere,'Organised labour and the Struggle for Democracy in Nigeria' (1997) 40(3) African Studies Review 77, 89-90., see also Agomo (n7) 232

[30] Agomo (n7) 234

[31] Tinuke Fapohunda," Employment Casualization and Degradation of Work in Nigeria" (2012) 3 (9) International Journal of Business and Social Science 262,< http://ijbssnet.com/journals/Vol_3_No_9_May_2012/31.pdf > accessed 21st July 2015

[32] ILO, Resolution concerning decent work and the informal economy 2002 Para 3 http://www.ilo.org/public/english/standards/relm/ilc accessed 27th November 2015

Nigeria has the largest informal sector in Africa.[33] This can be explained with reference to the country's massive population (estimated at 168,834,000 by the United Nations in 2012)[34] and decades of poor economic performance, denoted by a high unemployment rate of 12.9 per cent and soaring poverty of incidence of up to 54 per cent.[35] The size of the informal sector has been estimated at 57.9% of the GNP.[36]

ii. Informal Employment

The informal economy has been identified as encompassing the following categories of workers:

i. *Self-Employed*: including own account workers, heads of family businesses, and unpaid family workers;
ii. *Wage Workers*: including employees of informal enterprises, casual workers without a fixed employer, home workers, paid domestic workers, temporary and part-time workers and unregistered workers; and
iii. *Employers*: including owners and owner operations of informal enterprises.[37]

Employment may be considered informal by reason of the following: the non declaration of the jobs or the employees; casual jobs or jobs of a limited short duration; jobs with hours of work or wages below a specified threshold (e.g. for social security contributions); employment by unincorporated enterprises or by persons in households; jobs where the employee's place of work is outside the premises of the employer's enterprise (e.g.

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[33] Victor Onyebueke and Manie Geyer, The Informal Sector in Urban Nigeria: reflections from almost four decades of research' (2011) 59, Town and Regional Planning 66
[34] United Nations, Nigerian Population'(in 2012) <http://data.un.org/CountryProfile.aspx?crName=Nigeria > accessed 2nd June 2015
[35] Central Bank of Nigeria: "Annual Report and Statements of Accounts for the Year Ended 31st December 2009", pages IV-VI, <www.cenbank.org/OUt/2010/PUBLICATIONS/REPORTS/RSD> accessed 20th May, 2015. See also Onyebueke and Geyer (n33) 66.
[36] Friedrich Schneider, 'Size and Measurement of the Informal Economy in 110 Countries Around the World' (being a paper presented at a Workshop of Australian national Tax Centre, ANU, Canberra, Australia, July 17, 2002) <www.amnet.co.il/attachments/informal_110.pdf > accessed 20th May, 2015.
[37] ILO, *Women and Men in the Informal Economy: A Statistical Picture'* (ILO 202) pages 11-15, <www.ilo.org/dyn/infoeco/docs> accessed 20th May, 2015, see also Onyemachi Joseph Onwe, "Role of the Informal Sector in Development of the Nigerian Economy: Output and Employment Approach" (2013) 1 (1) Journal of Economics and Development Studies 62.

outworkers without employment contract); or jobs for which labour regulations are not applied, not enforced, or not complied with for any other reason.[38]

In terms of its analysis, this thesis focuses on wage workers in the informal economy, arguing especially with reference to the size of the population, that these need protection. The other categories can be classed as independent, not under the control of another. The wage workers in the informal economy include 'casual workers', agency workers, and domestic workers. The characteristics of this kind of work include a lack of job security, irregular working patterns, and sometimes long hours of working and low income (below the national minimum wage).

One impact of informalization is that the right to freedom of association is denied to most workers in the informal economy. This has affected unionisation in the oil and gas sectors and Export Processing Zones (EPZs) where the bulk of the workers are 'casuals. In fact, the right to freedom of association is virtually non-existent in these sectors.[39] Employers in these sectors prefer to relate with employees individually, rather than as a collective unit as represented by trade unions. This is in apprehension of the relative power of trade unions compared with individual worker.[40]

In general, it may be observed that despite their guarantee under the Constitution, human rights are abused in Nigeria from time to time. With respect to workers' rights although violations are more frequent and severe in military regimes, they cannot be said to be totally absent either in democratic regimes. For instance some of the following violations have been recorded during the period in office of various democratic governments. Following a strike in 2001, forty-nine lecturers were dismissed from the University of Ilorin. In 2002, shortly after the Nigerian Labour Congress (NLC) declared a nationwide strike over the increase of petroleum prices, security agents rounded up the NLC president and several other labour

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[38] ILO, *Informal Economy, Undeclared Work and Labour Administration* http://www.ilo.org/wcmsp5/groups/public/ page 6 accessed 27th November 2015

[39] Agomo (n7) 235

[40] Funmi Adewumi and Adebimpe Adenugba, *The State of Workers' Rights in Nigeria: An Examination of the Banking, Oil and Gas and Telecommunication Sectors* (Friedrich Ebert Shifting, Abuja 2010) 25 <http://www.ibrary.fes.de/pdf-files/bueros/nigeria> accessed 21st July 2015

leaders.[41] On 6th of January 2008, Alhaji Saula Saka, President of the Lagos State Branch of the National Union of Road Transport Workers (NURTW) was murdered. The killing was believed to be linked to his trade union activities.[42] Sometimes, the lives of trade union leaders who oppose government policies are not safe. In March 2008, Mobil Oil, a subsidiary of ExxonMobil, dismissed one hundred leaders and members of the Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN)-a trade union. The decision came a few days after management of Mobil Oil refused to take part in a national tripartite mediation meeting that three other companies had been invited to, and had participated in. At the end of March, 2008, PENGASSAN cancelled a planned strike after Mobil Oil agreed to reinstate the one hundred dismissed workers.[43] There have also been cases of unlawful dismissals of workers by government or other employers for having exercised the right to strike, and the raiding and sealing of trade union premises during strike action.[44]

1.1.4 Freedom of Association

Freedom of association is a universally recognized civil liberty and one of the most fundamental rights of workers. Time and again history has shown that recognition of the basic rights of workers and employers is a prerequisite for the emergence of democracy and for the overall development of national economies, Nigeria included. Looked at the other way round, there can be no real democracy and little economic development if the majority of the population are suppressed and denied the right to organize themselves to protect and further their economic and civil interests.[45]

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,

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[41] ITUC:'2009 Annual Survey of Violations of Trade Union rights in Nigeria' <http//survey09.ituc-csi-org/survey > assessed 15th July 2009
[42] ibid
[43] ibid
[44]ILO, Freedom of Association Cases, Case No. 2267,(concerning Nigeria,) 2003 <http://www.ilo.org/dyn/norm lex> accessed 5th August 2015
[45] ILO, Substantive Provisions of Labour Legislation:Freedom of Association http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm accessed 7th January 2016

freedom of association has an important role to play in the development and operation of a market economy, which generally functions most efficiently under democracy.[46]

Freedom of association is also of considerable significance to a developing country like Nigeria which has a large population of informal workers (many who are denied right to associate by the employers) It has the capacity to provide workers' organisations in the informal sector with the means to resist those measures taken aimed at boosting foreign direct investment and the promotion of new industries *to the detrment of workers' rights*.[47]

Freedom of association constitutes the foundation on which other rights are built within the employment relationship and as such, if the right to organise is denied, workers become more vulnerable, while management assumes an unfettered control of the labour process and employment relationship.[48]

1.1.4.1. Freedom of association: a fundamental human right?

Freedom of association and the right to collective bargaining are enshrined in the ILO Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No 87) and the Convention on the Right to Organise and Collective Bargaining (No 98). These rights are recognised as fundamental rights in the ILO's 1998 Declaration on the Fundamental Principles and Rights at Work.[49] The right to freedom of association is also recognised as a basic human right in various international instruments, most notably the Universal Declaration of Human Rights.[50]

In international law, freedom of association is accorded a special status. Aspects of the right are protected in a range of ILO Conventions, chief amongst these Conventions 87 and 98, which set out in detail the international standards on freedom of association. In addition, all

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[46] ILO, Substantive Provisions of Labour Legislation:Freedom of Association http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm accessed 7th January 2016
[47] Tonia Novitz, "Protection of Workers under Regional Human Rights Systems:An Assessment of Evolving and Divergent Practices" in Colin Fenwick and Tonia Novitz (eds) Human Rights at Work:Perspectives on Law and Regulation Hart Publishing Oxford 2010) 409
[48] Adewumi and Adenugba (n40) 59
[49] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, para 2, http://www.ilo.org/public/english/standards/ accessed 29th December 2015
[50] Universal Declaration of Human Rights, Article 20, http://www.ohchr.org/EN/UDHR/Documents/ accessed 29th December 2015

ILO Members are regarded simply by virtue of their membership of the ILO and acceptance of the ILO Constitution as being bound to respect, to promote and to realize, freedom of association. The 1998 Declaration states that –

> ... all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining ... [51]

The precise meaning of freedom of association – the extent to which it is protected in any particular context – can vary considerably. That said, the definition provided in ILO Conventions 87 and 98 has some claim to be understood as authoritative. The principles relating to freedom of association set out by these Conventions have largely influenced the drafting and terms of other international and regional documents on the matter and are regarded by some as having acquired a status akin to the rules of customary international law.[52]

The following principles reflect some of the essential elements of the right to associate freely as contained in the Conventions: the right of employees, without distinction whatsoever, to establish and subject only to the rules of the organisation concerned, to join organisations of their own choosing without prior authorisation,[53] the right of organisations to function independently without control or interference (eg by drafting their own constitutions, electing their representatives freely, organising their administration and activities, and formulating their programmes),[54] no dissolution or suspension by governmental authorities[55] the right to form and join federations and confederations which in turn have the right to affiliate to

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[51] ILO Declaration on Fundamental Principles and Rights at Work, para. 2.
[52] M .P Olivier and 0 Potgieter, "The Right to Associate Freely and the Closed shop" (1994) Journal of South African Law 290-294
[53] Convention 87 Article 2
[54] Convention 87 Article 3(1) and (2)
[55] Convention 87 Article 4

international organisations',[56] the acquisition of legal personality in such a way as to enable the organisations to exercise the other enumerated rights effectively,[57] measures should be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements,[58] adequate protection afforded to employees against acts of anti-union discrimination at the time of hiring, during employment, and in relation to termination,[59] adequate protection against interference by other organisations and by employers in their establishment, functioning or administration,[60] the establishment of appropriate national machinery to ensure respect for the rights relating to protection against anti-union discrimination and no external interference.[61] These rights, which also allow for certain exceptions, must however not be seen as exhaustive. They do not, for example, refer to the right to strike, the right not to associate, inviolability of trade union premises, and the right to reasonable access to the employer's premises. Internationally most of these rights mentioned last are regarded as necessary ingredients of freedom of association and as constituting part of its essential nature. This is the view taken by the supervisory bodies of the ILO.[62]

1.1.4.2 Nigerian laws relating to freedom of association

Freedom of association (including the right to form or belong to a trade union) has been guaranteed as a fundamental human right in the various Constitutions of Nigeria since independence in 1960.[63] In addition, labour legislations also provide for a right to associate.

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[56] Convention 87 Articles 5 and 6
[57] Convention 87 Aticle 7
[58] Convention 98 Article 4
[59] Convention 98 Article 1
[60] Convention 98, Article 2
[61] Convention 98 Article 3
[62] ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (Fifth edition 2006) . See Paras 520-525 (right to strike), Para 367 (right not to be compelled to join or not to join a trade union does not in itself infringe Conventions Nos. 87 and 98), Paras 178-192 (inviolability of trade union premises), see also M .P Olivier and 0**.** Potgieter, "The Right to Associate Freely and the Closed shop" (n52) 291-292
[63] 1960 Constitution section 25(1) 1963 Constitution section 26(1), 1979 Constitution section 37, 1989 Constitution section 40 and 1999 Constitution section 40 It is important to note that only the 1999 Constitution that is in force the earlier ones have been repealed, and the mention of them is to trace history of freedom of association in the Constitutions.

The legislations in question include: the Labour Act 1971 (as amended),[64] Trade Unions Act 1973 (as amended)[65] Trade Disputes Act 1976 and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.[66]

With respect to the Constitution, section 40 guarantees freedom of association (including the right to form and belong to a trade union) as a fundamental human right. Section 45 allows restrictions on this right on the grounds of public health and public peace. Some other labour rights in the Constitution are expressed to be Fundamental Objectives and Directive Principles of State Policy (FODPSP). And these are not justiceable.[67] They include "equal pay for equal work,"[68] "right to work,"[69] and "right to safety in employment".[70] Freedom of association *is* justiceable.[71]

Article 10(1) and (2) of the African Charter (Ratification and Enforcement) Act expressly guarantee both the right to associate and the right not to be compelled to join an association. And in its preamble specifically projects the principle of the indivisibility of rights, that is:

> civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.[72]

It further states that the Act shall 'have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'.[73] The Labour Act also protects freedom of association by making it unlawful for any employer to make it a condition of employment

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[64] Section 9(6)
[65] Sections 1(i) and 2-9
[66] Section10.The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is a domestication of the African (Banjul) Charter on Human and Peoples' Rights 1981
[67] Constitution 1999, Chapter II and section 6(6)(C). Labour rights (referred to as social rights in the Constitution) expressed as Fundamental Objectives and Directive Principles of State Policy are not justiceable.
[68] Constitution, section 17(3)(e).
[69] Constitution, section 17(3)(a).
[70] Constitution, section 17(3)(c).
[71] Constitution sections 40 and 46.See also *Non-Academic Staff Union of Educational and Associated Institutions* (NASU) *v Vice-Chancellor, University of Agriculture, Abeokuta.* <http://judgment.nicn.gov.ng> accessed 5th Decemberr 2011. Judgment delivered by Justice B. B. Kanyip on 21st February, 2012.
[72] Preamble to African Charter (Ratification and Enforcement) Act
[73] Preamble to African Charter (Ratification and Enforcement) Act

that a worker shall or shall not join a trade union or shall not relinquish membership of a trade union or cause a worker to be dismissed or in any way be prejudiced because of trade union membership or trade union activities.[74]

The Trade Unions Act 1973[75] provides comprehensive provisions for the formulation, registration and organisation of trade unions.[76] And the Trade Union (Amendment) Act 2005 fundamentally amended the Trade Union Act 1973 by opening the door for more central unions to be recognised apart from the Nigerian Labour Congress (NLC).[77]

The Trade Dispute Act purports to recognise the principle of collective bargaining and voluntary settlement of trade disputes.[78] However in reality it entrenches compulsory processes that leave little room for the disputing parties to engage in free collective bargaining of which the right to strike is a fundamental feature.[79] The law notwithstanding, Nigerian workers have never hesitated to exercise their right to strike, even with the criminalisation of such conducts.[80] This is often the only way to get employers to the bargaining table, particularly in the public sector.[81]

Nigeria has ratified ILO Conventions 87 and 98 concerning freedom of association. The status and implementation of international law and treaties in Nigeria depends on the type or subject matter of the treaty. If the subject matter relates to labour, employment and has been ratified, then the NICN has the power to enforce it notwithstanding any provision of the Constitution requiring domestication.[82] Thus the monist approach is applicable to labour

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[74] Labour Act, section 9(6). See also Agomo (n7) 242
[75] Cap T 14, Laws of the Federation of Nigeria, 2004
[76] Trade Unions Act sections 3-36.
[77] The Nigerian Labour Congress is the central union. See sections 7-8 of the Trade Union Act as amended
[78] Trade Dispute Act sections 3, 4 and 5. Section 3 recognises at least three copies of any collective agreement for settlement of a trade dispute to be deposited with the Minister of Employment, Labour and Productivity. Section 4 makes it imperative for the parties to attempt to settle their disputes using any agreed means. However (by section 5), this is subject to the Minister's overriding discretion to prescribe a means of settlement once he or she apprehends a dispute. See Agomo (n1) 246
[79] Agomo (n7) 246-247
[80] See Trade Dispute Act, Section 18(2) and section 30(7) of the Trade Unions Act as amended by section 6 of the Trade Union (Amendment) Act, 2005.
[81] Agomo (n7) 247
[82] Constitution 1999 (as amended by the Third Alteration Act 2010), section 254 C (2), This section provides that'Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international Convention, Treaty or Protocol of which Nigeria has ratified relating to labour, employment,

treaties that have been ratified. This is the basis for the direct implementation of ILO Conventions 87 and 98 in Nigeria. For all other ratified treaties (other than labour treaties), they must be enacted into law by the legislature (the National Assembly).[83] The dualist approach is thus applicable to treaties other than labour treaties.

Before 2010, the ability of Nigerian courts to uphold workers' rights to freedom of association was sometimes restricted by sections 12 (which requires the domestication of treaties) and 45 (which provides for derogations to the right to freedom of association in the Constitution) of the Constitution. But the Constitution was amended in 2010, and the NICN was empowered exclusively to enforce labour treaties that have been ratified (including Conventions 87 and 98) in spite of section 12 of the Constitution which requires the domestication of treaties.[84] One effect of this is that the NICN can now interpret section 40 of the Constitution (which provides for freedom of association) to conform to the ILO Convention 87 and 98.

1.1.4.3 Some Mechanisms for the Enforcement of Freedom of Association in Nigeria

In Nigeria, rights to freedom of association may be enforced by the courts or by alternative dispute resolution procedures.

(a) National Industrial Court of Nigeria (NICN) a specialised labour court

The NICN was established in 1976 but became functional in 1978 pursuant to the Trades Dispute Decree (now Trade Dispute Act, 1976). A specialised labour court is important for the implementation of workers' rights for several reasons. Firstly, the common law rules and concepts and ordinary court procedure is unsuitable for labour related issues. For example under the common law, any worker taking industrial action may be regarded as acting in breach of the contract of employment. The only way out of the contract at common law is to terminate it or give notice to quit and resign from the employment. In other words, common

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workplace, industrial relations or matters connected therewith'. It is important to note that the NICN has been empowered exclusively to hear all labour and employment matters in section 254 C (1).

[83] Constitution 1999 section 12(1)

[84] Constitution 1999 (as amended by the Third Alteration Act of 2010) section 254 C (2) of the Constitution

law treats industrial action as a contractual breach. Apart from this the common law tradition also governs the ordinary courts judges' interpretation of it.

From the Nigerian perspective, there are further reasons why a specialised labour court is desirable. These include: the delays experienced in the hearings of labour cases in the ordinary courts, and jurisdictional conflict as between State High Courts and Federal High Courts to hear labour cases.

(b) Mediation, Conciliation, Arbitration

The Trade Dispute Act provides for the appointment of a mediator and specifically states that if there exists agreed means for settlement of a dispute apart from the Act, (whether by virtue of the provisions of any agreement between organisations representing the interests of employers and organisation of workers or any other agreement), the parties to the dispute should first attempt to settle it by that means. If those means fail, a mediator could be appointed.

A Conciliator can be appointed under the terms of the Trade Dispute Act either by the parties or the Minister of Labour and Productivity[85] for the purpose of effecting settlement of dispute. Conciliation is also recognised by the Arbitration and Conciliation Act.[86] Parties can also decide to settle their disputes through arbitration. The Arbitration and Conciliation Act 1990[87] which applies to both domestic and international arbitrations, regulates arbitration proceedings in Nigeria

1.2 Objectives and Methodology

This thesis aims:

- To appraise the implentation of freedom of association under Nigerian law.

[85] Trade Dispute Act, section 8
[86] Arbitration and Conciliation Act , Cap 19 Laws of the Federation of Nigeria 1990, sections 37-42, and the Third Schedule
[87] Arbitration and Conciliation Act Cap 19, Laws of the Federation of Nigeria 1990

- To make an original contribution to the literature regarding the implementation of workers' fundamental rights in a developing country in this era of globalisation.
- To show that freedom of association is a fundamental human right of workers, also under Nigerian law.
- To assess the extent to which the Nigerian legislature and courts have been influenced by international labour standards and by the work of the ILO in protecting and promoting freedom of association.
- To show that freedom of association can also be enforced through non judicial means.
- To demonstrate the importance of specialised labour courts as a forum for the implementation of the fundamental right of workers in this era of globalisation.

In terms of its methodology, the thesis adopts an approach which combines black-letter analysis of Nigerian legislation and case-law with consideration of the type of legal reasoning adopted by judges in various courts. Using Ronald Dworkin's ideas about judicial interpretation as a framework, it assesses in particular the extent to which judges in Nigerian courts have been open to interpreting freedom of association as a human right, having reference to human rights standards and international norms. In addressing the enforcement of freedom of association through the courts, it refers to relevant secondary sources as well as primary sources relevant to the workers' right to associate, the labour court, the National Industrial Court of Nigeria (NICN) and the ordinary courts. Throughout, reference is had in the first instance to those Nigerian sources that are available. With respect to some matters, it has been found useful to also analyse British and other sources. For example, in considering the question of the possible benefits of specialised labour courts over ordinary courts, reference is had to the seminal arguments of Lord Wedderburn. The focus then turns to the specific case of Nigeria and the NICN, which is used as a case study in support of the primary argument advanced in this thesis regarding labour courts.

1.3 Structure

The thesis begins with a short chapter (Chapter 2) which examines the legal framework in Nigeria, assessing the extent to which workers' freedom of association is protected in the Constitution and labour legislation. The focus here lies primarily with the terms of the written documents and only secondarily with the courts' interpretation of the rights. The courts'

approach to interpreting freedom of association is returned to and dealt with at length in chapter 6.

In chapter 3, my argument proceeds in three stages. In the first section, I consider the particular significance of the human rights 'status' of freedom of association to Nigerian law and Nigerian workers. I then turn to address the question of whether labour rights can be understood as human rights from a theoretical perspective. The discussion focuses here on the concepts of universality, interdependence and the indivisibility of rights. With reference to these concepts, the argument is made that labour rights are human rights and can be enforced as human rights. But one issue that confronts the indivisibility and interdependence of human rights is justiciability. "While it is generally taken for granted that judicial remedies for violations of civil and political rights are essential, the justiciability of the other half of the indivisible rights namely economic, social and cultural rights is usually questioned and sometimes even denied."[88] I argue that once rights are expressed to be indivisible in legislation, the justiciability of economic, social and cultural rights is also implied.

The argument that labour rights, and especially freedom of association, ought to be protected as human rights is given further support in Chapter 4. This chapter considers the ILO's conceptualisation of freedom of association as a fundamental human right and its influence on Nigerian labour legislation and court decisions. The argument is that although the ILO has been weakened by some challenges in recent times, it continues to help to shape labour legislation and court decisions in Nigeria. The Chapter also further examines the ILO's influence which also helped to repeal some military decrees of the 1990s which violated freedom of association. Although the ILO does not concern itself with the type of method for implementing workers' right, it recognizes or mentions labour courts as one of the ways through which labour grievances can be resolved.[89] Thus the ILO's projection of freedom of association as a fundamental human right confirms the position of the existing literature which had suggested reliance on human rights as a potential to achieve protection of workers' interests.

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[88] Idah Elisabeth Koch"The Justiciability of Indivisible Rights" (2003) 72 Nordic Journal of International law 3, 3, mention of social rights is understood to include labour rights.

[89] See ILO Recommendation (concerning the Examination of Grievances within the Undertaking with a view to their Settlement) No. 130 of 1967

Chapter 5 further contextualises the argument in favour of labour courts by using the National Industrial Court of Nigeria (NICN) as a case study. It identifies and analyses three principles (exclusive jurisdiction, professional judges and flexible or simplified court procedure) as key to the effectiveness of labour courts in general. Building on the work of Lord Wedderburn and others, it argues that unless such principles are respected, separate labour courts will add little or nothing to the autonomy of labour.

Chapter 6 critically appraises the Nigerian Courts' interpretation of freedom of association as a constitutional right and a fundamental human right. It analyses and compares the case law of the labour court and the ordinary courts. It argues that the type of reasoning adopted by the judges of the labour court allows them greater opportunity to interpret labour standards widely in line with human rights and international labour standards. The reason is that the interpretation of the judges of the labour court (NICN) appears to look beyond the letter of labour statutes to include the underlying purposes of labour statutes and labour law generally. This has influenced their interpretations and made their judgments better reflect the principles embodied by labour laws. In the ordinary courts, the judges do not tend to base their decisions on the underlying purposes of labour statutes. This is partly why their decisions are at variance with those of the labour court (NICN).

A further factor which has now enhanced the position of the NICN with respect to enforcement of workers' rights is that the Constitution has since 2010 conferred exclusive jurisdiction on the NICN regarding all labour matters *including international labour treaties which have been ratified notwithstanding any provision of the Constitution which require domestication of treaties*.[90]

Chapter 7 examines some forms of ADR procedures commonly used in the resolution of labour disputes (including disputes relating to workers right to associate). It is acknowledged that ADR may offer the parties several benefits which include: saving the cost of litigation, avoiding the time, irritation, and emotion of a trial in the court, affording the parties immediate use of money, allowing the payor to avoid the possibility of a larger verdict,

[90] Constitution 1999 (as amended) sections 254C(1) and (2)

eliminating all uncertainties about the final outcome of a trial.,[91] procedural and substantive flexibility.[92] The chapter raises the question, however, whether ADR may not be well suited to the enforcement of labour rights. It points to "the inequality of the bargaining power which is inherent …in the employment relationship"[93] – and inequality which is further exacerbated in this era of globalisation. And it argues that the NICN's interpretations of labour law and principles and also its consistency in following prevous decisions in current cases may likely be better than ADR settlements in protecting workers' fundamental human rights.

Chapter 8 concludes by returning to the two key questions raised: that of the extent of the constitutional guarantee of freedom of association as a labour right in Nigeria, and that of the suitability of the ordinary courts, the labour court, and ADR procedures as forums for the interpretation and enforcement of that right. Is freedom of association guaranteed in law as a human right; is it accorded to all workers, informal as well as formal; and is it interpreted broadly, in line with international law and human rights charters, including especially the African Charter? On the basis of the conclusions reached in preceding chapters – that labour rights ought to be protected as human rights, in line with international standards, and that the NICN is the forum most suited to this task – it concludes by characterising the thesis as a whole as offering a strong counter-argument to those who would do away with the NICN's exclusive jurisdiction in labour matters. In conclusion, the hope is expressed that the bill currently before the National Assembly will not be passed.

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[91] H. Lee Sarokin, "Justice Rushed is Justice Ruined" (1985-1986) 38 Rutgers Law Review 431-433 see also Monica L. Warmbrod, " Could an Attorney Face Disciplinary Actions or even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?" (1996-1997) 27 Cumberland Law Review 794

[92] Thomas **0.** Main, "Adr : The New Equity" (2005-2006) 74 University of Cincinnati Law Review 354-366

[93] Otto Kahn-Freund, *Labour and the Law*, (Paul Davies and Mark Freedland eds, Stevens and Sons Third edn 1983) 1,18 The "inequality of the bargaining power" is is manifested thus: on the side of the employer he owns and controls the factors of production such as money, land and the business while the worker has only his labour to give and also has rights protected by law.

Chapter 2
Freedom of Association in Nigeria: the Legal Framework

2.0 Introduction

Workers' freedom of association is protected in the Nigerian Constitution, and in a number of statutes, namely, the Labour Act 1971, Trade Unions Act 1973, the Trade Disputes Act 1976, and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.[1] In addition to its express protection of freedom of association, the Constitution seems to also recognize rights to collective bargaining and to strike (though not expressly) by empowering the NICN exclusively to hear all matters relating to collective agreements and strikes.[2]

The aim in this chapter is to assess the extent to which freedom of association is protected in Nigerian law, focusing in this first instance on the terms of the Constitution and relevant legislation, and only secondarily on the interpretation of those documents by the courts. The approach of the courts is returned to and dealt with in detail in chapters 4 and 6. As will be shown, the Constitutional guarantee of freedom of association is subject to significant derogations.

The Chapter is divided into the following parts. Part I gives a brief background of the Nigerian Constitution. Analysis of section 40 (on freedom of association) is attempted in Part II. The nature of the constitutional derogations from freedom of association is examined in Part III. Part IV focused on the principles of the right to strike and collective bargaining (which are the other two components of freedom of association) in the Constitution. And Part V examines the position of treaties (particularly labour treaties) in the Constitution. This is explained to be necessary given Nigeria's ratification of ILO Conventions 87 and 98.

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[1] Section10.The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is a domestication of the African (Banjul) Charter on Human and Peoples' Rights 1981

[2] Constitution of the Federal Republic of Nigeria 1999 (as amended), sections 254C(1)(j)(i) and 254C(1)(m)

2.1. The Nigerian Constitution

During the colonial era and following independence, several constitutions were either promulgated or enacted into law in Nigeria.[3] In 1914, the territories comprising the northern and southern protectorates were amalgamated by the British colonial administration into one colony. Between 1922 and 1954, four constitutions were promulgated for Nigeria by the colonialists, each named after the British Governor of the time: the Clifford Constitution (1922), the Richards Constitution (1946), the Macpherson Constitution (1951), the Lyttelton Constitution (1954). A common feature of these Constitutions was that they were 'processed by the imperialists and were therefore non-autochthonous'.[4] Also worthy of note was that they contained no bill of rights or labour rights, and this is no surprise since the main aim of the imperialists was economic exploitation and not the development of the people.

Since independence, Nigeria has had five Constitutions (1960, 1963, 1979, 1989, and 1999) interspersed with long years of extra-constitutional military rule.[5] All five constitutions incorporated freedom of association including the right to form or belong to a trade union expressed as a fundamental human right.[6] Some other labour rights[7] contained in the Fundamental Objectives and Directive Principles of State Policy, though not justiciable, appeared only in the 1979, 1989 and 1999 Constitutions.[8] The reason for the exclusion of other labour rights in the two earlier Constitutions may have been that trade unions and other labour groups did not indicate any desire in this regard when the drafts of the constitutions were being prepared.

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[3] British Colonisation began officially in 1861 with the establishment of the Colony of Lagos.

[4] Taiwo Osipitan, *An Autochthonous Constitution for Nigeria: Myth or Reality*? University of Lagos Press (Inaugural Lecture Series) 2004, page 12. Also in <http://www.bayoosipitanandco.com/document.> accessed 19th November, 2013 A non-autochthonous Constitution can be defined as one which is not home made and which has not been wholly and exclusively processed by the representatives of the people.

[5] Ignatius Akaayar Ayua and Dakas C.J.Dakas, Federal Republic of Nigeria' <http://www.thomasfleiner. ch/files /categories/intensivekursII/nigeriaI.pdf > accessed 19th November, 2013

[6] Constitution 1960 section 25(1), Constitution1963 section 26(1), Constitution 1979 section 37, Constitution 1989 section 40 and Constitution 1999 section 40.

[7] Other labour rights such as 'equal pay for equal work', 'health, safety and welfare of all persons in employment', 'conditions of work are just and humane'.

[8] See Constitution 1979 section 17(3)(a-e); Constitution 1989 section 18(3)(a-e) and Constitution 1999 section 17(3)(a-e).

The 1999 Constitution came into force on 29th May 1999 and was the outcome of a transition process led by the military government of General Abdusalami Abubakar after more than 15 years of failed attempts to restore Nigeria to civilian rule.[9] Two major constitution-making efforts had failed during these years: the short lived 1989 Constitution that was never implemented fully, and a 1995 draft Constitution that was abandoned in 1998 after the sudden death of the then military head of state, General Sanni Abacha its chief sponsor.[10]

As part of the transition, General Abubakar appointed a Constitution Debate Coordinating Committee headed by Justice Niki Tobi (as he then was). One idea debated was to base the 1999 Constitution on any of the earlier ones, and the Committee found that the generality of the populace favoured the 1979 Constitution as a better point of departure in quest of a new constitution.[11] With minor adjustment to the 1979 Constitution, the 1999 Constitution was promulgated in early May 1999 by General Abdulsalami.[12] This explains the similarity of freedom of association and other labour rights provisions in the two constitutions, 1979 and 1999. As a matter of fact, the content of workers' rights within the two constitutions is the same.

2.2. Freedom of Association under section 40 of the Constitution.

Freedom of association is guaranteed by section 40 of the Constitution, which provides that:

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

[9] Ayua and Dakas (n5), see also J. Isawa Elaigwu and R. A. Akindele (eds.), *Foundations of Nigerian Federalism: 1960-1995*, (2nd ed., Jos Institute of Governance and Social Research, 2001)
[10] Ayua and Dakas (n5) See also J Isawa Elaigwu and R. A. Akindele, eds. (n9)
[11] Ayua and Dakas, (n5) see also Report of the Constitution Debate Coordinating Committee (CDCC), Volume 1, Main Report (Abuja: Government Printer, December 1999) 56.
[12] Ayua and Dakas, (n5)

The inclusion of this provision in chapter IV – the Fundamental Human Rights Chapter – cannot be a mistake since the right to 'form or belong to any trade union for the protection of his interest' is also part of the provision, protecting workers' freedom of association.

It will be helpful, at this juncture, to analyse the wording of section 40.

(i) 'Every person shall be entitled to assemble freely and associate with other persons…'

The implication of this part of the provision is that an employer cannot exercise this right for and on behalf of workers – only workers can exercise this right for themselves. This was the basis of the decision of the NICN in *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta.*[13] In that case, the Respondent, the Vice Chancellor of the University of Agriculture Abeokuta, constituted a caretaker committee to run the affairs of the petitioner Union (Non-Academic Staff Union of Educational and Associated Institutions (NASU)) at the Respondent's University (University of Agriculture, Abeokuta). The Respondent did not contest the fact of interference in the internal affairs of the claimant's branch union in the University, but only argued that he was not the proper party to be sued. Relying on section 40 of the 1999 Constitution, the Court held that no employer is permitted to interfere in the internal management of a trade union and that it 'is the exclusive preserve of members of the trade union itself'.[14] The idea of freedom is defeated if an employer is permitted to interfere in the internal management of a trade union. Also the interest of workers and employers differ and, as such, there cannot be effective representation of workers' interests by the employer.

(ii) 'he may form or belong to any …trade union for the protection of his interest'

Even though the word 'any' seems to suggest that a worker can join any union outside his trade or profession, the NICN has interpreted this part of the provision conjunctively with the phrase 'protection of his interest' to mean that "the phrase 'for the protection of his interest'

[13] *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta*, unreported Suit No.: NIC/LA/15/2011, judgment delivered by Justice B. B. Kanyip on 21st February, 2012. < http://judgment.nicn.gov.ng/ > accessed 5th November, 2013

[14] *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta* (n13)

does not give a citizen unrestrained freedom to join any trade union as a person proposing to join a trade union must show it protects his interest".[15] 'Interest' here is likely going to be based on the particular trade or profession. If X, a worker, is in the teaching profession, his interest is likely to be protected by trade unions in the teaching profession rather than trade unions in the oil and gas sector.

One further factor that may make the NICN compel a worker to join a trade union similar to his trade or profession is the Trade Union Act. The third schedule to that Act not only lists the trade unions in Nigeria, but their respective jurisdictional scope (that is their areas of trades or professions). By this a worker is under legal restriction to join only a union related to his work or profession.

In the *National Union of Petroleum and Natural Gas Workers(NUPENG) v Maritime Workers' Union of Nigeria,*[16] the employees of Polmaz Nigeria Ltd (a company involved in marine services and dock work) applied to the appellant union, NUPENG (a trade union in the oil sector), for membership of the union in exercise of their right to freedom of association. The respondent union, Maritime Workers' Union of Nigeria (a trade union in the marine sector), resisted the action of the appellant union to organise Polmaz employees, insisting that Polmaz employees were its members. The NICN relying on the list of the Trade Unions in the third schedule of the Trade Unions Act held that since the employees of Polmaz Nigeria Ltd were dock workers, the respondent union, Maritime Workers Union of Nigeria, was legally empowered to organise them, and not the appellant union, NUPENG. The NICN explained that the 'type of work done and the industry is the yardstick for determining jurisdictional scope'.[17]

It will appear that while the type of work may determine the jurisdictional scope of a union, the various types of "jurisdictional scope" listed may not be such as to capture all types of

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[15] *National Union of Shop and Distributive Employees (NUSDE) v The Steel and Engineering Workers Union of Nigeria,* unreported: Suit No.: NIC/ABJ/74/2011, Judgment delivered by Justice B. B. Kanyip on 8th March, 2013. <http://jdgment.nicn.gov.ng/pdf> accessed 5th November, 2013, see also: *The National Union of Petroleum and Natural Gas Workers v Maritime Workers'Union of Nigeria,* unreported Suit No.: NIC/LA/48/2010. Judgement delivered by Justice B. B. Kanyip on 21st June, 2012. <http://judgment.nicn.gov.ng/pdf.htp > accessed 5th November, 2013

[16] *National Union of Petroleum and Natural Gas Workers v Maritime Workers' Union of Nigeria* (n15)

[17] *National Union of Petroleum and National Gas Workers v Maritime Workers' Union of Nigeria* (n15)

trades or profession.[18] When such a situation arises that a trade union is not covered by the list in the third schedule, the Registrar of Trade Unions will be expected to register the applicant trade union by virtue of the relevant power conferred upon him in the third schedule.[19] It is important to note that the rule that the type of work determines the type of trade union to join does not apply to a trade union joining a federation. A trade union may join a registered federation of trade unions whether or not members of the trade union wishing to join the registered federation of trade unions are employed in trades, occupation or industries which are similar to the trades, occupations or industries of the trade unions which formed the registered federation which the trade union seeks to join.[20]

The implication is that while a trade union has freedom to join a federation whether or not the trade unions in the federation are engaged in similar trades or occupations. But an individual worker does not have this freedom. One reason for this disparity is that a 'federation of trade unions may be registered only if it is made up of 12 or more trade unions none of which shall have been a member of another registered federation of trade unions'.[21] Thus, if communality of interest in terms of the area of economic activity is not excluded, it may be difficult for a federation of trade unions to be formed. Also the number 12 is quite large, if similarity of economic activity is not dispensed with.

It is important to note that a worker's constitutional right to associate, form or belong to trade union is not absolute.

2.3 Constitutional derogations from freedom of association: section 45

Section 45(1) of the Constitution provides that:

> Nothing in section(s) … 40 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.

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[18] For instance, Nigerian Union of Teachers (NUT,) and Academic Staff Union of Universities (ASUU)
[19] Trade Unions Act 1973 (as amended) Third Schedule
[20] See Trade Unions Act (as amended) section 31. See also *National Union of Shop and Distributive Employees (NUSDE) v The Steel and Engineering Workers Union of Nigeria* (n15)
[21] Trade Unions Act (as amended) section 8(1)(b)

The implication of this provision is that where any other law or Act of the National Assembly prohibits or limits freedom of association for the purpose of defence, safety, order, morality, health of the public, then that law or Act prevails over the Constitution. And the right to associate guaranteed in section 40 can no longer be invoked.

The provision came up for interpretation in the following cases: *Osawe v Registrar of Trade Unions,*[22] *Registered Trustees of National Association of Community Health Practitioners of Nigeria and Ors v Medical and Health Workers Union of Nigeria*[23] (the facts of these two are fully discussed in Part III below) and *Basil Ositadinma Mbanefo and Others v Judicial Service Commission of Anambra State.*[24] In the latter case, the plaintiffs (Basil Ositadinma and Others) who were part of the management staff of the defendant, claimed also to be members of the Judiciary Staff Union of Nigeria, Anambra State Branch (a general union of all staff of the judiciary). They relied on section 40 of the 1999 Constitution which guaranteed their rights to belong to a trade union. The defendant contended that the plaintiffs were senior officers in the management cadre of the Anambra State Judiciary and relied on section 3(3) and (4) of the Trade Unions Act, which provides that:

> No staff recognised as a projection of management within the management structure of any organisation shall be a member of or hold office in a trade union (whether or not the members of that trade union are workers of a rank junior, equal or higher than his own) if such membership or of the holding of such office in the trade union will lead to a conflict of his loyalties to either the union or to the management.

The court found that the plaintiffs were senior officers and, as such, a projection of management. It held that 'Section 3(3) and (4) is a provision that is not necessarily incompatible with the freedom of association and so is reasonably justifiable in a democratic

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[22] *Osawe v Registrar of Trade Unions* [1985] 4NWLR (Pt. 4) 755

[23] *Registered Trustees of National Association of Community Health Practitioners of Nigeria and Health Workers Union of Nigeria* [2008] 2 NWLR Pt. 1072, 575.

[24] *Basil Ositadinma Mbanefo and Others v Judicial Service Commission of Anambra State*, unreported Suit No NIC/En/07/2009, judgment delivered by Hon. Justice B. B. Kanyip on 30th June, 2011. <http://judgment.nicn.gov.ng/ > accessed 5th November, 2013

society'. It further held that the plaintiffs are management staff and so are prohibited from being members of the Judiciary Staff Union of Nigeria and that their membership will lead to a conflict of loyalty either to the union or their employer.

The rationale of this decision is thus drawn from the derogation in section 45(1) of the Constitution. It will appear that the meaning of management staff is determined, not by the whim of an employer, but by (the courts) considering whether the status authority, duties and accountability of an individual employee are such as are the normal attributes of an employee who exercises executive authority.[25] Thus, the derogation is by law only and such law must meet the criterion stipulated, that is: reasonably justifiable in a democratic society for any one of the stipulated interests or purposes.[26] Any attempt by an employer to prevent or prohibit an employee from joining a trade union not based on any law will be an infringement of the employee's right to associate.[27]

I turn now to the other two components of freedom of association: the right to strike and collective bargaining.

2.4 The principles of the right to strike and collective bargaining in the Constitution

2.4.1 The Constitution and the Right to Strike

The right to strike is not guaranteed by the Constitution but may be implied by the constitutional protection of freedom of association given that the strike is 'an intrinsic corollary to the right to organize'.[28] Even though the Constitution does not expressly provide for a right to strike, it confers exclusive jurisdiction on the NICN to entertain matters relating or connected to 'strike, lock-out or any industrial action'.[29] Other statutes do not expressly

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[25] *National Union of Petroleum and Natural Gas Workers v NNPC* unreported Suit No.LD/13/83, High Court of Lagos State (Ayorinde J) <http://judgment.nicn.gov.ng/ >accessed 28th July 2015. See also Egerton E. Uvieghara, *Labour law in Nigeria* (Malthouse Press Limited, Lagos, 2001) 321

[26] Uvieghara (n25) 321

[27] Uvieghara (n25) 321

[28] ILO,*Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (fifth revised edition 2006) Para 523

[29] Constitution 1999 (as amended), section 254 C (1)(c)

provide for the right to strike but either provide immunities for workers and trade unions against liabilities for strike action,[30] or prescribe the procedure to be followed before embarking on strike action.[31]

Two key statutes which limit the right to strike are the Trade Dispute Act and the Trade Unions Act (as amended). Section 18 (1) of the Trade Dispute Act provides that a worker shall not take part in a strike in connection with any trade dispute where-

a. the procedure specified in section 4 or 6 of the Act has not been complied with in relation to the dispute;[32] or
b. a conciliator has been appointed under section 8 of the Act for the purpose of effecting a settlement of the dispute; or
c. the dispute has been referred for settlement to the Industrial Arbitration Panel under section 9 of the Act; or
d. an award by an arbitrator tribunal has become binding under section 13 (3) of the Act; or
e. the dispute has subsequently been referred to the National Industrial Court under section 14 (c) or 17 of the Act; or
f. the National Industrial Court has issued an award on the reference.

Any person or worker who contravenes the foregoing provision is guilty of an offence and liable on conviction in the case of an individual to a fine of N100 or to imprisonment for a term of six months.[33]

The opinion of scholars on the foregoing provision, with which I agree, is that 'it does not leave any room for a lawful strike'.[34] It rather emphasizes other ways of settlement than

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[30] Trade Unions Act (as amended) sections 33 and 34. The Trade Unions Act was amended by the Trade Union (Amendment) Act 2005

[31] Trade Dispute Act 1976, section 18; Trade Unions Act (as amended) section 31(6)

[32] The procedure specified in section 4 or 6 of the Trade Dispute Act is as follows:
section 4 (1) specified that if there exists agreed means for settlement of the dispute apart from the Act, then the parties must first attempt to settle it by that means, section 4 (2) specified that if the attempt to settle the dispute under section 4 (1) fails, the parties shall within seven day of the failure meet together under the presidency of a mediator mutually agreed upon. Section 6 (1) specify that if within seven days of the date on which a mediator is appointed under Section 4 (2) the dispute is not settled, the dispute should be reported to the Minister.

[33] Trade Dispute Act section 18(2)

[34] Uvieghara (n25) 445,446 see also Chioma Agomo, 'Legal protection of Workers' Human Rights in Nigeria: Regulatory Changes and Challenges' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing Ltd, UK, 2001) 229,248 N. E. Worugji and J. A. Archbong, 'Legal Response to Strike in Nigeria: A call for a New legal Regime' (2009) 3 (1), Nigerian Journal

strike. It also criminalizes any contravention, so that what started as a civil process may end up as a criminal offence for which the sentence may be fine or imprisonment.

A further restriction on the right to strike is contained in the Trade Unions Act (as amended).[35] Section 31(6) of the Act provides that:

> No person, trade union or employer shall take part in a strike or lockout or engage in any conduct in contemplation or furtherance of a strike or lockout unless;
>
> a. the person, trade union or employer is not engaged in the provision of essential services,
> b. the strike or lockout concerns a labour dispute that constitutes a dispute of right,
> c. the strike or lockout concerns a dispute arising from a collective and fundamental breach of contract of employment of collective agreement on the part of the employee, trade union or employer,
> d. the provisions for arbitration in the Trade Dispute Act, cap 432, laws of the Federation of Nigeria 1990 have first been complied with: and
> e. in the case of an employee or a trade union, a ballot has been conducted in accordance with the rules and constitution of the trade union at which a simple majority of all registered members voted to go on strike.

It is important to note that the foregoing provision did not repeal section 18(1) of the Trade Dispute Act but prescribed further restrictions so that the former and the latter form a body of law that restricts the right to strike in Nigeria. The NICN has however stated in *Attorney General Osun State v Nigeria Labour Congress (Osun State Council) and Others*[36] that

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of Labour law and Industrial Relations 11,29, O. V. C. Okene, 'The Right of Workers to Strike in a Democratic Society: The Case of Nigeria' (2007) 19 (1) Sri Lanka Journal of International law 193,207,

[35] Trade Unions Act 1973 was amended by the Trade Union (Amendment Act) 2005

[36] *Attorney General Osun State v Nigeria Labour Congress (Osun State Council) and Others*, unreported Suit No: NICN/LA/275/2012, judgment delivered by justice B.B.Kanyip on 19th December 2012. Also in: <http://judgment.nicn.gov.ng/ > accessed 21st February 2014

section 31(6) of the Trade Union Act (as amended) is the current law that regulates the right to strike in Nigeria.

It may be important at this juncture to highlight the differences between the provisions relating to the right to strike in section 18(1) of the Trade Dispute Act, and section 31(6) of the Trade Union Act (as amended). The major differences between the two laws are:

i. While the right to strike can be exercised by all categories of workers in the Trade Dispute Act, there is a blanket ban for those in essential services in the Trade Union Act (as amended).
ii. In the Trade Dispute Act, the reason for the strike need not be labour related. This gives workers the opportunity to go on strike for social or economic reasons. But in the Trade Union Act (as amended), the reasons for the strike must be labour related.
iii. Under the Trade Dispute Act, workers in the union need not vote before embarking on a strike, but in the Trade Union Act (as amended), it is a condition that a simple majority of all registered members of the union must vote to go on strike. This appears to be government's strategy to prevent the central labour organisation-Nigerian Labour Organisation (NLC) from calling out workers to strike.
iv. In the Trade Dispute Act, it appears from the wording of section 18(1) and the use of the word "or" that the right to strike will become exercisable once one or any of the stipulated conditions is fulfilled. But in the Trade Union Act (as amended), the word "or" is absent, which seems to suggest that all the conditions stipulated or prescribed must be fulfilled before the right to strike becomes exercisable.

The foregoing paragraph (iv) was also the view taken by the NICN in *Attorney General, Osun State v Nigeria Labour Congress (Osun State Council) and Others.*[37] The plaintiff employer (Osun State government) sought an injunction to restrain the defendants (the Nigerian Labour Congress Osun State Council, the Osun State Council of Trade Unions Congress, and the chairman of the Osun State Joint Service Negotiating Councils I, II and III) from calling its (Osun State government) workers to strike over implementation of the minimum wage. Following section 31(6) of the Trade Unions Act (as amended) the NICN found that all conditions precedent to strike has not been followed and held that:

[37] *Attorney General, Osun State v Nigeria Labour Congress (Osun State Council) and Others* (n36)

> The manner in which the requirements of Section 31 (6) of the Trade Unions Act as amended are provided for suggests that all of them must be met before the right to strike can arise. The non-satisfaction of any of them necessarily means that the right to strike has not arisen and so cannot be exercised. Since there is no evidence before this count that the requirements in section 31 (6) (a), (d) and (e) of the defendants cannot be legal and valid.[38]

This judgment was delivered on 19th of December 2012 (that is after the constitutional amendment enlarging the jurisdiction of the NICN to include international best practices in labour).[39] One wonders why there is a deviation from the ILO's prescription on the prerequisites or conditions for exercise of the right to strike. The ILO has prescribed that the 'legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike'.[40] It is hoped that the NICN would re-visit this judgment, guiding itself by ILO principles in this regard.

We turn now to consider the position of workers in 'essential services' under section 31(6) (a) of the Trade Union Act (as amended). Generally, workers in essential services are prohibited from going out on strike. Under international law, "essential services" has been defined 'as only those services the interruption of which would endanger life, personal safety or health of the whole or part of the population'.[41] Under the Trade Disputes (Essential Services) Act 1976 in contrast, the definition of essential services is unusually broad, including, for example banking and teaching at all levels.[42] In the recent case of *Aero Contractors Co. of Nigeria Limited v National Association of Aircrafts and Engineers (NAAPE), Air Transport Services Senior Staff Association of Nigeria (ATSSAN), National Union of Air Transport Employees*

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[38] *Attorney General, Osun State v Nigeria Labour Congress (Osun State Council) and Others* (n36)
[39] Constitution 1999 (as amended,) section 254 C (1) (f) enlarged the jurisdiction of the NICN to include international best practices in labour.
[40] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the General Body of the ILO* (n28) Para. 548
[41] ILO, *Freedom of Association Digest of Decisions and Principles of the Freedom of Association Committee of the General Body of the ILO* (n28) paras 581-585
[42] Trade Disputes (Essential Services) Act 1976, Cap T.9 laws of the Federation of Nigeria 2004 section 7 (1)

(NUATE),[43] however, the NICN interpreted this definition restrictively to reflect the ILO position.

In *Aero Contractors*, the plaintiff company (engaged in the domestic air travel sector in Nigeria) sought an injunction restraining the defendants (consisting of pilots, engineers and their senior staff unions) from embarking on a strike, claiming that its business was an 'essential service' as defined under the Trade Disputes (Essential Services) Act.[44] The NICN refused to follow the broad definition of "essential services" as contained in the Trade Unions Act (as amended),[45] Trade Dispute Act[46] and the Trade Disputes (Essential Services) Act,[47] and rather followed the ILO's more restrictive concept of essential services. The Court's reason for this position is that 'this court (NICN) is mandated to apply international best practice and treaties, conventions and protocols ratified by Nigeria'.[48] Following the ILO, it ruled that essential services in the strict sense for which the right to strike may be subject to major restrictions or even prohibitions are: the hospital sector, electricity services, water supply services, the telephone services, air traffic control. Applying the foregoing principles, the NICN held that only members of the defendant unions engaged in air traffic control came within the ambit of those engaged in an essential service. It further held that all other workers in the aviation sector apart from those in air traffic control can exercise their right to strike.

2.4.2 The Constitution and Collective bargaining

Although the right to bargain collectively is not expressly provided in the Constitution, it may be implied from the guarantee of freedom of association. This is so because it is generally understood that the right to bargain collectively constitutes an essential element of freedom of association.[49] Even though the right to bargain collectively is not expressly provided in the Constitution, the latter has expressly conferred exclusive jurisdiction on the NICN to hear and

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[43] *Aero Contractors Co. of Nigeria Limited v National Association of Aircrafts and Engineers (NAAPE)*, Air Transport Services Senior Staff Association of Nigeria (ATSSAN), National Union of Air Transport Employees (NUATE), unreported Suit No.: NICN/LA/120/2013, Judgment delivered 4th February, 2014 by Justice B. B. Kanyip, http://judgment.nicn.gov.ng/ accessed 19th February, 2014

[44] Trade Dispute Essential Services Act, sections 1, 7 (1) (b) (III) and 8 (2)

[45] Trade Unions Act (as amended) section 31 (6) (a)

[46] Trade Dispute Act, see section 48 (1) and the First Schedule to the Act

[47] Trade Dispute (Essential Services) Act, section 7 (1)

[48] *Aero Contractors Co. of Nigeria Limited v National Association of Aircrafts and Engineers (NAAPE)*, *Air Transport Services Senior Staff Association of Nigeria* (n43)

[49] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the General Body of the ILO*, (n28) Para.881

determine any question as to the interpretation and application of any collective agreement.[50] By that it can be said that the Constitution recognises the right to bargain collectively because the collective agreement is the end product of collective bargaining.

The principle of collective bargaining is also recognised in other statutes. Section 24 (1) of the Trade Union Act as amended by the Trade Union Amendment Act provides that '…for the purposes of collective bargaining all registered unions in the employment of an electoral college to elect members who will represent them in negotiations with the employer'. Although parties are encouraged to bargain freely, they are required under section 3(1) of the Trade Unions Act (as amended) to deposit with the Minister of Labour and Productivity any collective agreement[51] reached and any contravention is an offence punishable with a fine.[52] The latter provision seems to evince a government intention to control or regulate the content of collective agreements.

As earlier said, the end product of collective bargaining is the collective agreement. It is therefore important to also analyse the status and enforceability of collective agreements in Nigeria.

2.4.2.1 *The Enforceability of Collective agreements*

Prior to the current exclusive jurisdiction of the NICN on labour matters, the enforceability of collective agreements in Nigeria had dual jurisprudence. This was because the ordinary courts (States High Courts, High Court of the Federal Capital Territory Abuja) had concurrent jurisdiction with the NICN on labour matters.[53] While other courts other than the NICN held

[50] Constitution 1999, section 254C(1)(f)(i)
[51] Trade Unions Act section 3 (1)
[52] Trade Unions Act section 3 (1) (b)
[53] *Attorney-General, Oyo State v Nigerian Labour Congress, Oyo State Chapter and Others [2003]* 8 NWLR (Pt. 821) 33-34, see also Constitution 1999, sections 257 (1) and 272 (1) for the Jurisdiction of the High Court of the Federal Capital Territory, Abuja and States High Courts respectively, compare with jurisdiction of the National Industrial Court in section 7 (1) of the National Industrial Court Act

that collective agreements are binding in honour only and not enforceable,[54] the NICN held that collective agreements are binding.[55]

In finding that collective agreements are binding in honour only and consequently not enforceable, the other courts had reference to the common law. They reasoned that in order for it to be binding, the employee would have to have inserted a clause in his contract that a subsequent collective agreement entered into would be part of the contract so signed. In *Union Bank of Nigeria v Edet,*[56] the employee's contention that her termination flouted the collective agreement was rejected. It was held that collective agreements except where they have been adopted as forming part of the terms of employment, are not intended to give or capable of giving individual employees a right to litigate over an alleged breach of their terms nor are they meant to supplement their contract of service.[57] The other courts' refusal to enforce collective agreements is based on the privity of contract,[58] and most collective agreements are usually between the employers on one hand and trade unions on the other hand, an individual employee seeking to benefit from it is not party to it.[59]

While this was the attitude of other courts to the status of collective agreements, the NICN had a different view. Its view is revealed in *National Union of Civil Engineering, Construction, Furniture and Woodworkers' v Beton Bau Nigeria Ltd and Other's.*[60] The plaintiff union brought this action pursuant to section 15 (now 16) of the Trade Dispute Act for the interpretation of the collective agreement between it and the 1st defendant, the effect of which entitled its listed 158 members to a certain sum of money. The NICN held that it had jurisdiction to entertain the matter. But the plaintiff union lost the case on another ground to wit because it failed to establish the status of the 158 members and so the court was not sure

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[54] *Union Bank of Nigeria v Edet* (1993) 4 NWLR (Pt 287), 298-299, see also *Afribank (Nig) Plc v Osisanya* [2000] 1NWLR (Pt. 642) 598

[55] *National Union of Civil Engineering, Construction, Furniture and Wood Workers v Beton Bau Nigeria Limited and Anor*,, unreported Suit No.: NIC/8/2002/… Judgment delivered on 5th February 2008, court was presided by Justice B.A.Adejumo(President) Justice B. B. Kanyip, Justice M. B. Dadda, also in <http://judgment.nicn.gov.ng>/ accessed 24th February, 2014

[56] *Union Bank v Edet* (n54) 288, 298-299, see also *Afribank (Nig) Plc v Osisanya*(n54) 598

[57] *Union Bank v Edet* (n54) 288, 291 per Uwaifo JCA as he then was

[58] *Union Bank v Edet* (n54) 288

[59] *Union Bank v Edet* (n54) 288

[60] *National Union of Civil Engineering, Construction, Furniture and Woodworkers' v Beton Bau Nigeria Ltd and Others* (n55)

whether they were all employees. This the union could have done by exhibiting the employment letters of the 158 members.[61]

It is important to note that this decision was in 2008, that is, before the constitutional amendment of 2010 conferring exclusive jurisdiction on the NICN. Since 2010, there has been no case on the status of collective agreements. But it seems likely that the NICN will follow its own ruling in the *National Union of Civil Engineering, Construction, Furniture and Woodworkers* case in subsequent cases. That this will be likely is shown by recent statements by some judges of the NICN (in papers presented).[62]

At this juncture I turn now to the implementation of treaties under the Constitution particularly ILO conventions 87 and 98 which Nigeria has ratified. As a first step, it will be important to briefly examine the status of the Constitution vis-à-vis treaties**.**

2.5 The Constitution and the Implementation of Treaties

Sections 1(1), 1(3) and 12(1) of the Constitution stipulate that the Constitution is supreme. Section 1(1) provides that:

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[61] *National Union of Civil Engineering, Construction, Furniture and Woodworkers' v Beton Bau Nigeria Ltd and Others* (n55)

[62] See Justice B.B. Kanyip,"Reforming the Labour Laws: A peep through Honourable Justice Uwais Lenses", <http://nicn.gov.ng/ > accessed 24th February 2014 where the honourable Justice B.B. Kanyp said: "…whereas the regular courts insists on the strict common law approach, at the NIC(N), the sanctity and binding effect of collective agreements is accepted with more, so that once the courts' jurisdiction to interpret a collective agreement is activated under sections 15 and 20 of the Trade Dispute Act there is often no question as to it being binding in honour only. It is deemed to be legally binding for all intents and purposes", see also: Justice B.A. Adejumo "The National Industrial Court of Nigeria: Past, Present and Future", being a Paper delivered at the refresher course organised for judicial officers of between 3-5 years post appointment by the National Judicial Institute Abuja at the Otutu Obaseki Auditorium, National Judicial Institute Abuja, on the 24th of March 2011, <http://nicn.gov.ng/> accessed 24th February 2014, where the honourable Justice B.A. Adejumo said: "The cumulative effect of the confusion created as to the scope of jurisdiction of the NICN was that several courts at the same time had concurrent jurisdiction on the subject matters on which NICN was supposed to have exclusive jurisdiction. Therefore the Federal High Court, the 36 High courts of the States of the Federation, the Federal Capital Territory High Court and the NICN were held to have concurrent jurisdiction in the resolution of labour and trade disputes [see *Attorney- General Oyo State v Nigerian Labour Congress, Oyo State Chapter and Others*(n53) 1, at 33-34]. The resultant effect was conflicting decisions, absence of clarity and uniformity in the decisions of various courts on virtually the same issue. For example, at the High courts, collective agreements were only binding if incorporated into the conditions of service of the employees",[see *Nwanjagu v Baico* (2000) 14 NWLR(Pt.687) 356, *Afribank (Nig) PLC v Kunle Osisanya* (n54) 598 and *Federal Government of Nigeria v Adams Oshiomhole*(2004) 1NNLR (Pt 2) 339,355] , while at the NICN they were legally binding" [see *National Union of Civil Engineering, Construction, Furniture and Woodworkers' v Beton Bau Nigeria Ltd and Anor*,(n55*)*

> This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.

Section 1(3) states that:

> If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void.

Section 12(1) provides that:

> No treaty between the Federation and any other Country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

In view of the foregoing provisions, the Supreme Court has always held that the Constitution is supreme.[63] This raises the question: what is the status of a treaty in Nigerian law?

It is important to state that in the hierarchical classification of sources of domestic laws in Nigeria by the Supreme Court in *Labiyi v* Anretiola[64] treaties were not included at all. Sources of domestic law given were as follows:

Under democratic dispensation:

i. Constitution of the Federal Republic of Nigeria 1999.
ii. Laws made by the National Assembly (Senate and House of Representatives) and assented to by the President, Commander in Chief of the Armed Forces of the Federal Republic of Nigeria.
iii. Laws enacted by the House of Assembly of a State.
iv. Common law as represented by judicial precedents.

Under the Military Regime:

a. Constitution (Suspension and Modification) Decree 1984.
b. Decrees of the Federal Military Government.
c. Unsuspended provisions of the Constitution 1979.
d. Laws made by the National Assembly before 31st of December 1983 or having effect as if so made.[65]

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[63] *Abacha v Fawehinmi* [2000] 6NWLR (Pt.660) 228
Inspector-General of Police v All Nigerian Peoples Party and Others (2007), AHRLR 179 (Ng CA)
[64] *Labiyi v Anretiola* [1992] 8 NWLR ,Pt. 158, 139

e. Edicts of the Military Governor of a State.

f. Laws enacted before 31st December 1983 by the House of Assembly.

g. Common law as represented by judicial precedents.

From the foregoing list, a wrong impression was given that treaties are not one of the sources of Nigerian law. Legal scholars have always regarded international law as a source of domestic law. [66] Treaties are one of the sources of international law,[67] and international law is one of the sources of domestic law.[68]

This brings us back to the question: what is the status of a treaty? In *Abacha v Fawehinmi*,[69] the Supreme Court before answering that question, and also without citing *Labiyi v Anretiola*,[70] defined a treaty as "an international agreement concluded between states in written form and governed by international law". Uwaifo JSC also noted that a 'Treaty' has an "international flavour".[71] It will appear that in spite of the statement of the Supreme Court that a Treaty has an "international flavour", it ranked the Constitution above a Treaty because of the confirmation of section 12(1) of the Constitution in the *Registered Trustees' Case*.[72]

As a general rule, the legal status of international treaties within a particular nation state depends on whether that state operates a monist or a dualist system.[73] The monist theory takes the view that there is only one single system of law, with two component parts – International law and Domestic law – so that international law applies directly without any legislative or executive action.[74] This is also called the adoption or incorporation theory.[75] Dualists, on the other hand, contend that international law and domestic law are two separate and distinct systems, and that international law does not form part of domestic law unless

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[65]On December 31st 1983, the Civilian Government of President Shehu Shagari was overthrown by a Military Coup led by Major General Muhammadu Buhari

[66] A. O. Obilade, *Nigerian legal system* (sweet and Maxwell, London 1979) 171, A. E. W. Park: *The Sources of the Nigerian law*, (African Universities Press, London, 1963) 1

[67]Christopher Schrever. *Sources of International law: Scope and Application*. <http://www.univie.ac.at/intlaw/ wordpress >accessed 14th April, 2012

[68] A. O. Obilade (n66) 171

[69] *Abacha* (n63) 228

[70] *Labiyi* (n63) In this decision the Supreme Court failed to mention 'Treaties' as a source of the Nigerian Law

[71] *Abacha* (n63) 228

[72] *Registered Trustees* (n23)

[73] Chilenyi Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) Vol. 19 African Journal of International and Comparative Law 38

[74] Nwapi, (n73) 44

[75] Nwapi, (n73) 44

domestic law expressly incorporates it through legislation. This is sometimes called the transformation theory.[76]

Nigeria operates both the dualist and monist system. In line with the dualist approach, section 12 (1) of the Constitution provides that for a treaty to be enforceable, it must be enacted into law by the legislature. Since independence, all Constitutions have contained similar provisions adopting the dualist approach.[77] But by the Constitutional amendment of 2010, the NICN was empowered to enforce labour treaties that have been ratified notwithstanding anything contrary in the Constitution. Thus, while the dualist approach is now only applicable to non labour treaties, the monist approach is now used for labour treaties, and this seems to be the effect of the constitutional amendment in 2010.

2.5.1. Enforcement of labour treaties before the constitutional amendment in 2010

In the period before the Constitutional amendment of 2010, the Supreme Court examined section 12 (1) of the Constitution in the following cases: *Abacha v Fawehinmi*[78] and *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors.v Medical and Health Workers Union of Nigeria.*[79] In the case of *Abacha,* (decided before the constitutional amendment in 2010) the relevant issue was the status of the African Charter (treaties generally) and decrees of the federal military government (domestic legislation generally). Relying on section 12 (1) of the Constitution, the Supreme Court held that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. It further held that where however the treaty is enacted into law as was the case with the African Charter (which was enacted as

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[76] Nwapi, (n73) 44

[77] For instance ,1960 Constitution section section 69 , states that 'Parliament may make laws for Nigeria or any part thereof with respect to matters not included in the legislative list for the purpose of implementing any treaty, convention or agreement between the federation and any arrangement with or decision of an international organisation of which the Federation is a member: provided that any provision of law enacted in pursuance of this section shall not come into operation in a Region unless the Governor of that Region has consented to its having affect'.Section 74 of 1963 Constitution retained exact words of section 69 of the 1960 Constitution. Section 12 (1) of the 1979 Constitution states that 'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. This is also the exact wording of section 12 (1) of the 1999 Constitution. It is important to note that the 1960, 1963, 1979 Constitutions have been repealed

[78] *Abacha* (n63) 228

[79] *Registered Trustees* (n23) 575

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of 1990) it becomes binding and the courts must give effect to it like all other laws falling within the judicial power of the courts.[80] The plaintiff's reliance on the African Charter was upheld because it had been domesticated.

In *Registered Trustees* (which was also decided before the constitutional amendment in 2010), the status of ILO Convention 87 and 98 was under consideration. The Supreme Court followed the decision in *Abacha* and held that no treaty between the Federation and any other country shall have the force of law except to the extent that any such treaty has been enacted into law by the national Assembly. It further held that since ILO Conventions 87 and 98 (through signed by the Nigerian Government) had not been enacted into law by the National Assembly, they had no force of law in Nigeria.[81]

2.5.2. Enforcement of labour treaties (including ILO Conventions 87 and 98) after the constitutional amendment of 2010

The amendment of the Constitution in 2010 had the effect of empowering the National Industrial Court (NICN) to the exclusion of any other court[82] to enforce ratified labour treaties …notwithstanding anything contrary in the constitution[83]. Section 254C (2) specifically provides that:

> Notwithstanding anything… contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international Convention, treaty or protocol of which Nigeria has ratified relating to labour employment, workplace, industrial relations…

Also section 254C (1) (h) provides that:

> Notwithstanding… anything contained in this Constitution… the National Industrial Court shall have and exercise jurisdiction to the

[80] The majority judgment was delivered by Ogundare JSC
[81] The majority judgment was delivered by Mukhtar JSC
[82] Constitution 1999 section 254C (1)
[83] Constitution 1999 section 254C (2)

> exclusion of any other court in civil causes and matters relating to, connected with or pertaining to the application or interpretation of international labour standards.

And section C (1) (f) provides that:

> Notwithstanding… anything contained in this constitution… the national Industrial court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters relating to or connected with unfair labour practice or international best practices in labour employment and industrial relation matters.

These provisions have the following implications; firstly, two types of implementation seem to have been created by the Constitution.

i. The dualist approach, for all treaties other than labour treaties.
ii. The monist approach for labour treaties that have been ratified.

Secondly, the NICN can now enforce all ratified labour conventions (including Conventions 87 and 98). Domestication is no longer necessary making Section 12(1) of the Constitution now a moribund provision as far as labour treaties and Conventions are concerned.[84] In *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor University of Agriculture, Abeokuta*[85]

(the facts which have been previously stated)[86], the NICN held that:

> …no employer is permitted to interfere, no matter how minutely (*sic*) it may be, in the internal running and management of a trade union… This statement of principle accords with Section 40 of the 1999 Constitution, as amended, and the International Labour organisation (ILO) jurisprudence regarding the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), which establishes the right of workers' and employers', organisations "to

[84]Section 12(1) of the Constitution provides that: 'No Treaty between the Federation and any other Country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

[85]*Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta* (n13)

[86] See section 2..2

> organise their administration and activities and to formulate their programmes", (Article 3) and recognises the aims of such organisations as 'furthering and defending the interests of workers and employers' (Article 10).[87]

It is important to note that this judgment was delivered on 21st February, 2012, that is after the 2010 constitutional amendment. In addition to section 40 the NICN also *suo moto* relied on Convention 87 as its domestication was no longer an issue (as was the case in the *Registered Trustees' Case*), since the NICN can now enforce labour treaties that have been ratified without the previous requirement of domestication.

2.6. Conclusion

The chapter examined the legal framework for freedom of association in Nigeria focussing on the Constitution since it is supreme and ranked higher than all other statutes. The argument is that though freedom of association (including the right to form trade unions) has been guaranteed as a fundamental human right there are derogations. The implication of the derogations is that where any other law or Act of the National Assembly prohibits or limits freedom of association for the purpose of defence, safety, order, morality, health of the public, then that law or Act prevails over the Constitution and that is the case, the right to associate guaranteed in section 40 can no longer be invoked.

The principle of right to strike and collective bargaining (that is the other two components of freedom of association) though not expressly guaranteed by the Constitution, the latter conferred exclusive jurisdiction on the NICN to entertain matters relating or connected to 'strike, lock-out or any industrial action'[88] and to hear and determine any question as to the interpretation and application of any collective agreement.[89]

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[87] *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta* (n13)
[88] Constitution 1999 (as amended), section 254 C (1)(c)
[89] Constitution 1999, section 254C(1)(f)(i)

This chapter also examined the implementation of treaties in the Constitution (particularly labour treaties) in view of ILO Conventions 87 and 98 which also gurantee freedom of association. The amendment of the Constitution in 2010 had the effect of empowering the National Industrial Court (NICN) to the exclusion of any other court[90] to enforce ratified labour treaties notwithstanding anything contrary in the constitution[91]. Thus domestication is not required before labour treaties can be enforced.

[90] Constitution 1999 section 254C (1)
[91] Constitution 1999 section 254C (2)

Chapter 3
Labour Rights as Human Rights?

> [Globalisation is the reason] why the active pursuit of human rights and the struggle for labour standards is crucial.[1]
>
> Given the conflicting aims of powerful multinationals and weakened states, all means must be considered whereby fundamental labour standards and principles can be created, upheld and enforced in the global market.[2]

3.0 Introduction

In developed countries, with decades' experience of welfare states, strong trade unions and high levels of worker protection, the effects of globalisation on labour rights have been well-charted. Globalisation on the one hand and nation states' implementation of neoliberal policies on the other have 'accelerated the breakdown of the traditional firm which was the basis upon which unions were organised' in most countries after World War II.[3] 'Laws that protected and promoted trade unions have been undermined as the economy and structure of enterprises have changed or have been refashioned to promote competition via individual contracting'.[4] This new development 'has had a profound impact on the traditional support for labour rights'[5]. Workers' traditional strategies of using solidarity, collective bargaining or 'fighting collectively' through the trade unions are in decline. Also there is now an increase in non traditional forms of work usually referred to as casual work, agency work or contract work. Such work types are more common in the private sector and many employers in this sector do not tolerate trade unionism and collective bargaining. The decline of the "vehicles" for labour rights (such as the traditional firm and collective bargaining) caused by

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[1] Lord Wedderburn, 'Common law, labour law, global law' in *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press, 2002) 44

[2] Wedderburn (n1) 44, 50

[3] Judy Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007 – 2008) 29 Comparative Labour Law and Policy Journal 29 at 31 Neoliberal policies include policies such as: deregulation, commercialisation and privatisation.

[4] Judy Fudge (n3) 31 For example in Nigeria, the Federal Government enacted the Trade Union (Amendment) Act 2005, which effected the following new changes: withdrawal of one central labour union in Nigeria, and union membership was made voluntary- see section 2, more conditions for strike action/lockout- see section 6, freedom granted to employee to join or not to join a union and no employee shall be forced to join any union or be victimised for refusing to join or remain a member, - section 2.

[5] Judy Fudge (n3) 31

globalisation has led to "the emergence of 'human rights' as an influential discourse nationally, regionally and internationally" and "has encouraged litigants and lobbyists to defend workers interests in these terms"[6].

Bearing in mind this discussion of the increased importance of human rights discourse for labour law in *developed economies*, but giving consideration rather to the specific case of Nigeria, a *developing country*, this chapter argues that labour rights ought to be protected and promoted in Nigerian law as a human right. I begin by discussing the particular significance of the human rights 'status' of freedom of association to Nigerian law and Nigerian workers. I then turn to address the question of whether labour rights can be understood as human rights from a theoretical perspective. Part II discuss the concepts of universality, interdependence and indivisibility of rights and also act as a framework for the discussion in part III, which addresses more directly the question: 'are labour rights human rights?"

3.1 A Human Right in Nigeria?

In Nigeria there has been a departure, since 1985, from "public sector led development process to a market-oriented development process".[7] Government policies are now geared towards trade liberalisation and privatisation. The impacts of these policies have been drastic. One noticeable effect is the increase in the hiring of casual labour in the private sector. This is significant because the "increase in the casualisation of workers has made it difficult to organise workers".[8] For example "employers in Nigeria's Oil and Gas sectors have not been particularly disposed towards unionism. This is reflected in refusal to recognise

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[6] Tonia Novitz and Collin Fenwick, 'The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice' in Collin Fenwick and Tonia Novitz (eds), *Human Rights at Work* (Hart Publishing Ltd 2010) 1.

[7] Agomo Chioma Agomo, 'Legal protection of Workers' Human Rights in Nigeria: Regulatory Changes and Challenges' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing Ltd, UK, 2001) 229, 235

[8] Sola Fajana "Industrial Relations in the Oil Industry in Nigeria" ILO Working Paper 2005, 26 <http://www.ilo.org/wcmp5/groups/public> accessed 24th January, 2013

unions, victimisation and dismissal of active workers and the use of threats, bribery and the infiltration of unions…"[9]

Employers' resistance to trade unions is so strong in the oil and gas, financial and telecommunication sectors that workers have very little opportunity to exercise the right to freedom of association. Furthermore, the position of workers in the informal sector is rendered precarious because the Nigerian Labour Act defines "worker" so as to exclude them.[10] Also, informal work appears to be on the rise in Nigeria because of the shrinking formal employment opportunities, and pressures in the global economy leading to more outsourcing and subcontracting. Given that "worker" is defined in the existing Labour Act to exclude informal work – and thus to exclude informal workers from the scope of statutory labour rights, narrowly construed – the question arises whether these workers' interests could be protected as *human rights*, enjoyed by all.

3.2 Are Labour Rights Human Rights?

The consequences of globalisation – including, especially, the growth of informal work – are gradually undermining collective workers' rights thereby making it difficult for workers to rely solely on fighting collectively through trade unions. Thus the strategy of the human rights' approach is to expand the horizon of attaining labour justice, albeit without attempting or purporting to replace workers' solidarity.

Some scholars have argued that the enforcement of workers' rights through human rights provisions will mean that only individual workers' rights will be guaranteed. John Rawls' first principle of justice emphasised that 'each person is to have an equal right to the most extensive basic liberty...'.[11] Rawls' view seems to recognise only the individual and neglects collective rights to justice. On this reasoning, Hugh Collins commented that 'a probable implication ... for grounding labour law in fundamental individual rights... is that the

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[9] Funmi Adewunmi, Adebimpe Adenugba Funmi Adewumi and Adebimpe Adenugba, *The State of Workers' Rights in Nigeria: An Examination of the Banking, Oil and Gas and Telecommunication* Sectors (Friedrich Ebert Shifting, Abuja 2010) 25 <http://www. ibrary.fes.de/pdf-files/bueros/nigeria> accessed 21st July 2015, 66
10Trade Union Act section 54
[11] John Rawls, *A Theory of Justice*, (Harvard University Press, 1971) 60

fundamental rights seem more likely to secure individual employment rights than rights to collective bargaining and to strike.'[12]

The question whether labour rights are human rights has provoked a lot of debate among scholars.[13] Surveying the literature, Virginia Mantouvalou identifies three different approaches, namely the Positive Approach, the Instrumental Approach, and the Normative Approach[14]. These approaches may usefully be outlined here as a way of navigating the subsequent discussion of the nature of human rights in general, and labour rights in particular.

The Positive Approach views labour rights as human rights to the extent that the former are contained in human rights treaties. In support of the argument that labour rights are human rights, the 'positivists' rely on treaties such as the Universal Declaration of Human Rights (UDHR),[15] the International Covenant on Economic Social and Cultural Rights (ICESCR),[16] the International Covenant on Civil and Political Rights (ICCPR),[17] and the African (Banjul) Charter on Human and Peoples' Rights,[18] all of which contain labour rights. In addition, the positivists turn to the International Labour Organisation (ILO) standards to find an answer to the question whether labour rights are human rights.[19] One of the key instruments here is the ILO Declaration of Fundamental Principles and Rights at Work,[20] in which the ILO approved a list of labour rights as human rights[21].

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[12] Hugh Collins, 'Theories of Rights as Justifications for Labour Law', in Davidov and Langille (eds). *The Idea of Labour Law* (OUP 2011) 137, 150

[13] Nicholas Valticos 'International labour standards and Human Rights: Approaching the year 2ooo' (1998) 137(2) International Labour Review 135, 136-137, Nsongurua Ndombana 'Social Rights are Human Rights: Actualising the Rights to Work and Social Security in Africa' (2006) 39 Cornell International law Journal 181, Jay Youngdahl, 'Solidarity First: Labour Rights are not the same as Human Rights' (2009) 18 new Labour Forum 31, 31-32 < http://digitalcommons.ilr.Cornell.edu/cgi/viewcontent.cgi?> accessed on 15th August 2012. Kolben 'Labour Rights as Human Rights?' (2010) 50 Virginia Journal of International Law 449

[14] Virginia Mantouvalou Are Labour Rights Human Rights' (2012) 3 European labour law Journal 151.

[15] Universal Declaration of Human Rights, <http://www.un.org/events/humanrights/2007> accessed on 14th August 2012. Though the UDHR is not a treaty, it is recognised by the International Community.

[16] International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 <http://www.ohchr.org/english/law/ > accessed on 15th August, 2012.

[17] International Covenant on Civil and Political Rights(ICCPR), 1966 <http:www.2.ohchr.org/English/law/> accessed on 18th October, 2012

[18] African (Banjul) Charter on Human and Peoples Rights, 1981 <http://www.africa.union.org/official_documents/treaties> accessed on 15th August 2012

[19] Virginia Mantouvalou (n14) 154

[20] ILO Declaration on Fundamental Principles and Rights at Work, 1998, <http://www.ilo.org/public/english/standards/ > accessed on 19th December, 2012.

[21] Virginia Mantouvalou (n14) 154

The Instrumental Approach views labour rights as human rights only insofar as it is practically or politically useful to do so. **"**Scholars adopting this approach examine which labour rights are human rights according to the relevant documents and assess how institutions and civil society organisations fare in protecting them, so as to assess 'whether labour rights really are promoted under the rubric, or within the framework of human rights'.[22] In other words, the main argument in this approach is that 'the character of labour rights as human rights is endorsed if either state or international institutions, like courts or civil society organisations like trade unions and NGOs are successful in promoting them as such'.[23]

The Normative Approach regards the question whether labour rights are human rights "as a theoretical (rather than positivistic and instrumental) and normative (rather than descriptive) issue. It does not necessarily engage with positive law or activists' strategies ... but examines the issue as a matter of moral truth."[24] The scholarship holding this view defines human rights as rights that are conferred on all human beings by the status of their humanity and concludes that labour rights do not have some key elements of human rights contained in this definition and for that reason should not be categorised as such.[25]

In Part III, the Positive Approach and the Iinstrumental Approach will be further explored and developed, the first with reference to the principle of the 'indivisibility of rights', and the second by way of a discussion of the jurisdiction and practices of the Nigerian courts. Some international human rights instruments not only provide for labour rights, they also propagate the indivisibility of rights.[26] My argument here is that if rights are indivisible as expressed in such international human rights instruments, then labour rights can be enforced as human rights. With respect to the indivisibility of rights, the human rights instruments upon which I focus are the African (Banjul) Charter on Human and Peoples's Rights 1981[27] and the

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[22] Virginia Mantouvalou (n14) 151, 156. See also P Alston, 'Labour Rights as Human Rights: The Not So Happy State of Art' in Alston (ed*) Labour Rights as Human Rights* (OUP 2005)3.
[23] Virginia Mantouvalou (n14) 156
[24] Virginia Mantouvalou (n14) 163
[25] H. Collins (12) 137, K. Kolben (n13) 449
[26] The African charter is an example. It advocates the indivisibility of rights.
[27] African (Banjul) Charter on Human and Peoples' Rights 1981

African Charter (Ratification and Enforcement) Act 1981[28] (their contents are virtually the same and the latter is a domestication of the former in Nigeria). Regarding the courts, the focus lies with the NICN.

3.2.1 The Concepts of Universality, Interdependence and Indivisibility of Rights.

The approval of the Universal Declaration of Human Rights[29] (UDHR) was the major landmark in the construction of a body of international human rights law.[30] The Declaration "introduced the contemporary conception of human rights characterized by their universality and indivisibility".[31] Universality calls for the extension of human rights to all human beings in the belief that being human is the sole criterion for entitlement to human rights.[32] Indivisibility suggests that the guarantee of political and civil rights is a precondition for the observance of social, economic and cultural rights and vice versa.[33] As conceived in the UDHR, then, human rights "comprise an indivisible, interdependent and inter-related unity that is capable of associating the list of civil and political rights to the list of social, economic and cultural rights. In this manner [the UDHR] enshrines an integrated concept of human rights".[34]

Following the UDHR, some other international human rights treaties have also affirmed this contemporary conception of human rights in their wordings. For example the wording of the Vienna Declaration and Programme of Action is as follows:

> All human rights are universal, indivisible and interdependent and related. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis…[35]

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[28] African Charter (Banjul) Charter was domesticated in Nigeria as the African Charter (Ratification and Enforcement) Act 1983 cap 10,Laws of the Federation of Nigeria 1990

[29] The Universal Declaration of Human Rights was approved on 10th December 1948

[30] Flavia Piovesan, "Social, Economic and Cultural Rights and Civil and Political Rights" (2004) 1 SUR International Journal on Human Rights 22

[31] Flavia Piovesan (n30) 21, 22

[32] Flavia Piovesan (n30) 22

[33] Flavia Piovesan (n30) 22

[34] Flavia Piovesan (n30) 21, 22

[35] Vienna Declaration and Programme of Action, Para 5 (adopted by the World Conference on human rights in Vienna on 25th June, 1993), < http://www.2.ohchr.org/english/law/vienna.htm> accessed 12th February,2013

In the same vein, the Preamble to the African Charter also emphasises the indivisibility and interdependence of human rights thus:

> …civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.[36]

There are a number of different ways in which human rights may be classified or categorised.[37] One popular classification divides human rights into three categories namely: first, second and third generation rights. Given the contemporary conception of human rights as universal, interdependent and indivisible, it is arguable that the traditional way of classifying rights into first, second and third generation has become outdated. Because of its continued influence in shaping human rights instruments and policy discourses, it is nonetheless important to be aware of the 'generation of rights' narrative.

3.2.2. Generations of Rights

The 'generation of rights' narrative follows T.H. Marshall's account of the historical development of citizenship developed in a lecture entitled, "*Citizenship and Social Class*", delivered at Cambridge in 1949.[38] T. H. Marshall explained that citizenship[39] consists of three elements: civil, political and social.[40] The civil element is composed of the rights necessary

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[36] African (Banjul) Charter, Preamble <http://www.africa union.org/official documants/treaties> accessed 12th February, 2013. Other instruments which regard rights as indivisible and interdependent are: International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR). These Covenants in the third paragraphs of their Preambles, acknowledge the linkage of all human rights. Similarly, paragraph 13 of the Proclamation of Tehran states in part that: since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.

[37] John C. Mubangizi, "Towards a new Approach to the Classification of Human Rights with Specific Reference to the African Context" (2004) 4 African Human Rights Law Journal 93, 94

[38] This lecture was published in 1950 and also reprinted in 1992 in T.H. Marshall and Tom Bottomore, *Citizenship and Social Class* (1992 Pluto Press London)

[39] T.H. Marshall defined "citizenship" as "a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed". See T. H. Marshall and Tom Bottomore (n38) 1,18

[40] T.H. Marshall and Tom Bottomore (n38)1,8

for individual freedom, such as freedom of expression and religion, and personal liberty.[41] The formative period for civil rights was the eighteenth century.[42] The political element consists of the right enabling individuals to participate in decisions where political power is exercised.[43] The formative period for political rights was the nineteenth century.[44] The social element consists of "the right to a modicum of economic welfare and security…"[45] that is the right to social security. The formative period for social rights was the twentieth century.[46] Potentially, social rights are not limited to social security but include labour rights such as the right to work, the right to fair remuneration, and the right to equal pay for equal work.[47]

The recognition of civil and political rights in Nigeria is fairly recent, beginning with the 1960 Constitution (the Independence Constitution), which incorporated a bill of rights,[48] and subsequent Constitutions (1963, 1979 and1999 Constitutions),[49] which guaranteed civil and political rights. It is important to note that while social, economic and cultural rights are clearly absent from both the 1960 and 1963 Constitutions they are provided for under the 1979 and 1999 Constitutions but expressed as fundamental objectives and directive principles of state policy that are not justiciable.[50] The implication is that labour rights such as equal pay for equal work,[51] the right to work[52] and the right to safety in employment[53] set out in chapter II of the Constitution are *not* legally enforceable.

The constitutions which operated in Nigeria prior to independence[54] in 1960 were designed to "achieve specific political objectives of the colonialists without any formal or conscious attempt by the colonial government to safeguard human rights in its entirety".[55] It has been

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[41] T.H. Marshall and Tom Bottomore (n38) 8
[42] T.H. Marshall and Tom Bottomore (n38) 10
[43] T.H. Marshall and Tom Bottomore (n38) 8
[44] T.H. Marshall and Tom Bottomore (n38) 10
[45] T.H. Marshall and Tom Bottomore (38) 1,8
[46] T.H. Marshall and Tom Bottomore (38) 10
[47] Constitution of the Federal Republic of Nigeria, 1999, section 17 (3)
[48] Nigerian Constitution of 1960.See Chapter 3,< http://www.worldstateman.org/Nigeria_Const1960pdf > accessed 20th March, 2013
[49] The Constitutions of 1960, 1963 and 1979 have been repealed. Mention of them here is for the purpose of the narrative.
[50] Constitution 1999, see Chapter II section and 6(6)(c)
[51] Constitution 1999,section 17(3)(e)
[52] Constitution 1999, section 17(3)(a)
[53] Constitution 1999, section 17(3)(c)
[54] Nigeria's pre- independence Constitutions are: Clifford Constitution of 1922, Richard Constitution of 1946, McPherson Constitution of 1951 and Lyttelton Constitution of 1954.
[55] Jacob Abiodun Dada, "Human Rights under the Nigerian Constitution: Issues and Problems" (2012) 2 (12) International Journal of Humanities and Social Science 33,35

argued that this could not have been otherwise, since "colonialism is antithetical to human rights protection".[56] If T.H. Marshall's historical development of rights[57] is applied to the Nigerian Constitutions, it appears that civil and political rights were recognized first, because the 1960 and 1963 Constitutions only provided for civil and political rights. The recognition of social, economic and cultural rights started with the 1979 Constitution and followed through to the 1999 Constitution. The justiciability of civil and political rights and the non-justiciability of social, economic and cultural rights in the Nigerian Constitutions constitute another type of classification of rights: justiciable rights and non- justiciable rights.

The criticism with the three generations classification of rights as first, second and third is that it implies a priority for civil and political rights: a "hierarchy is therefore assumed which reinforces the tendency to marginalise other categories of human rights".[58] This marginalisation is apparent in the Nigerian Constitution, where civil and political rights are justiciable and social and economic rights are not.[59]

It is important to note that in the African Charter, the categories of rights go beyond civil and political, economic, social and cultural, to include the right to development (economic, social and cultural development),[60] the right to national and international peace and security,[61] and the right to general satisfactory environment.[62] It is important to note also that the African Charter recognised group rights such as family rights,[63] and the right of a people to self-determination.[64] The reason for these categories of rights can be understood from the Preamble to the African Charter to be the need to achieve a better life for the African people, to eradicate all forms of colonialism, and to maintain the values of African civilizations. It is important to note that rights in the African Charter have equal status and are indivisible.[65]

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[56] Jacob Abiodun Dada (n55) 33, 35
[57] T.H. Marshall and Tom Bottomore (n38)
[58] John C. Mubangizi, (n37) 93,98
[59] The marginalisation is also in the ICCPR where only civil and political rights are mentioned.
[60] African (Banjul) Charter, Article 22
[61] African (Banjul) Charter, Article 23
[62] African (Banjul) Charter, Article 24
[63] African (Banjul) Charter, Article 18 (1)(2)
[64] African (Banjul) Charter, Article 20
[65] See Preamble to African (Banjul) Charter

The historical priority accorded to civil and political rights has recently been challenged and instead there is a call for a more collective approach to rights termed: "universality interdependence and indivisibility of rights".[66] It is important at this juncture to define these terms.

3.2.3 Universality

In relation to human rights, the term "universality" is used in several different ways. Jack Donnelly distinguishes between the following: conceptual universality, historical or anthropological universality, functional universality, international legal universality.[67] 'Universality' in the sense of conceptual universality implies that human rights are rights that one has simply because one is human.[68] "Human rights are … 'universal' rights in the sense that they are held 'universally' by all human beings".[69] It implies, in effect, that human rights are equal and inalienable.[70] In the sense of historical or anthropological universality, the implication of 'universality' is that human rights are held to be universal because most societies and cultures have practised human rights throughout most of their history.[71] In the sense of functional universality, 'universality' means that human rights provide attractive remedies for some of the most pressing threats to human dignity.[72] Human rights today do precisely that for a growing number of people of all regions of the world.[73] Finally, in the sense of international legal universality, 'universality' means the widespread active endorsement of internationally recognised human rights instruments and documents by nation states.[74] As of May 2012, the six oldest international human right treaties (on civil and political rights, racial discrimination, women, torture and children) have at least 150 states parties each.[75] The widespread ratification of internationally recognised human rights treaties thus gives rise to their universality.

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[66] Scott Veitch, Emilios Christodoulidis, Lindsay Farmer, *Jurisprudence: Themes and Concepts* (second edition Routledge 2012) 30
[67] Jack Donnelly "The Relative Universality of Human Rights" (2007) 29 (2) Human Rights Quarterly, 281
[68] Jack Donnelly "The Relative Universality of Human Rights" (n67) 282
[69] Jack Donnelly "The Relative Universality of Human Rights" (n67) 283
[70] Jack Donnelly "The Relative Universality of Human Rights" (n67) 283
[71] Jack Donnelly "The Relative Universality of Human Rights" (n67) 284
[72] Jack Donnelly "The Relative Universality of Human Rights" (n67 286
[73] Jack Donnelly "The Relative Universality of Human Rights" (n67) 286
[74] Jack Donnelly "The Relative Universality of Human Rights" (n67) 288
[75] United Nations Report, "Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights" by Navanethem Pillay, June 2012,

Jack Donnelly's 'conceptual universality' and 'international legal universality' are the most relevant to this chapter.[76] The implication of 'conceptual universality' for workers is that workers, as humans, are entitled to protection of their human rights in the place of work. With respect to "international legal universality", it is important to note that workers' human rights are universally recognised by the Universal Declaration of Human Rights,[77] Human Rights Instruments,[78] ILO Conventions,[79] the ILO Declaration on Fundamental Principles and Rights at Work,[80] and the Vienna Declaration.[81] Most States have endorsed these instruments.

3.2.4 Interdependence of Rights

According to Craig Scott, interdependence may be understood as having two senses: organic and related interdependence.[82] Firstly, in "the organic rights sense ... one right forms a part of another right and may therefore be incorporated into that latter right".[83] In the organic rights sense, interdependent rights are "inseparable or indissoluble"[84] insofar as "one right (the core right) justifies the other (the derivative right)".[85] To protect right 'X' will mean directly protecting right 'Y'.[86]

<http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening> accessed 18th February, 2013.

[76] Jack Donnelly "The Relative Universality of Human Rights" (n67) 288 In relation to human rights "universality" in this sense means human rights are rights that one has simply because one is human.

[77] Universal Declaration of Human Rights, 1948, Article 23.

[78] For example: International Covenant on Economic, Social and Cultural Rights, Article 22(1), African Charter, Articles 10, 15.

[79] For Example: Freedom of Association and Protection of the Right to Organise Convention, 1948, Rights to Organise and Collective Bargaining Convention, 1949.

[80] ILO Declaration on Fundamental Principles and Rights at Work, 1998, Para.2

[81] Vienna Declaration and Programme of Action, 1993

[82] Craig Scott: "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights (1989) 27 Osgoode Hall Law Journal 767, 779. See also Gillian MacNaughton and Diane F. Frey, "Decent work for All: A Holistic Human Rights Approach" (2010-2011) 26 American University International Law Review 441, 447, United Nations: Human Development Report 2000 at 74,< http://hdr.undp.org/en/media/HDR_2000> accessed 19th February, 2013.

[83] Craig Scott (n82) 779

[84] Craig Scott (n82) 779

[85] Craig Scott (n82) 779-780

[86] Craig Scott (n82) 780

In the Nigerian Constitution, there is a link between some fundamental human rights provisions (which are justiciable) and some social rights provisions expressed to be Directive Principles of State Policy (which are not justiciable). For example there is a link between workers' right of association (which is justiciable) and various workers' rights such as: the right to safety and welfare of persons in employment, the right to equal pay for equal work, and the right to work (which are not justiciable). That said, the assertion by Craig Scott that once the core right is protected the derivative right is directly protected does not reflect the position of the Nigerian Constitution.[87] While a worker's right to associate is protected, other various workers' rights mentioned in the Constitution are not directly protected. The only way in which workers might benefit from those other rights not directly protected by the Constitution is *indirectly* through collective bargaining which is an outflow of the right of association, or directly through the African Charter.[88]

Secondly, "interdependence may also be understood in its related rights sense ... according to which the rights in question are mutually reinforcing or mutually dependent, but distinct".[89] In related interdependence, rights are treated as equally important and complementary yet separate,[90] so that to "protect right 'X' will indirectly protect right 'Y'".[91] In fact, there is no fundamental difference between the two senses of interdependence proffered by Craig Scott, other than that in the second 'related' sense, one right is classed as a civil or political right and the other is classed an economic or social right: hence they are 'distinct' or 'separate' yet complementary. For example, freedom of association in the Nigerian Constitution[92] is classed as a civil right while other various workers' rights under section 17(3) are recognised as social rights,[93] but both rights are complementary and mutually dependent.

[87] Craig Scott (n82) 780
[88] The African Charter has been domesticated in Nigeria as the African Charter (Ratification and Enforcement) Act, Cap. 10 Laws of the Federation of Nigeria 1990
[89] Craig Scott (n82) 782
[90] Craig Scott (n82) 782
[91] Craig Scott (n82) 783
[92] Constitution 1999 section 40
[93] For example, right to work, right to equal pay for equal work, right to safety in the place of work.

3.2.5 Indivisibility of Rights

According to James Nickel, indivisibility is "a very strong form of interdependence"[94] which implies that no human right can be fully realised without realising all other human rights.[95] This conception differs from that proffered by Jack Donnelly who writes that "[t]he Universal Declaration model treats internationally recognised human rights holistically, as an indivisible structure in which the value of each right is significantly augmented by the presence of many others".[96] According to Nickel, it is important to note that "indivisibility" does not only mean interdependence but also means that there is no hierarchy among different kinds of rights: that is, civil, political, economic and social rights are equal. Donnelly's conception of indivisibility captures this better with the word "holistic". The preamble to the African Charter expresses indivisibility with this phrase: "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception".[97]

The implication of the indivisibility or holistic approach to rights is that it can be used to argue that labour rights are human rights. One issue that confronts the indivisibility and interdependence of human rights is justiciability. "While it is generally taken for granted that judicial remedies for violations of civil and political rights are essential, the justiciability of the other half of the indivisible rights namely economic, social and cultural rights is usually questioned and sometimes even denied".[98] In the Nigerian Constitution, social rights (which includes some labour rights) set out in chapter two are not justiciable.[99] Can labour rights which are not justiciable in the Constitution[100] but are also contained in the African Charter[101] be enforced? Although there is no court decision which directly answers this question, the answer may be inferred from the Supreme Court's judgment in *Abacha v*

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[94] James W. Nickel, "Rethinking Indivisibility: Towards A theory of Supporting Relations between Human Rights" (2008) 30. Human Rights Quarterly, 984, 987
[95] James W. Nickel, (n94) 984
[96] Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press,2003) 22,27
[97] African (Banjul) Charter
[98] Ida Elisabeth Koch, "The Justiciability of Indivisible Rights" (2003) 72 Nordic Journal of International Law 3,3
[99] Constitution 1999, section 6(6)(c)
[100] Constitution 1999
[101] African (Banjul) Charter

Fawehinmi.[102] (This case though not related to labour rights has implication for labour rights).

The facts were as follows. On the 30th of January 1996, the respondent, a legal practitioner, was arrested at his residence in Ikeja, Lagos without any warrant by the respondents (this was during the military dictatorship of General Sanni Abacha). He was then taken to the State Security Service Detention Shangisha, Lagos from where he was transferred to Bauchi Prisons and further detained incommunicado. He was not brought to trial over any offence. On 1st February 1996, he filed an action at the Federal High Court Lagos, challenging his arrest and detention relying on Article 6 of the African Charter.[103] Article 6 provides that: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested".

It is important to note that the respondent's strategy of relying on the African Charter[104] was borne out of the fact that Nigeria was then under military dictatorship. The fundamental human rights provisions in chapter IV of the Constitution had been suspended by various military Decrees.[105] The appellant argued that the African Charter[106] had also been suspended by military Decree,[107] implying that the respondent could not rely on it. But the Supreme Court found that while the relevant Decree suspended the fundamental human rights provisions of the Constitution, there was nothing in it suggesting that the African Charter was suspended. [108] It reinforced this finding with reference to the provisions of sections 16(1)(2) and 17 of the Constitution (Suspension and Modification) Decree,[109] which preserved all existing laws except the Constitution. The Supreme Court held that the African Charter remained in full force and effect and enforceable by the several high courts.[110] It stated:

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[102] *Abacha v Fawehinmi* (2000)6NWLR(Pt.660)228
[103] African Charter (Ratification and Enforcement) Act
[104] African Charter (Ratification and Enforcement) Act
[105] See State Security (Detention of Persons) Decree No 2 of 1984 as amended, section 4(2) ; Constitution (Suspension and Modification) Decree No. 107, 1993
[106] African Charter (Ratification and Enforcement) Act
[107] State Security (Detention of Persons) Decree No. 2 of 1984 as amended
[108] African Charter (Ratification and Enforcement) Act
[109] Constitution (Suspension and Modification) Decree No 107 of 1993
[110] *Abacha* (n102) the lead judgment was delivered by Ogundare JSC

> By Cap. 10 the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it…No doubt Cap 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute…But that is not to say that the Charter is superior to the Constitution.[111]

This judgment has implications for social rights (labour rights) because the African Charter guarantees not only civil and political rights but social and economic rights. The implication of this judgment is that: Firstly, labour rights which are not justiciable in the Constitution can be enforced through the African Charter.[112] Secondly, since apart from the Constitution the African Charter has been ranked higher than all other statutes, informal workers can also enforce their rights through it. Thirdly, both formal and informal workers are entitled to the workers' rights guaranteed under the Charter.

3.3. Labour Rights Are Human Rights

As was mentioned above, three different approaches to the question 'are labour rights human rights' have been identified in the literature. This Part (Part 3.3) will address the main arguments advanced in the literature and their implications for Nigerian labour law.

3.3.1. The Positivist Approach

The Positivists' answer to the question whether labour rights are human rights is drawn from international and regional instruments. Nicholas Valticos has argued that 'International Labour Standards as a body constitute a special category of human rights.'[113] Expressing a similar view, Nsongurua Udombana maintains that:

> …work is a human right because it is a means to an end - human survival. By creating the material wealth in society, work makes human flourishing possible and is the measure of human dignity… The right to work thus is both an inherent and instrumental freedom; it

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[111] *Abacha* (n102) < http://www.lawpavilonpersonal.com/newfulllawreport>*per* Ogundare JSC accessed 1st April 2013
[112] African (Banjul Charter)
[113] Nicholas Valticos, (n13) 135, 136-137

> promotes development and contributes to the expansion of human freedom in general.[114]

The right to work includes many different elements though importantly it does not include a 'right to be provided with work'.[115] It does encompass the right to an opportunity to earn a livelihood,[116] the right to fair remuneration[117] or equal pay for equal work,[118] and the right to healthy and safe working conditions.[119] Other elements of the right to work are: an obligation of non discrimination to members of disadvantaged groups,[120] and freedom from forced labour.[121]

Is the right to work legally enforceable in Nigeria? The answer is not straightforward because of the position of the African Charter and the Constitution regarding the right to work. The right to work is expressly guaranteed under the African Charter while it is not justiciable in the Constitution.[122] Although there are plethora of authorities which confirm the superiority of the Constitution,[123] it can be argued that since the African Charter has also been domesticated[124] its provisions are binding,[125] and as such the right to work can be enforced under it in spite of the non-justiciablity of the right to work in the Constitution. The strength of this argument is drawn from the decision of the Supreme Court in *Abacha v Fawehinmi*,[126] which, as we have seen, held that "The provisions of that Charter are enforceable in the same manner as those of Chapter 4 of the 1979 Constitution…"[127] The implication is that all rights

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[114] Nsongurua Udombana, (n13) 181 ,187
[115] Krzysztof Drzewicki, 'The Right to Work and Rights in Work' in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights : A Textbook* (Martins Nijhoff Publishers, Dordrecht, 2001) 235
[116] Article 6(1) ICESCR, Constitution 1999 section 17 (3)
[117] Article 7(a) ICESCR
[118] Article 15 African (Banjul) Charter, Constitution 1999 section 17(3)(e)
[119] Article 7(1)(b)ICESCR, Article 15 African (Banjul) Charter, Constitution 1999 Section 17(3)(b)
[120] Article 18(3) African (Banjul) Charter, Constitution 1999 section 17(3)(e)
[121] Article 8 ICCPR, ILO Declaration on Fundamental Principles and Rights at Work 1998, Article 5 African (Banjul) Charter, Constitution 1999 section17(3)(f)
[122] Constitution 1999 sections 6(6)(c) and 17(3)
[123] *Doeherty v Balewa* (1961) 1ANLR 60; *Attorney General of Bendel State* v *Attorney General of the Federation & Ors* (1981)10SC; *Nafiu Rabiu v Kano State* (1980) 8-11 SC 85; *Abacha v Fawehinmi* (n102)
[124] The African Charter is domesticated in Nigeria as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap 10, Laws of the Federation of Nigeria 1990
[125] *Abacha* (n102) 228
[126] *Abacha* (n102) 228, Judgment of Uwaifo JSC which was part of the lead judgment
[127] *Abacha* (n102) 228 *per* Uwaifo JSC, Chapter IV of the 1979 Constitution contains Fundamental Human Rights provisions.

guaranteed in the African Charter are enforceable, and the right to work is enforceable in Nigeria.

It is important at this juncture to examine the following International Instruments which the positivists rely on for their arguments, and the status of these Instruments in Nigerian law.

3.3.1.1. International Labour Organisation (ILO) Standards

These standards are laid down in Conventions and Recommendations. Together these instruments form the "international labour code."[128]

The question now arises: Does the ILO view labour rights as human rights? According to Virginia Mantouvalou "for many decades, the ILO did not explicitly present the documents adopted under its auspices as human rights documents"[129], but further noted that "in recent years the ILO has endorsed a list of labour rights as human rights."[130] In its 86th Session in June 1998, the ILO adopted unopposed the "ILO Declaration on Fundamental Principles and Rights at Work"[131] and this instrument 'reaffirms the following as fundamental rights: Freedom of Association and the effective recognition of the Right to Collective Bargaining, the Elimination of all forms of forced or compulsory labour, the Effective abolition of Child and the Elimination of discrimination in respect of employment and occupation.[132] The Declaration also binds all ILO member states, irrespective of whether they have ratified the relevant Conventions.[133]

Francis Maupain commenting on the idea of fundamental rights in the Declaration noted that "fundamental rights are enabling rights and their increased application gives greater possibilities for workers all over the world to 'claim' other workers rights...".[134] Also the

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[128] Werner Sengenberger: *Globalisation and Social Progress: The Role and Impact of International Labour Standards* (A Report Prepared for the Friedrich Ebert stiftung, 2nd revised and extended revision, Friedrich Ebert Stiftung Publisher's Bonn, 2005) 36. [Online Book]: <http://www.coc.rendertisch.de/news/news november2005> accessed 9th August, 2012

[129] Virginia Mantouvalou, (n14) 151,154

[130] Virginia Mantouvalou (n14) 151,154

[131] ILO Declaration on Fundamental Principles and Rights at Work, 1998, < http://www.ilo.org > accessed 17th October, 2012

[132] ILO Declaration (n131) section 2 (a-d).

[133] ILO Declaration (n131) section 2.

[134] Francis Maupain 'Revitalisation not retreat: the real potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights' European Journal of International law (2005) 16(3) 439, 439.

reason why the rights contained in the Declaration are regarded as fundamental is provided in the Preamble, which affirms that

> 'in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential'.[135]

There has been disagreement among some scholars regarding the listing of only four fundamental rights in the ILO Declaration. Philip Alston has argued that:

> ...instead of consisting of a heterogeneous and wide ranging set of labour rights, a new normative hierarchy has been established. It privileges a set of four 'core labour standards' …consisting of freedom of association, freedom from forced labour and from child labour and non-discrimination in employment.[136]

In line with this view, Virginia Mantouvalou also noted that, 'By listing these rights as fundamental human rights, the ILO left a number of other labour rights outside the scope of the Declaration…'[137]

In my own view, it was not necessary to include in the Declaration "heterogeneous and wide ranging set of labour rights" as expected by Philip Alston, neither is it important to include all labour rights in the Declaration as Virginia Mantouvalou wished. Freedom of association is the "main door right" which leads to other rights. It can also be regarded as an "umbrella right" which covers most workers' rights. Give a reasonable man freedom over a thing; he can be able to do for himself, what the giver of that thing never imagined. It is also important to note that the ILO Declaration did not repeal the earlier Conventions which dealt with matters relating to rights specified in the ILO Declaration.

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[135] Preamble to ILO Declaration (n129)
[136] Phillip Alston "Core Labour Standards and the Transformation of the International Labour Rights Regime" (2004) 15(3) European Journal of International Law 457,458
[137] Virginia Mantouvalou.(14) 151, 154

Although Freedom of association is guaranteed by the Constitution of Nigeria,[138] government (either federal or state) and employers from time to time continue to violate workers' right to associate.[139]

3.3.1.1.1 *ILO Declaration and the Four Core Labour Rights as Human Rights*

The four core labour rights—abolition of child labour, elimination of forced labour, elimination of discrimination in respect of employment and occupation, and freedom of association and the right to collective bargaining—have been included in major international human rights documents at least since the second half of the twentieth century..[140] Also the ILO Constitution and the UDHR have insisted on the primacy of the recognition of the inherent dignity of human beings. The ILO's stance toward the status of labour rights has been expressed by its founding principle that ―Labour is not a commodity. The difference that the 1998 Declaration made is that these long standing principles have gained additional salience in regard to human rights at work. Now, at the beginning of the twenty first century, it is not as easy for governments and employers to ignore this principle as they could then. Partly due to the ILO's century-long efforts, international norms have permanently evolved to include this principle in the international political arena. In addition, the ILO's 1998 Declaration gives the four core labour rights a compliance-pull.[141]

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[138] Constitution 1999 section 40

[139] Following a strike in 2001, forty-nine lecturers were dismissed from the University of Ilorin. In 2002, shortly after the Nigerian Labour Congress (NLC) declared a nationwide strike over the increase of petroleum prices, security agents rounded up the NLC president and several other labour leaders. On 6th January 2008, Alhaji Saula Saka, President of the Lagos State Branch of the National union of Road Transport Workers (NURTW) was murdered. ITUC: '2009 Annual Survey of Violations of Trade Union Rights in Nigeria'< http://survey09.ituc-org/survey-php?> accessed 15-07-2009

[140] Özen Eren , "The Role of the International Labor Organization's (ILO's) 1998 Declaration on Fundamental Principles and Rights at Work in Strengthening the ILO Regime : A Study on the ILO'S Committee on Freedom of Association (CFA)" (A PhD Dissertation in Political Science submitted to the Graduate Faculty of Texas Tech University in partial fulfilment of the requirements for the degree of Doctor of Philosophy in May, 2010 see page 129

[141] Özen Eren , (n140) 130

3.3.1.1.2 *ILO Declaration 1998 and Freedom of Association*

The 1998 Declaration opened up new grounds to defend freedom of association in addition to the traditional economic and industrial relations ground.[142] It signaled the recognition of freedom of association as a civil and political right equally as much as a socio-economic right. In this way, the responsibility to defend freedom of association would no longer fall solely upon labor unions, but also upon human rights organizations.[143] Likewise, labor unions would be encouraged to defend freedom of association as a civil right, in addition to their traditional stance of considering it as a socio-economic right; and conversely, human rights groups would be familiarized with considering freedom of association as a socio-economic right in addition to viewing it as a civil and political right.

Therefore, as a result of the 1998 Declaration, the stigma attached to socio-economic rights in human rights communities (and, conversely, to civil and political rights in labor unions and industrial relations communities) is expected to fade. In sum, the international consensus that has been emerging about considering freedom of association as a fundamental human right has further been consolidated by the ILO's 1998 Declaration [144]

3.3.1.2. The Universal Declaration of Human Rights (UDHR)[145]

Another document which supports labour rights as human rights is the Universal Declaration of Human Rights (UDHR). Though not a treaty, it is influential and recognised by the international community. Labour rights contained therein include: the right to work, to free choice of employment, to receive equal pay for equal work, to just remuneration, to form and join trade unions,[146] to rest and leisure including reasonable limitation of working hours and periodic holidays with pay.[147] Although the UDHR is not binding its provisions relating to labour are important for the purpose of advancing workers' rights in a developing country like Nigeria. As an internationally recognized human rights document, it neither makes distinction between the categories of workers' rights listed nor between civil rights and social and economic rights. This is unlike the Nigerian Constitution which classed freedom of

[142] Özen Eren , (n140) 136
[143] Özen Eren , (n140) 136-137
[144] Özen Eren , (n140) 136-137
[145] Universal Declaration of Human Rights (n15) .Though the UDHR is not a treaty; it is recognised by the International Community.
[146] UDHR, Article 23.
[147] UDHR, Article 24.

association a fundamental human right and justiciable[148] and other workers' rights as Directive Principles of State Policy and non- justiciable.[149] The Nigerian Constitution also made a distinction between civil rights and social and economic rights. This is why the UDHR is very important to Nigerian workers.

3.3.1.3. International Covenant on Economic Social and Cultural Rights (ICESCR)[150]

The positivists also rely on the ICESCR. One striking feature of this Treaty is that it divides human rights into economic, social and cultural rights. There is a relationship between labour rights and social rights. While some social rights are regarded as labour rights,[151] some labour rights are also social rights. The labour rights guaranteed in the ICESCR include: "the right of every one to form trade unions and join the trade union of his choice… for the promotion and protection of his economic and social interests."[152] It guarantees to trade unions the right "to establish national federations or confederations and the latter's right to form or join international trade-union organisations."[153] The ICESCR also guarantees trade unions the right "to function freely subject to no limitations other than those prescribed by law and which are necessary… for the protection of the rights and freedoms of others."[154] Lastly, the right to strike is also guaranteed.[155] It is important to note that Nigeria ratified this treaty on July 29, 1993 and as is such bound to recognise and enforce the labour rights related herein as human rights since the treaty is recognised as a human rights treaty.

3.3.1.4. International Covenant on Civil and Political Rights (ICCPR) 1966[156]

The positivists also describe the protection afforded to labour rights in the ICCPR as constituting human rights. Article 22(1) provides that "everyone shall have the right to freedom of association with others including the right to form and join trade unions for the

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[148] Constitution 1999 sections 40 and 46
[149] Constitution 1999 sections 17(3) and 6(6)(c)
[150] International Covenant on Economic Social and Cultural Rights (ICESCR) 1966, <http://www.ohchr.org/english/law/...> accessed 15th August, 2012
[151] For example; a right to work and decent working conditions, a right to form and join a trade union, including a right to collective bargaining and right to strike. See Virginia Mantouvalou, 'The case for Social Rights', <http://scholarship.law.georgetown.edu/cgi/viewcontent > accessed 18th October, 2012
[152] ICESCR Article 8(1)(a).
[153] ICESCR Article 8(1)(b).
[154] ICESCR Article 8(1)(c).
[155] ICESCR Article 8(1)(d).
[156] International Covenant on Civil and Political Rights (ICCPR), 1966; < http://www.2.ohchr.org/english/law/...> accessed 18th October, 2012

protection of his interests."[157] Nigeria ratified the ICCPR on 29th July, 1993(a). It is important to note that apart from the phrase "freedom of association" in article 22 (which phrase also covers workers), the right to form and join trade unions was clearly stated, thereby strengthening the argument of the positivists that labour rights are human rights. While Article 22 of the ICCPR specifically mentioned only trade unions, Section 40 of the Nigerian Constitution mentioned "political party, trade union or any other association."[158]

3.3.1.5. African (Banjul) Charter on Human and Peoples Rights

At the regional level (Africa), 'the African Charter guarantees work' as a right in the following words: 'every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.'[159] Nsongurua Udombana contends that the foregoing provision 'commits states to realise this right through a national employment policy that provides opportunities for work, with institutions and techniques to achieve that objective'.[160] While this may be the ideal applied to a democratic government, employers in the private sector may not be under any duty to provide work.

The African Charter also guarantees the right to freedom of association.[161] Though it does not expressly provide for the right to form and join trade unions, this and other basic rights of workers may be implied from the guarantee of freedom of association.

Nigeria ratified the African Charter on the 2nd of June, 1983 and also domesticated it as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[162] The content of the latter is almost the same as the African Charter. It appears from the preamble of both the African Charter and African Charter (Ratification and Enforcement) Act[163] that human rights and social rights are indivisible and interdependent. It is succinctly put thus:

> …civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality

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[157] ICCPR, Article 22(1)
[158] Constitution of the Federal Republic of Nigeria
[159] African (Banjul) Charter, Article 15
[160] Nsongurua Udombana (n13) 181, 188
[161] African (Banjul) Charter Article 10
[162] African Charter on Human and Peoples' Rights (Ratification and Enforcement)
[163] African Charter (Enforcement and Ratification) Act

> and … the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;[164]

The mention of 'social rights' is an acknowledgment of labour rights.[165]

It can be argued that since both the African Charter[166] and the African Charter (Ratification and Enforcement) Act[167] affirm the indivisibility of rights, the implication is that labour rights can be enforced as human rights.

3.3.1.6. Indivisibility of Rights: African Charter

The African Charter integrates three kinds of human right, affirms their universality, indivisibility and interdependence,[168] commits states to recognize, promote and realize all rights.[169] The Charter guarantees more particularly civil and political rights,[170] economic, social and cultural rights[171] and solidarity or collective rights.[172] Social rights imply labour rights, but not all social rights are labour rights. Some scholars prefer to merge the two as "labour and social rights"[173] while others prefer to subsume labour rights under social rights and call the category 'social rights'.[174]

According to Nsongurua Udombana, 'social rights ...cannot be effectuated unless the human rights community takes the indivisibility of human rights seriously'.[175] For this reason Udombana urged 'judicial and non-judicial institutions in Africa to keep faith with the principle of indivisibility of all rights, both in their interpretative mandates and in their advocacies respectively'.[176]

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[164] African (Banjul) Charter, Preamble ; African Charter (Ratification and Enforcement) Act)
[165] Freedom of association and collective bargaining is listed as a fundamental social right of workers which right is also a labour right. See Articles 11-14, Community Charter of the Fundamental Social Rights of Workers. <http://www.aedh.eu/plugins/fckeditor/usefiles.> accessed 22-08-2012.
[166] African (Banjul) Charter
[167] African Charter (Ratification and Enforcement) Act
[168] See Preamble to the African (Banjul) Charter<. http://www.africa_union.org/official_documents/treaties > accessed 22nd November, 2012. See also Nsongurua Ndombana (n13) 181,184.
[169] African (Banjul) Charter Articles 1, 25, and 26 , see also Ndombana (n8) at 184
[170] African (Banjul) Charter Articles 3-13
[171] African (Banjul) Charter Articles 14-18
[172] African (Banjul) Charter Articles 19-24., solidarity rights relates to groups or collectives.
[173] Judy Fudge. (n3) 29, 32
[174] Nsongurua Ndombana (13) 181 at 187.
[175] Nsongurua Ndombana (13) 181 at 242.
[176] Nsongurua Ndombana (13) 181 at 185.

The crusade of indivisibility of rights is also a route through which labour rights can be enforced by the courts at the national level. The positivists argued that labour rights are human rights when the former are contained in human rights instruments. It can be further argued that the 'language' of indivisibility of rights in human rights instruments further strengthens the foregoing argument of the Positivists and implies that labour rights can be enforced as human rights.

3.4. Argument for the Instrumental Approach

In Nigeria, before the enlargement and exclusive jurisdiction of the National Industrial Court (NICN),[177] the Federal High Court and State High Court (human right courts) and the NICN were generally held to have concurrent jurisdiction in the resolution of labour disputes because then, there was no clarity as to the jurisdiction of the NICN.[178] Moreover the Supreme Court had earlier held that the jurisdiction of the State High Court is unlimited,[179] while the Court of Appeal had also held that the Federal High Court and not the High Court of the Federal Capital Territory was better suited to entertain a dispute involving the Nigerian Labour Congress and the Federal Government of Nigeria.[180] Presently, by reason of its exclusive jurisdiction on labour matters whether national or international, the NICN also has jurisdiction to hear fundamental human rights matters arising from labour matters whether national or international labour standards.[181]

It can be argued that now that the NICN has exclusive jurisdiction it is in a better position to enforce labour matters. This argument is fully articulated in chapter 5

3.5 Arguments against using human rights as labour rights

As earlier noted, while Nicholas Valticos and Nsongurua Udombana argue that labour rights are human rights, Jay Youngdahl is opposed to that view and emphasises that:

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[177] The NICN's Jurisdiction was enlarged and also made exclusive by the Constitution (as amended by the (Third Alteration) Act, 2010.
[178] *Kalango v Dokubo* (2003) 15 WRN 32
[179] *Savannah Bank of Nigeria Limited v Pan Atlantic Shipping and Transport Agencies Limited* (1987) 1NWLR (Pt 49) 212 at 227, Judgment delivered by Coker JSC (as he then was).
[180] *Federal Government of Nigeria v Adams Oshiomhole* (2004) 1NLLR (pt 2) 339
[181] Constitution 1999 section 254C (1)(d)

> "...the replacement of solidarity and unity as the anchor for labour justice with 'individual human rights' will mean the end of the union movement'... Rights discourse individualises the struggle at work. The union movement however was built on and nourished by solidarity and community. The powerless can only progress their work life in concert with each other, not alone. Fighting individually, workers lose, fighting together, workers can win"[182]

As has been argued in this chapter, the purpose of the human rights approach is to expand the horizon of attaining 'labour justice'; it is not a 'replacement of solidarity' as conceived by Jay Youngdahl. This is necessary as the forces of globalisation are gradually undermining collective workers rights thereby making it difficult to rely solely on 'fighting collectively through unions.' Furthermore, what is referred to as 'individual human rights' may not be restricted to the individual worker alone but sometimes the union of workers and this should have been termed 'collective human rights of workers'. In a developing country like Nigeria, it would be a mistake to emphasize workers' solidarity as the only avenue for labour justice. There have been many occasions where government and employers violated workers' rights to associate and sometimes went as far as dismissing all the workers.[183]

Kelvin Kolben writing from the United States' perspective noted that labour scholars and labour movements have developed an interest in using human rights discourse and international legal instruments to propagate labour rights, workplace justice and workplace governance.[184] Kolben urged the labour advocates not to 'hitch a ride on the human rights train'[185] and noted three important ways that human rights and labour rights conceptually differ from each other.

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[182] Jay Youngdahl (n13) 31, 31-32

[183] Following a strike in 2001, forty-nine lecturers were dismissed from the University of Ilorin. In 2002, shortly after the Nigerian Labour Congress (NLC) declared a nationwide strike over the increase of petroleum prices, security agents rounded up the NLC president and several other labour leaders. On 6th January 2008, Alhaji Saula Saka, President of the Lagos State Branch of the National union of Road Transport Workers (NURTW) was murdered. ITUC: '2009 Annual Survey of Violations of Trade Union Rights in Nigeria'< http://survey09.ituc-org/survey-php?> accessed 15-07-2009

[184] K. Kolben (n13) 449, 450

[185] K. Kolben (n13) 484

a. While labour rights primarily concern private actors (employees), human rights primarily concern states;[186]
b. Individualism substantially grounds humans rights, that is human rights take the individual as the primary subject, while labour rights on the other hand emphasise the collective as the means of individual freedom.[187]
c. The method or process of possessing labour rights is through mobilisation and the collective voice of workers in forcing an employer to negotiate work conditions. Human rights on the other hand do not require mobilisation but the law of the state 'guarantees individuals in relation to the state.[188]

Although the differences highlighted by Kolben are important, there is a growing need to employ human rights (apart from the traditional collective mobilization of workers) to enforce labour rights. Kolben has also rightly noted that 'the turn to human rights discourse by labour scholars and labour organisations are largely strategic'[189] and 'to take advantage of the hegemonic status of human rights discourse and the relative effectiveness of some human rights advocacy strategies to help realise several objectives.'[190]

The main objective in Nigeria is the effective enforcement of labour rights which are violated from time to time. The human rights approach and its effectiveness is also dependent on the empowerment of the courts. In Nigeria, the National Assembly recently passed a law (which amended the Constitution) and empowered the National Industrial Court exclusively to hear all matters relating to labour including fundamental human rights matters arising from labour and employment; and also international labour conventions that have been ratified.[191]
The matter of specialised labour courts forms the focus of the next chapter

[186] K. Kolben (n13) 468-472
[187] K. Kolben (n13) 471
[188] K. Kolben (n13) 472
[189] K. Kolben (n13) 451
[190] K. Kolben (n13) 451
[191] Constitution 1999 sections 254 A(1), 254 C91)(d), 254(2)

3 6 Conclusion

Having explained the particular importance of the question of the human rights' status of labour rights in a Nigerian context, this Chapter focuses on the theoretical consideration of labour rights as human rights. The attempt to answer the question: are labour rights human rights, has provoked a lot of debate among scholars. In the literature that explains labour rights as human rights, Virginia Mantavalou articulated three different approaches namely: the Positivist Approach, the Instrumental Approach and the Normative Approach[192]. The Positivist Approach regards labour rights as human rights to the extent that labour rights are contained in human rights treaties. The Instrumental Approach views labour rights as human rights if either state or international institutions like courts or civil society organisations like trade unions and NGOs are successful in promoting them as such. The Normative Approach holds the view that human rights are rights conferred on all human beings by the status of their humanity and concludes that labour rights do not have some key elements of human rights contained in this definition and for that reason should not be categorised as such.

The chapter argued in support of both the Positive and Instrumental Approaches. Regarding the Positive Approach, it was strengthened further along indivisibility of rights. It argued that if rights are expressed as indivisible in some international human rights instruments, then labour rights can be enforced as human rights. For this argument, I relied on the African (Banjul) Charter and the African Charter (Ratification and Enforcement) Act, both of which expressed rights to be universal, indivisible and interdependent. Thus the "language" indivisibility of rights in some treaties supports further and also strengthens the positivists' argument and also implies that labour rights can be enforced as human rights.

In support of the Instrumental Approach, NICN was projected as a labour court which has exclusive jurisdiction to hear labour matters and thus also promotes labour rights as human rights by enforcement of labour rights.

On some scholars' argument against using human rights as labour rights[193], it was argued that the purpose of the human rights approach is to expand the horizon of attaining labour justice as the forces of globalisation are gradually undermining collective workers rights thereby

[192] Virginia Mantouvalou (n14) 151.
[193] J. Youngdahl (n13) 31-32, K. Kolben, (n13) 468- 472

making it difficult to rely solely on fighting collectively through unity. And that this is also necessary in a developing country like Nigeria where workers rights are violated from time to time. It was argued further taking cognisance of Nigeria that the effectiveness of the human rights approach to labour rights is dependent on the empowerment of the courts. And in this regard, the National Assembly recently amend the Constitution and empowered the NICN to hear all matters relating to labour.

Chapter 4
Freedom of Association and the ILO

4.0. Introduction

This chapter aims to investigate the ways in which international law serves to reinforce the notion that freedom of association is a human right and ought to be protected as such under Nigerian law. It also considers the extent of the right to freedom of association under international law and the 'scope' of its application (ie the question which workers ought to enjoy the right). And it addresses the question, to what extent the law of Nigeria has been influenced by international law – in guaranteeing freedom of association as a human right; in interpreting freedom of association widely; and in according freedom of association to a wide range of workers, informal as well as formal.

In international law, freedom of association is recognised to be a fundamental human right. In its Preamble, the ILO Constitution of 1919 sets forth the principle of freedom of association as one of the means of improving the conditions of workers and ensuring peace. The Declaration of Philadelphia, which has formed part of the ILO Constitution since 1944, reaffirms that "freedom of expression and of association are essential to sustained progress" and emphasizes that this is one of the "fundamental principles on which the Organisation is based." The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No.87), and the Right to Organize and Collective Bargaining Convention, 1949 (No.98) embody the legal standards protecting the principle of freedom of association. In June 1998, the Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference, stated that:

> all Members, even if they have not ratified the [fundamental] Conventions in question, have an obligation arising from the very fact of membership in the Organisation, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights.

These principles include freedom of association and the effective recognition of the right to collective bargaining. The Declaration on Social Justice for a Fair Globalization, 2008 adds that freedom of association and the effective recognition of the right to collective bargaining

are of particular significance for the achievement of the ILO's four strategic objectives namely: (i) create greater opportunities for women and men to secure decent employment and income; (ii) enhance the coverage and effectiveness of social protection for all; (iii) strengthen tripartism and social dialogue; and (iv) promote and realize standards and fundamental principles and rights at work.[1]

In seeking to analyse the ILO's conceptualisation of freedom of association as a fundamental human right and its influence on Nigerian law, the Chapter focuses in turn on the following: (i) Nigerian labour legislation; (ii) Court (NICN) decisions and judicial reasoning; and (iii) provisions of the African Charter. Even though the ILO has been weakened by some challenges in recent times, its influence has helped and continues to help to shape labour legislation and court decisions in Nigeria. The principal focus herein lies with Conventions 87 and 98 since they lay out the general rules of freedom of association within the ILO's jurisprudence. As the chapter illustrates, although the nature of the ILO's relationship with Nigeria cannot be regarded as that of a "rule imposer", "maker" and "enforcer", its interpretation of the principles of freedom of association is very important, not least because of the way in which it has influenced and continues to influence labour legislation and the reasoning of domestic courts.

The chapter is divided into two parts. Part 1 explores the beginning of Nigerian's relationship with the ILO and the nature and characteristics of the relationship. Challenges posed to the ILO in times of globalisation are highlighted briefly and consideration is given, in particular, to the current crisis in the ILO, involving the criticism by the Employers' Group of the right to strike as part of freedom of association. Part II examines the influence of the ILO's principles on freedom of association on the law in Nigeria.

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[1]ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations Report III (Part1B) Para. 50,<http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2012-101-1B).pdf> accessed 12thAugust 2013 see also Geraldo von Potobsky, "Freedom of Association: The impact of Convention No. 87 and ILO action" (1998) 137 (2) International Labour Review 195

4.1. The ILO and its Member States

Nigeria's relationship with the ILO began in 1955 when it attended the International Labour Conference as an observer (being as yet a British Colony and not independent).[2] Its status as an observer continued until independence (in 1960) when it formally joined or became a member of the ILO on the 17th of October 1960.[3]

In analysing the nature and character of the ILO's relationship with its Member States, (Nigeria included), the work of Anne Trebilcock is particularly useful. Trebilcock has pointed out some indices which suggest that the relationship is one of influence rather than that of rule imposer, maker or enforcer.[4] She specifically notes the following:

4.11. States' involvement in the standard setting process.

Member states (which comprise the representatives of employers, workers and government) take the decisions about which items will be considered for possible standard setting.[5] The ILO Constitution stipulates adequate consultation of members prior to the adoption of a Convention or a Recommendation.[6] Any of the governments of the members can object to the inclusion of an item or have it removed from the agenda.[7] The Standing Orders of the Conference further specifying consultation at all stages of drafting preparatory reports and draft instruments.[8] In addition, the adoption of a Convention or a Recommendation by the Conference requires a majority of two-thirds of the votes cast by the delegates present.[9] A

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[2] ILO, International Labour Conference Record of Proceedings, Thirty-Eight Session, 1955, page 52, where Chief Festus Okotie-Eboh, the then Federal Minister of Labour and Welfare confirmed in this regard that: 'This is the first occasion on which Nigeria had been represented by her own delegation…' at page 52, <www.ilo.org/public/libdoc/il;o/p/09616/09616(1955-38).pdf> accessed 9th March, 2015.

[3] ILO, International Labour Office, Minutes of the 147th Session of The Governing Body, Geneva, 15th-18th November 1960, para 7,<www.ilo.org/public/libdoc/ilo/p/09601/09601(1960-147).pdf >accessed 9th of March, 2015.

[4] Anne Trebilcock, Putting the Record Straight: About International labour Standard Setting' (2009-2010) 31 Comparative Labour Law and Policy Journal 553-570. She is a former legal adviser and Director of Legal Services of the International Labour Organisation.

[5] Trebilcock (n4) 554, while the ILO secretariat is charged under Article 10(1) of the ILO Constitution with proposing subjects for possible standard-setting, if the Governing Body does not wish the topic to appear on the Conference agenda, the suggestion is excluded. In addition, a government, a representative, employer or worker organisation, or a public international organisation can propose ideas for standards. See also ILO Constitution Article 14(1) <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf> accessed 8th August 2015

[6] ILO Constitution, Article 14(2)

[7] ILO Constitution, Article 16

[8] See Standing Orders of the International Labour Conference, articles 6, 38-40, 44-45, 59-67. <www.ilo.org/dyn/normlex/ >accessed 10th March, 2015.

[9] ILO Constitution, Article 19(2)

vote is void unless the total number of votes cast is equal to half the number of the delegates attending the Conference.[10] These two provisions safeguard against a minority of delegates dictating their view on others.[11]

4.1.2. Flexibility clauses developed in standards 'provide latitude to accommodate specific contexts'.[12]

The purpose of such clauses is to enable a Member State to develop national conditions that will help to give effect to the standard it has ratified. Examples of such flexibility clauses can be found in both Conventions 87 and 98. For instance Article 9(1) of Convention 87 states that 'the extent to which the guarantees provided for in this Convention shall apply… shall be determined by national laws and regulations'. Similarly, Article 4 of Convention 98 stipulates that:

> measures appropriate to national Conventions shall be taken, where necessary, to encourage… machinery for voluntary negotiation between employers or employers' organisations and workers' organisation, with a view to regulation of terms and conditions of employment by means of collective agreements.[13]

4.1.3 States determine how they will implement the standard they ratified.

Once a state has exercised its free choice to ratify a Convention, it has to report on 'the measures which it has taken to give effect to the provisions of the Conventions to which it is a party".[14] Thus the ILO Constitution requires that a state 'give effect' to a Convention it has voluntarily ratified; it does not specify how.[15] This leaves the state with flexibility to implement a ratified Convention by any method it deems fit in the circumstance.

It will appear that the purpose of the ILO's supervisory machinery (including the procedure provided in Article 33 of the Constitution[16]) is to give states '…nudging over time,

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[10] ILO Constitution, Article 17(3)
[11] Trebilcock (n4) 555
[12] Trebilcock (n4) 555
[13] See also Right to Organise and Collective Bargaining Convention (No. 98) of 1949 Articles 3 and 5.
[14] ILO Constitution, Article 22, see also Trebilcock, (n4) 553, 557
[15] Trebilcock (n4) 557
[16] Article 33 of the ILO Constitution provides that: 'in the event of any member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the

encouragement of improvements, and--where justified--stronger calls for change that can eventually bear fruits'.[17] Therefore, if the aims of the ILO's supervisory machinery are '…calls for change…' then the use of sanctions is not intended. Trebilcock noted in this regard that:

> The ILO Constitution does not refer to sanctions, and it was even amended to remove references to measures 'of an economic character.' Its Article 33 does empower the Governing Body to recommend to the Conference 'such action as it may deem wise and expedient to secure compliance' with the recommendations of a Commission of Inquiry.[18]

Similarly, Brian A. Langille had also noted earlier in this regard that:

> [A]ll of this is a game of moral persuasion and, at most, public shaming. It is a decidedly soft law system. There are in fact no sanctions.[19]

It is important to note that the procedure prescribed under Article 33 of the ILO Constitution is hardly used and in fact has been invoked only once since the establishment of the ILO in 1919.[20] It has been explained that the crucial reason why Article 33 has been invoked on only one occasion is the general hostility to trade sanctions as a means of enforcing international labour standards,[21] and that imposing sanctions in respect of ratified conventions act as a disincentive to ratification.[22]

Thus by this flexible character of the relationship between the ILO and Member States, the latter, Nigeria included, are at liberty to take steps they deem fit to enforce ratified conventions.

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decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith'.

[17] Trebilcock (n4) 553, 563

[18] Trebilcock (n4) 553, 563

[19] Brian Langille, 'Core Labour Rights-"The True Story (Reply to Alston)' (2005) 16(3) The European Journal of International law 409, 413

[20] Article 33 of the ILO Constitution has been invoked only once against Myanmar (Burma) in 2000 which engaged in forced labour then.

[21] Bob Hepple *Labour Laws and Global Trade* (Hart Publishing 2005) 55

[22] Bob Hepple(n21) 55

4.2. Crisis in the ILO?

Since the end of the Second World War, the ILO has been exposed to a series of challenges arising by reason of decolonisation, the Cold War, and more recently globalisation.[23] Doubts have been raised, in particular, about the continued viability of tripartism and voluntarism as such central tenets of the Constitution and workings of the ILO.[24] With its attendant rise in transnational trade, production, investments, and also movement of labour across borders and new types of work, one of the most significant consequences of globalisation has been the weakening of organised labour within the ILO vis-à-vis the Employers' Group. As will be explained in this part of the chapter, the resultant imbalance of power between workers and employers has very serious implications for the interpretation and promotion of international labour standards in general and, particularly, freedom of association.

At the 2012 International Labour Conference, a serious attempt was made by the Employers Group in the ILO to challenge the jurisprudence regarding the right to strike established by the Committee of Experts on the Application of Conventions and Recommendations (CEACR, an independent body of Experts appointed by the Director-General with the approval of the Governing Body).[25] The essence of the Employers' challenge was that neither the preparatory work for Convention 87 nor an interpretation based on the Vienna Convention on the Law of Treaties offers a basis for developing principles regulating in detail the right to strike.[26] In other words, the Employers' assertion is that CEACR has somehow exceeded its mandate by interpreting ILO Convention 87 on Freedom of Association and Protection of the Right to Organise as encompassing protection of the right to strike.[27]

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[23] Bob Hepple (n21) 34-53

[24] Bob Hepple (n21) 34-53

[25] ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para 117-123. See also Tonia Novitz: "The Committee of Experts and the Right to Strike: a historical perspective" (2012) 19(2) International Union Rights 20, Lee Swepston:"Crisis in the ILO Supervisory System: Dispute over the Right to Strike" (2013) 29(2) The International Journal of Comparative Labour Law and Industrial Relations 199, Claire La Hovary: "Showdown at the ILO? A historical perspective on the Employers' group's 2012 challenge to the right to strike" (2013) 42 (4) Industrial Law Journal 338, Francis Maupain, "The ILO Regular Supervisory System: A Model in Crisis?" (2013) 10 International Organizations Law, 117 at 121-128, Janice R Bellace, "The ILO and the right to strike" (2014) 153 (1) International Labour Review 29 at 56-59

[26] ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights Report of the Committee of Experts on the Application of Conventions and Recommendations (n1)para 117-123

[27] Novitz "The Committee of Experts and the Rght to Strike :a historical perspective" (n25) 20

In view of the recognition accorded to the right to strike within and outside the ILO, it is doubtful whether the Employers' assertion can be pursued far. Although neither the ILO Constitution nor any Convention explicitly recognises the right to strike, since the 1950s different ILO supervisory bodies have found that the right to strike is a necessary corollary of the right to organise and bargain collectively and have examined the extent to which and the way in which it is implemented in Member States.[28] The right to strike was first asserted as a basic principle of freedom of association by the tripartite Committee on Freedom of Association (CFA) in 1952[29] and has been recognized and developed in its decisions over more than a half century.[30] In 1959, the CEACR essentially taking into consideration the principles established by the CFA regarding right to strike, first made its consideration in respect of the right to strike in relation to Convention 87.[31]

When the CEACR has made its comments on the Convention the Conference Committee on the Application of Conventions and Recommendations (CCAS), a tripartite "standing committee"[32] of the International Labour Conference bases its work on the CEACR's comments.[33] And this the CCAS does by calling on about twenty-five governments to provide it with oral explanations on the basis of the CEACR's comments (from among several hundreds of comments made each year by the CEACR).[34] The mandate of neither the CEACR nor the CCAS indicates a hierarchy between them and in particular neither the CEACR nor

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[28] Swepston (n25) 204, see also ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para. 118

[29] ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para 118

[30] ILO, International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para 118, see also ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (fifth revised edition 2006) page 3

[31]ILO International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para 117 and 118, see also ILO, International Labour Conference 43rd session 1959, Information on the Application of Conventions and Recommendations (Report III Part I General Report Part Three) Page 114, http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1959-43).pdf accessed 8th August 2015

[32] The mandate of the Conference Committee on the Application of Conventions and Recommendations (CCAS) is to consider the measures taken by Members States to comply with ratified conventions and also to consider the information furnished by Member States concerning the results of inspections. See ILO, Standing Orders of the International Labour Conference, Article 7(1)(a) <www.ilo.org/public/english/bureau/> accessed 21st October 2014

[33] Swepston, (n25) 202

[34] Swepston,(n25).202

the CCAS is accorded the role of passing judgment on the findings of the other.[35] Instead, the CCAS adds a public and political element of direct discussions with selected governments in a tripartite setting to gather additional information and put additional pressure on them in a public setting to implement the conventions they have ratified.[36] Each Committee (CEACR and CCAS) bases its work in large part on the work of the other, in a circular and complementary way.[37] Thus, the supervisory bodies have understood the right to strike as an outflow of the freedom of association conventions (87 and 98) for well over 50 years.

Apart from the supervisory bodies' recognition of a right to strike in Convention 87, some other ILO instruments also refer to the right to strike, principally, the Abolition of Forced Labour Convention[38] which prohibits the use of any form of forced or compulsory labour as a punishment for having participated in strikes and the Voluntary Conciliation and Arbitration Recommendation[39] which indicates that the parties should be encouraged to abstain from strikes and lockouts in the event of voluntary conciliation and arbitration and that none of its provisions may be interpreted as limiting in any way whatsoever, the right to strike.[40]

Certain resolutions also make reference to the right to strike. The Resolution Concerning the Abolition of Anti-Trade Union Legislation adopted in 1957, called for the adoption of laws ensuring the effective and unrestricted exercise of trade union rights including the right to strike by workers.[41] Similarly, the Resolution Concerning Trade Union Rights and Their Relation to Civil Liberties, adopted in 1970, invited the Governing Body to instruct the Director General to take action in a number of ways "with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense," with particular attention to be paid, *inter alia*, to the "right to strike".[42] The right to strike has also

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[35] Swepston, (n25).202
[36] Swepston,(n25) 202
[37] Swepston, (n25).203
[38] The Abolition of Forced Labour Convention (No 105) 1957
[39] Voluntary Conciliation and Arbitration Recommendation (No 92) 1951
[40] ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para 121
[41] ILO, International Labour Conference, 40th session 1957 Information and Reports on the Application of Conventions and Recommendations (Report III Part I) Para 783 http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1957-40).pdf accessed 8th August 2015
[42] ILO, International Labour Conference, 54th session 1970 Innformation and Reports on the Application of Conventions and Recommendations (Report III Part I) Para 735-736 http://www.ilo.org/public/libdoc/ilo

been affirmed in various resolutions of the ILO's regional conferences and industrial committees.[43]

Outside the ILO, the right to strike has been recognized by international human rights instruments notably the International Covenant on Economic, Social and Cultural Rights.[44] It is also included in the European Social Charter[45] and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.[46] Thus, the right to strike is therefore applicable under international human rights law, whether or not the countries concerned have ratified ILO Convention 87- and indeed, whether or not one believes that the right to strike is even included in Convention 87.[47]

At the national level, a very large number of countries[48] (including Nigeria) have also recognized the right to strike. For instance in Nigeria, the right to strike is recognized in the Trade Union Act[49] though the exercise of it is subject to certain conditions or restrictions.[50]

/P/09661/09661(1970-54).pdf accessed 8th August 2015 see also Bernard Gernigon, Alberto Odero, Horacio Guido, *ILO Principles Concerning the Right to Strike*, (ILO Geneva 1st edition, 2000) 8

[43] See Resolution Concerning Protection of the Right to Organize and to bargain collectively adopted by the Third Regional Conference of the American States Members of the ILO held in Mexico city in 1946, para.3 of its first section: see also Resolution on Freedom of Association and Protection of the Right to Organise adopted at the First African Regional Conference held in Lagos 1960, para.5; Fifth Asian Regional Conference held in Melbourne in 1962 which adopted a resolution (paragraph 42) which mentioned strike. At the sectional level, the Committee on Inland Transport--One of the international industrial committees set up pursuant to a decision taken by the Governing Body in January 1945--adopted in 1947 a resolution that also reflects the importance given to strikes in paragraphs 13(2) and 17 of that Resolution; Jane Hodges-Aeberhard and Alberto Odero de Dios, "Principles of the Committee on Freedom of Association Concerning Strikes" (1987) 126(5) International Labour Review pages 543-545

[44] International Covenant on Economic, Social and Cultural Rights, 1966, Article 8(d)

[45] European Social Charter (Revised) 1996 Article 6(4)

[46] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" 1988, Article 8,www.oas.org/juridico/engkish accessed 22nd October 2014

[47] Swepston, (n25) 207

[48] ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para 123

[49]Trade Union Act 1973 Cap T14, Laws of the Federation of Nigeria,2004 (as amended by the Trade Union (Amendment Act) 2005 sections 31(6) and 43 (1B)

[50] See Trade Unions Act as amended section 31(b), see also *Attorney General Osun State v Nigeria Labour Congress (Osun State Council) and Ors*., unreported, Suit No: NICN/LA/275/2012, judgment was delivered by Hon. Justice Kanyip on 19th December 2012, http://judgment.nicn.gov.ng/pdf.php? accessed 22nd October, 2014

4.3 ILO Conventions 87 and 98 and Nigerian Labour Law

Before examining the influence of the ILO on Nigerian labour legislation and court decisions, it will be worthwhile to briefly analyse the meaning of freedom of association as contained in Conventions 87 and 98 and the jurisprudence of the ILO. In what follows, reference will be made primarily to the text of the Conventions and to decisions of the supervisory bodies involving Nigeria.

4.3.1 Freedom of Association in the ILO

The importance of freedom of association as a labour right can be understood from the broad interpretation given to it by the ILO. The broadness of the interpretation is to give room for diverse situations as much as possible. It has also been interpreted to include the right to strike and collective bargaining. The general principles of freedom of association in Conventions 87 and 98 'are normally considered integrally'[51] and have since been followed up by other ILO Conventions dealing with specific aspects of freedom of association,[52] however the focus herein lies with conventions 87 and 98.

In analysing the meaning given to freedom of association in Conventions 87 and 98, attention must be given to not only to the terms of the Conventions but also the interpretations thereof by the supervisory bodies of the ILO (CFA and CEACR). These interpretations now constitute a body of "case law" which also influences the courts in Nigeria.

4.3.2 Convention 87, Article 2

By Article 2 of Convention No. 87, workers and employers without distinction whatsoever shall have the right to establish and subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

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[51] Harold Dunning, 'The Origins of Convention No. 87 on freedom of association and the right to organise' (1998) 137(2) International Labour Review 149 , 163

[52] It is also true that the Right of Association (Agriculture) Convention (No. 11) and the Right of Association (Non-Metropolitan Territories) Convention (No. 84) had been adopted in 1921 and 1947 respectively. Furthermore, over the past ten years the International Labour Conference has adopted four new Conventions in this field, namely the Workers Representatives Convention, 1971 (No. 135); the Rural Workers' Organisation Convention 1975 (No. 141); the Labour Relations (Public Service) Convention 1978 (No. 151); and the Collective Bargaining Convention, 1981 (No. 154). See A. J. Pouyat, 'The ILO's freedom of association standards and machinery: a summing up" (1982) 121 (3) International Labour Review 287

In relation to workers, this provision is designed to give expression to the principle of freedom to establish or join workers' organizations. Both the (CFA and CEACR) have explained the phrase "without distinction whatsoever" to mean essentially that freedom of association should be guaranteed without discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality, political opinion, etc, not only to workers in the private sector of the economy, but also to civil servants and public employees in general.[53] Both the CFA and CEACR have also affirmed that all public service employees (except the armed forces and the police as indicated in article 9 of Convention 87) should like workers in the private sector be able to establish organizations of their own choosing to defend their interest.[54]

Article 9 paragraph 1, of Convention 87 is the only authorized exception from the scope of the application of the Convention. And this concerns members of the police and the armed forces. The CEACR has emphasized that these exceptions are justified on the basis of the responsibility of these two categories of workers for the external and internal security of the State.[55] It however noted that these exceptions must be construed in a restrictive manner to exclude workers who do not fall into those two categories.[56]

The CEACR has observed that civilian workers in the manufacturing establishments of the armed forces or at the Army Bank or in the services of the army should enjoy the right to establish and join trade union organisations.[57] And that since Article 9(1) provides only for

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[53] ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (n30) Para 209, see also ILO,,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para. 63

[54] ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para 220; see also ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para. 63-66

[55]ILO, International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para. 67

[56]ILO International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para. 67

[57] ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para. 227 – 229

exceptions to the general principles; workers should be considered as civilians in case of doubt.[58]

This principle is the basis upon which the CEACR[59] requested the Nigerian Government to amend section 11 of the Trade Union Act which denies the right to organise to employees in the Customs and Excise Department, the Immigration Department, the Prison Services, the Nigerian Security Printing and Minting Company, the Central bank of Nigeria and Nigerian External Telecommunication.[60] This provision is yet to be amended though the Government has said it would amend it in the Collective Labour Relations (Special Provisions) Bill 2012[61] In relation to Article 2, CFA has also explained that the right to join a trade union also imply that no one should be compelled to join or not to join a trade union.[62] This means that a provision of the Nigerian Trade Union Act (as amended)[63] which stipulates that 'membership of a trade union by employee shall be voluntary and no employee shall be forced to join any trade union or be victimised for refusing to join or remain a member'[64] is consistent with Conventions No. 87 and 98.

The phrase "Rights of workers to establish and join organisations of their own choosing" means that the government should seek to encourage trade unions to join together voluntarily to form strong and united organisations and not impose upon them by legislation a compulsory unification which deprives the workers of the free exercise of their right of association.[65] On the basis of this interpretation, section 3(2) of the Trade Union Act which restricts the possibility of other trade unions from being registered where a trade union already exists has been observed by CEACR to be inconsistent with the principle in Article 2

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[58] ILO, *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (30) Para 226
[59] ILO,CEACR Observation on Freedom of Association and Protection of the Right to Organize Convention No 87 (Concerning Nigeria), adopted 2012,published 102nd International Labour Conference session 2013 http://www.ilo.org/dyn/normlex/ accessed 9th August 2013
[60] ILO,CEACR Observation on Freedom of Association and Protection of the Right to Organize Convention No 87 (Concerning Nigeria), (n59)
[61] The Collective Labour Relations (Special Provisions) Bill 2012 passed its first reading on 10th May 2012 and since then it has been pending before the National Assembly. Effort made to get this Bill proved abortive.
[62] ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (30) Para. 367
[63] The Trade Union Act was amended by the Trade Union (Amendment) Act 2005
[64] Trade Union Act (as amended) section 12(4)
[65] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para. 319 – 324.

of Convention 87.[66] The Nigerian government has been requested accordingly to amend the section in question.

In interpreting Article 2, the CFA has ruled further that 'the membership should be fixed in a reasonable manner so that the establishment of organisations is not hindered'.[67] While no particular number is indicated by the CFA, it has however stated that the 'legal requirement that there be a minimum number of 20 members ...does not seem excessive and therefore does not in itself constitute an obstacle to the formation of a trade union'.[68] However, a minimum of 50 members fixed by legislation was considered to be too high a figure.[69]

The latter reflects the situation in Nigeria, where section 3(1) of the Trade Union Act requires 50 workers to establish a trade union. The CEACR has noted that such a high figure 'could have the effect of hindering the establishment of enterprise organisations, particularly in small enterprises'.[70] The Nigerian government's reply was that 'Section 3(1)(a) applies to the registration of national unions and that at the enterprise level there is no limit to the number of people to establish a trade union'.[71] In light of this reply, the CEACR requested that the Nigerian government amend section 3(1) of the Trade Union Act to indicate clearly that the minimum membership requirement of 50 workers does not apply to the establishment of trade unions at the enterprise level.[72]

While the Nigerian government's reply to the CEACR is a welcome development, it is important to note that there is neither a provision of the Trade Unions Act nor decisions of the Nigerian Courts which could justify or confirm the government's reply. The activities of

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[66] ILO, CEACR Observation (Concerning Nigeria)on Freedom of Association and Protection of the Right to Organise Convention (No. 87) 1948 (n59)
[67] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para. 287
[68] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para. 292
[69] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para. 284
[70] ILO, CEACR Observation(Concerning Nigeria) on Freedom of Association and Protection of the Right to Organise Convention (No. 87) 1948 (n59)
[71] ILO, CEACR Observation (Concerning Nigeria) on Freedom of Association and Protection of the Right to Organise Convention (No. 87) 1948 (n59)
[72] ILO, CEACR Observation (Concerning Nigeria) on Freedom of Association and Protection of the Right to Organise Convention (No. 87) 1948, (n59)

trade unions are heavily regulated by the Trade Unions Act. It is hoped that the government will amend section 3(1) of the Trade Union Act to reflect its reply to CEACR.

4.3.2.1 Freedom of Association of Informal Workers

The protections guaranteed in Convention 87 also cover informal workers. Article 2 provides that '*workers… without distinction whatsoever shall have the right to establish… join organisations of their own choosing without previous authorisation'*. The CFA has interpreted Article 2 to include informal workers hence it stated specifically 'All workers without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organisations of their own choosing*'.*[73] It further emphasized that:

> By virtue of the principles of freedom of association, all workers- with the sole exception of members of the armed forces and the police- should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organise.[74]

It is important to note that informal workers include: casual work, part-time work, temporal work, 'contract' workers. And whatever label put on this type of work, job insecurity is the factor which is common to them all. The CEACR has confirmed the position of the CFA and also emphasized that: 'with regard to the informal economy… under the terms of the convention, these workers have the right to organize and to collective bargaining'.[75] It further

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[73]Italicised emphasis mine, see ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30), para. 255.
[74]Italicised emphasis mine, see, ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) para. 254
[75]ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, (n25) Para 75

noted that the only authorized exception to the term 'without distinction whatsoever' is that set out in Article 9, paragraph 1 of Convention 87 (relating to armed forces and the police).[76]

4.3.2.2 Are Informal Workers' Protected in Nigeria?

In *Olabode Ogunyale and Ors v Globalcom Nigeria Ltd,*[77] the NICN said:

> The Nigerian Labour Act does not mention the term 'casual worker' although it is a fact/reality of the workplace both locally and internationally. The point is that there is no legislation in place in Nigeria recognising, regulating or protecting casual workers rights'.

It can be argued, informal workers' rights can be enforced through the African Charter, African Charter (Ratification & Enforcement) Act, Constitution (as amended), Employees Compensation Act, and ILO Conventions 87 and 98,[78] all which made no distinction among wokers for purposes of protection.

4.4 ***Convention 87, Article 4***

By Article 4 of Convention 87, *workers and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.*

The CFA has emphasised that the cancellation of registration of an organisation by the registrar of trade unions or their removal from the registrar amounts to the dissolution of that organisation by an administrative authority[79] and that cancellation of a trade union's

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[76]ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, (n25) para. 63.

[77]*Olabode Ogunyale and Ors* v *Globalcom Nigeria Ltd,* unreported Suit No: NIC/30/2008, judgment delivered 13th December 2012 presided by Hon. Justice B.B Kanyip http://judgment.nicn.gov.ng.php accessed 24th March,2015

[78] See: African Charter (Ratification and Enforcement) Act ,Articles 2, 3,10 and 19,Constitution 1999 as amended sections 254C(1)(f), 254C(1)(e), Employees Compensation Act 2010, section 73, see also *Abel Abel v Trevi Foundation Nigeria Limited* unreported suit No: NIC/PHC/55/2013, judgment delivered by Hon. Justice O. Y. Anuwe on 3rd June, 2014, http://judgment.nicn.gov.ng.php accessed 15th October, 2014, *Olabode Ogunyale and Ors v Globalcom Nigeria Ltd,* (n77)

[79]ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para. 685

registration should only be possible through judicial channels.[80] It has further ruled that legislation which accords the minister the complete discretionary power to order the cancellation of the registration of a trade union without any right of appeal to the Courts is contrary to the principles of freedom of association.[81]

In Nigeria, one such provision is section 7(9) of the Trade Union Act and the reasons for which the Minister may cancel registration includes 'overriding public interest'.[82] This provision was introduced during the military administration of Sani Abacha and Abdul Salam to control the activities of trade unions. 'Overriding public interest' was not defined by the Act, but it could mean not to disturb public peace. It is difficult to understand how this can be a ground for cancelling registration since trade union members are civilians pursuing their labour rights.

The CEACR had requested that the Nigerian government amend section 7(9) of the Trade Unions Act as 'the possibility of administrative dissolution under this provision involved a serious risk of interference by the public authority in the very existence of organisations'.[83] The Nigerian government has promised to address the CEACR's request in the Collective Labour Relations (Special Provisions) Bill.[84]

4.5 Convention 87, Articles 5 and 6

By Articles 5 and 6 of Convention 87 *workers and employers organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers. The provisions of Articles 2, 3 and 4 ...apply to federations and confederations of workers and employers' organisations.*

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[80]ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para. 687
[81]ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para. 689
[82] Trade Unions Act (as amended) section 7(9)
[83]ILO, CEACR Observation (Concerning Nigeria) on Freedom of Association and Protection of the Right to Organise Convention (No. 87) 1948 (n59)
[84]ILO, CEACR Observation (Concerning Nigeria) on Freedom of Association and Protection of the Right to Organise Convention (No. 87) 1948 (n59) The Collective Labour Relations (Special Provisions) Bill 2012 passed its first reading on 10th May 2012 and since then it has been pending before the National Assembly. Effort made to get this Bill proved abortive.

Convention 87 is not confined to the right of workers to establish and join first level organisations, but also recognizes the right of such organisations to establish higher level organisations such as "federations" and "confederations". The CFA did not prescribe the number of trade unions that can establish a federation or confederation but has emphasised that the requirement of excessively high minimum number of trade unions conflicts with Article 5 of Convention 87 and with the principles of freedom of association.[85]

In Nigeria, section 8(a)(1)(b) and (g) of the Trade Unions (Amendment) Act 2005 specify minimum of 12 trade unions. The CEACR has observed that this minimum number of 12 is high and that it conflicts with Article 5.[86] It has therefore requested that the government amend section 8(a)(1)(b) and (g) of the Trade Unions (Amendment) Act. The CEACR's position is informed by the need to encourage workers to decide for themselves and discourage interference by public authorities.

With respect to trade unions' affiliation with international organisations, the CFA has emphasised that national legislation which requires that government permission be obtained for the international affiliation of a trade union is incompatible with the principle of free and voluntary affiliation of trade unions with international organisations.[87] This principle is the basis for the CEACR's observation that section 1(2) of the Nigerian Trade Unions (International Affiliation) Act 1996, which requires that government permission be obtained for the international affiliation of a trade union, is incompatible with the principle of free and voluntary affiliation of trade unions with international organisations.[88] It has also requested that the government amend the Act to ensure that the international affiliation of trade unions does not require government permission.

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[85]ILO, *Freedom of Association: Digest of decisions* (n30) Para. 714.
[86]ILO, CEACR Observation (Concerning Nigeria) on Freedom of Association and Protection of the Right to Organise Convention (No. 87) 1948 (n59)
[87]ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para. 737
[88]ILO, CEACR Observation (Concerning Nigeria) on Freedom of Association and Protection of the Right to Organise Convention (No. 87) 1948 (n59)

4.6 The Right to strike (Convention 87, Articles 3 and 10)

Even though Convention 87 does not explicitly mention the right to strike, it establishes the right of workers' and employers' organisation to 'organise their administration and activities and to formulate their programmes' (Article 3) and defines the aims of such organisations as 'furthering and defending the interests of workers or of employers' (Article 10).[89] On the basis of these provisions, the two bodies set up to supervise the application of ILO Standards, the CFA and CEACR have frequently stated that the right to strike is "an intrinsic corollary to the right to organise protected by Convention No. 87",[90] and that it is a fundamental right of workers and of their organisation and have 'defined the limits within which it may be exercised laying down a body of principles in connection with the right to strike'.[91] Thus, the right to strike is an outcome of the ILO's supervisory bodies' interpretation of Convention 87.

4.7. Collective bargaining (Convention 98)

According to the Governing Body of the ILO, collective bargaining is a 'fundamental aspect of the principles of freedom of association".[92] Convention 98 supplements certain aspects of Convention No. 87 and has three main objectives:

- the promotion of collective bargaining,
- protection against acts of anti-union discrimination both at the time of taking up employment and in the course of employment including the termination of the employment relationship, and
- protection against any acts of interference in the internal affairs of workers' and employers' organisations.[93]

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[89] Gernigon, Odero, Guido *ILO Principles Concerning the Right to Strike* (n42) 8

[90] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n30) Para.523, See also ILO, General survey on the Fundamental Conventions Concerning rights at work in light of the ILO declaration on Social Justice for a Fair Globalisation (n25) Para.117

[91] Bernard Gernigon, Alberto Odero, Horacio Guid *ILO Principles Concerning the Right to Strike* (n42) 8

[92] ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, (n30) Para. 925

[93] ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para 166

Article 4 of the Convention 98 stipulate that *measures appropriate to national conditions shall be taken, where necessary to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements.*

This provision sets out two essential elements: action by the public authorities to promote collective bargaining and the voluntary nature of negotiation which implies the autonomy of the parties.[94] The public authorities' obligation to promote collective bargaining excludes recourse to measures of compulsion.[95] The ILO Committee on Collective Bargaining agreed that the term 'promotion' should not be interpreted in a manner suggesting an obligation for the state to intervene to impose collective bargaining, thereby allaying the fear expressed by the employer members (that is employers group in the ILO) that the text of the Convention could imply the obligation for the state to take compulsory measures.[96]

The CFA, following this line of reasoning, has stated that nothing in article 4 of Convention No. 98 places a duty on a government to enforce collective bargaining with a given organisation by compulsory means, and that such an intervention by a government would clearly alter the nature of bargaining.[97] It cannot therefore be deduced from the ILO's Conventions on collective bargaining that there is a formal obligation to negotiate or to achieve a result (an agreement).[98] However, the supervisory bodies have considered that the criteria established by law should enable the most representative organisations to take part in

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[94]ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para 198

[95]Bernard Gernigon, Alberto Odero and Horacio Guido, *ILO Principles Concerning Collective Bargaining* International Labour Review (2000),. 139 (1) 40

[96]This was during the preparatory work for Convention Promoting Collective bargaining (No.154), the Committee of Collective Bargaining agreed upon an interpretation of the term 'promotion'

[97]ILO, *Freedom of Association: Digest of decision and principles of the Freedom of Association Committee of the Governing Body of the ILO*, (n30) Para. 927

[98] Gernigon, Odero and Guido, *ILO Principles Concerning Collective Bargaining*, International (n95) 41 Some of the ILO Conventions on Collective bargaining are: Right to Organise and Collective Bargaining Convention, 1949, (No. 98), Labour Relations (Public Service) Convention 1978 (No. 15) Collective bargaining Convention, 1981 (No. 154).

collective bargaining,[99] which implies the recognition or the duty to recognise such organisations.[100]

With respect to the voluntary nature of negotiation, the CEACR has emphasised that the existing machinery and procedures should be designed to facilitate bargaining between the sides, leaving them free to reach their own settlement.[101] Interventions by the authorities which have the effect of cancelling or modifying the content of collective agreements freely concluded by the parties would therefore be contrary to the principle of free and voluntary negotiation.[102]

The CFA has established that the bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent, and recourse to these bodies should be on a voluntary basis and that all legislation establishing machinery and procedure for arbitration and conciliation designed to facilitate bargaining between both sides of industry must guarantee the autonomy of the parties to collective bargaining.[103]

In a case concerning Nigeria in respect of the illegal dismissal of 49 academics in the University of Ilorin, the Government tried to take away the right of University workers to collective bargaining by directing each council of the Federal Universities to negotiate with individual chapters of Academic Staff Union of Universities (ASUU) in each Federal University.[104] This decision was aimed according to ASUU at undermining and invalidating an agreement between it and the Government in 2001, the Government having sent a bill to the National Assembly (legislature) the substance of which was to decentralise negotiations

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[99]ILO, International Labour Conference 81st Session 1994 General Survey of the Reports on the Freedom of Associatio and the Right to Organize Convention (No 87) and the Right to Organize and Collective Bargaining Convention (No 98) 1949, (Report III Part I) Para. 245 http://www.ilo.org/public/ libdoc/ilo/P/09661/09661(1994-81-4B).pdf accessed 8th August 2015

[100] Gernigon, Odero and Guido, *ILO Principles Concerning Collective Bargaining*, (n95) 41

[101]General Survey of the Reports on Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention 1949, Para 248 (n99)

[102]ILO,International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para 200

[103]ILO, Freedom of Association: *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, (n30) Paras. 932 – 933.

[104] ILO, Reports of the Committee on Freedom of Association (340th and 341st Report) Official Bulletin vol. LXXXIX 2006, series B No.1 Case No.2267 (Nigeria) Paras 152-158, http://www.ilo.org/public/libdoc/ilo/P/09604/09604(2006-89-series-B).pdf accessed 8th August 2015

with University Unions.[105] There was no response from the Government on this complaint. The CFA affirmed that 'the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and consequently, the level of negotiation, should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority'.[106] Since then ASUU has continued as one union.

Another recent complaint by international trade union organisations,[107] concerns Nigerian statutory provisions which require every agreement on wages to be registered with the Ministry of Labour,[108] and also subject to the approval of Ministry of Labour.[109] The Government's response was that the practice seeks to ensure that there is no undue economic disruption in a particular industry as there is usually a benchmark agreed to by the relevant employers and trade unions.[110] In this regard, the CEACR emphasised that legal provisions which make collective agreements subject to the approval of the Ministry of Labour for reasons of economic policy so that "employers and workers' organisations are not able to fix wages freely are not in conformity with Article 4 of the Convention respecting the promotion and full development of machinery for voluntary collective negotiations".[111] The CEACR has requested that the Government ensure that the relevant provisions are amended to give effect to the principle of free collective bargaining.[112]

Two main factors therefore stand in the way of voluntary negotiation or free collective bargaining in Nigeria: Government interference (as in the case of ASUU) and legislation. These factors are capable of affecting workers' free collective bargaining. Regarding

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[105] ILO, Reports of the Committee on Freedom of Association Case No. 2267 (concerning Nigeria) (n104)
[106] ILO, Reports of the Committee on Freedom of Association Case No. 2267 (concerning Nigeria) (n104) See also, ILO, *Freedom of Association: Digest of decisions and Principles of the Freedom of Association, Committee of the Governing Body of the ILO*,(n30) Para.988
[107] ITUC,2009 Annual survey of violation of trade union rights (concerning Nigeria) http://survey/09.ituc_csi.org/survey accessed 4th September, 2013, see also ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations,International Labour Conference 102nd Session 2013 (Report III (Part 1A) pages 131-132, http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2013-102-1A).pdf accessed 10th August 2015
[108] Trade Dispute Act, section 3
[109] See Wages Board and Industrial Councils Act, sections 1, 2, 3, 4 and 5 and the Trade Dispute Act section 19
[110]ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations , International Labour Conference 102nd Session 2013, Pages 131-132, (n107)
[111] ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations , International Labour Conference 102nd Session 2013, Pages 131-132, (n107)
[112] ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations , International Labour Conference 102nd Session 2013, Pages 131-132, (n107)

legislation, it will appear that trade unions organisations are yet to take advantage of the recent constitutional amendment (by the Third Alteration Act)[113] which empowered the National Industrial Court (NICN) to enforce all ratified ILO Conventions. In this regard, right to free collective bargaining can be enforced in the NICN.

4.7.1 Protection against anti-union discrimination

The protection afforded to workers and trade union leaders against acts of anti-union discrimination and acts of interference is an essential aspect of freedom of association as such acts may result in practice in a denial of freedom of association and the guarantees laid down in convention No. 87 and also consequently of collective bargaining.[114] Protection against any act of discrimination which undermines freedom of association in respect of employment is guaranteed primarily under Convention 98, together with the Workers' Representative Convention,[115] and the Labour Relations (Public Service) Convention.[116]

Article 1, Paragraph 1 of Convention No. 98 states in general terms that 'workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment'.[117] Article 2, Paragraph 1, states that "workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning and administration".[118] The 'acts of anti-union discrimination in respect of their employment' covers dismissal, transfer, demotion and other prejudicial acts both at the time of taking up employment and in the course of employment and at the time of the termination of the employment relationship.[119]

An act of anti- union discrimination in respect of employment can be illustrated in a case concerning the Nigerian Government's dismissal of 49 academic lecturers including five trade union officials for having exercised the right to strike, as far back as May 2001; they

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[113] Constitution 1999 (as amended) section 254 C (1) and (2)
[114] ILO, General Survey on the Fundamental Conventions, Report III (Part 1B) International Labour Conference (n1) para. 167.
[115] Workers Representatives Convention, 1971 (No. 135)
[116] Labour Relations (Public Service) Convention 1978 (No.151)
[117] Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Article 1(1)
[118] Right to Organise and Collective Bargaining Convention, 1949 (No. 98) Article 2(1).
[119] ILO, International Labour Conference 101st Session 2012, General Survey on the fundamental Conventions concerning rights at work Report of the Committee of Experts on the Application of Conventions and Recommendations (n1) Para. 173. See also *ILO, Freedom of Association: Digest of decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*,(n30) Para. 781

were not reinstated until after the Supreme Court in December 2009 ordered their reinstatement. The CFA has observed that cases concerning anti-union discrimination be examined rapidly and that 'an excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned'.[120]

4.8 Nigerian Labour Legislations

In Nigeria, while Treaty-making is a prerogative of the president of Nigeria[121] (that is the executive arm of government), the National Assembly (the legislature at the national level) is exclusively empowered to make laws for the purpose of implementing a Treaty,[122] and also matters listed in the Exclusive List, one of which is labour.[123] Although the National Assembly has made several labour statutes for the purpose of implementing ILO Conventions that have been ratified, the analysis herein will be limited to statutes made for the purpose of implementing Conventions 87 and 98. It is important to note that both Conventions 87 and 98 were ratified on 17th March 1960.

Since independence, various Nigerian Constitutions have always guaranteed freedom of association and the right to form trade unions as a fundamental human right.[124] The inclusion of freedom of association and right to form trade unions in the Constitution (in section 40)

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[120] ILO, 356th Report of the Committee on Freedom of Association Case No. 2267 (Nigeria), Official Bulletin vol XCIII, 2010 series B No.1, Paras. 79-82, http://www.ilo.org/public/libdoc/ilo/P/09604/09604(2010-93-serie-B)engl.pdf accessed 8th August 2015 see also ILO, Freedom of Association: Digest of decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, (n30) Para. 826

[121] Although nothing in the Constitution confers this power on the president of Nigeria, it is the practice and also the position at common law. See the dictum of Hon. Justice Michael Ekundayo in the Supreme Court decision in *Abacha v Fawehinmi*, <www.nigeria-law.org/general> accessed 25th March, 2015.

[122] Constitution 1999, section 12 (1) and (2)

[123]See the Constitutio1999, section 4. It is important to note however that State Assemblies (legislature at the state level) can only make laws on matters in the Concurrent Legislative List. See the Constitution 1999 section 4(7) of the .Section 318 (1) defines 'Exclusive legislative list as that which only the National Assembly can make laws on, while the Concurrent Legislative List' is that which both the National Assembly and State Houses of Assembly may make laws on. Labour matters are listed as item 34 in the Second Schedule (Part I) of the 1999 Constitution.

[124] See 1960 Constitution, section 25(1) 1963 Constitution section 26 (1) 1979 Constitution section 37, 1989 Constitution section 40, and 1999 Constitution section 40. It is important to note that only the 1999 Constitution that is in force the earlier ones have been repealed. Although the legislature never enacted the constitution (for example the 1999 constitutions signed into law by then military head of state general Abdusalam Abubakar on May 5th 1999) Section 40 guarantees freedom of association and right to form trade unions as a fundamental human right.

makes them constitutional rights. And as the Constitution is supreme, if there is any conflict between this provision and any other enactment, this constitutional provision prevails and that other enactment becomes void to the extent of its inconsistency or conflict.[125]

The influence of Conventions 87 and 98 on Nigerian legislation can be observed in the wording of a number of statutory provisions. For example, section 1 (1) of the Trade Union Act defines a 'trade union' as:

> …any combination of workers or employers, whether temporal or permanent, the purpose of which is to regulate the terms and conditions of employment of workers, whether the combination in question would or would not, apart from this Act, be an unlawful combination by reason of any of its purpose being in restraint of trade, and whether its purpose do or do not include the provision of benefits for its members.'

Apparently, this provision gives statutory force to Article 2 of Convention 87, which guarantees the right of workers 'without distinction whatsoever' to form trade unions. The implication of the phrase 'whether temporal or permanent' in section 1 (1) of the Trade Union Act is that informal workers have the right to unionise as well as regular workers and confirming no distinction between 'temporal or permanent workers.' Also, section 30 of the Trade Union Act (as amended) which confers on trade unions the right to establish federations is an enactment of article 5 of Convention 87.

The Labour Act protects union activities of a worker and in this regard, section 9 (6) of the Labour Act provides that:

> No contract shall:
>
> a. if a condition of employment that a worker shall or shall not join a trade union or shall or shall not relinquish membership of a trade union, or
> b. cause the dismissal of, or otherwise prejudice a worker:
> i. by reason of trade union membership or

[125] Constitution 1999, section 1 (1) and (3)

ii. because of trade union activities outside working hours or, with the consent of the employers, within working hours or
iii. by reason of the fact that he has lost or been deprived of membership of a trade union or has refused or been unable to become, or for any other reason is not a member of a trade union.

It will appear that this subsection is an enactment of Article 1 of Convention 98 which guarantees adequate protection against acts of anti-union discrimination in respect of employment. However, the Act covers only employees who are defined as workers. And those excluded by the definition of "worker" under the Act includes 'casual workers' or 'emergency workers'. It can be argued that since Convention 98 has been ratified, the rights of 'casual workers' and emergency workers can be enforced through section 254 C(2) of the Constitution, notwithstanding section 12 of the Constitution which requires the domestication of treaties.[126]

The ILO principle of collective bargaining is also recognised by the Trade Union Act (as amended), the Labour Act and the Wages Boards and Industrial Councils Act 1973 in line with Article 4 of Convention 98.

A careful examination of the statutes that have been influenced by Conventions 87 and 98 reveals that none of them enact wholly all the provisions of either of the Conventions, but only particular excerpts or Articles as the National Assembly (legislature) deemed fit in the circumstances. Also some of the labour statutes prescribe restrictions or limitations which are neither in Conventions 87 and 98 or interpretations of them by the supervisory bodies of the ILO. For example while the CFA has specified that the "legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike",[127] the conditions prescribed for a strike under the Trade Union Act are such that it is difficult for workers to go on a lawful strike.[128]

[126] Constitution 1999 section 254 C (I)
[127] ILO, *Freedom of Association: Digest of decisions* (30) Para. 548
[128] See Trade Union Act (as amended) by the Trade Union Amendment Act) section 31(6)

Furthermore while Article 4 of Convention 98 prescribes voluntary negotiation between employers and employees, both the Trade Dispute Act and the Wages Board and Industrial Council Act contain provisions which seem to allow for government interference with collective bargaining. For instance, section 3 of the Trade Dispute Act requires every collective agreement for the settlement of a trade dispute to be deposited with the Minister of Labour and Productivity. It is important to note that currently once a labour treaty has been ratified by the President of Nigeria it can be directly enforced by the Court (NICN) whether or not the National Assembly legislate on it.[129]

4.9 The ILO's Role in the Repeal of the Military Decrees of the 1990s

In addition to the labour legislation discussed above, the ILO's influence also helped to repeal some obnoxious military decrees of the 1990s which violated freedom of association.[130]

Following strike action by oil workers in July 1994, supported by a general strike of the Nigerian Labour Congress (NLC) – an umbrella union with 41 affiliates or trade unions[131] – the then military government promulgated Decrees which dissolved the national bodies of the NLC, and the respective national and state executive councils of the National Union of Petroleum and Natural Gas Workers (NUPENG) and the Petroleum and Natural Gas Association of Senior Staff of Nigeria (PENGASSAN). Thereafter, government-appointed administrators were installed, the offices of the NLC, NUPENG and PENGASSAN were sealed, their bank accounts were frozen and check-off facilities were suspended.

The military government also promulgated Decrees which effectively prevented the operation of trade unions in different academic institutions; restructured the previous 41 registered industrial unions into 29 named affiliates omitting several previously registered and recognised unions of senior staff; and further extended ministerial control over the

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[129] Constitution 1999 section 254C(2)

[130] A decree is a law promulgated by the head of the Federal Military Government in a military regime. Once a democratically elected government comes into power all military decrees are automatically regarded as Acts of the National Assembly by the effect of section 315(1) of the Constitution.

[131] These workers were calling on the then military government of General Sanni Abacha to return the country to a democratically elected government.

registration of trade unions and the operation of check-off, while tightening restrictions on the right to participate in union activities.

Three major trade unions complaints were made against the military Decrees which violated freedom of association in the 1990s, resulting in ILO Cases Nos. 1530,[132] 1793[133] and 1935.[134]

It is important to note that since 29th of May 1999, the country has been ruled by democratic governments. Democratic governments tend to respect workers' rights because of the rule of law. This is not to say that workers' rights are never violated by democratic governments, only that violations are generally fewer compared to military regimes. The responses of the ILO to trade unions' complaints in Cases Nos: 1530, 1793 and 1935 will now be examined herein.

4.9.1 Case No. 1530

In a Joint Communication of 19 April 1990, the International Trade Secretariats[135] on behalf of their various affiliates in Nigeria presented a complaint of violations of trade union rights

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[132] ILO Case No 1530 , "Complaint Against the Government of Nigeria" presented by the International Transport Workers' Federation (ITF) together with several other international workers' organizations and the International Confederation of Free Trade Unions (ICFTU) See ILO, Report of the Committee on Freedom of Association (277th Report) Official Bulletin, 1991 Vol. LXXIV, Series B, No. 1, Para 192-209, <www.ilo.org /public/libdoc/ilo/> accessed 17th April 2015

[133] ILO Case No.1793, "Complaint Against the Government of Nigeria" presented by the International Confederation of Free Trade Unions (ICFTU),the Organisation of African Trade Union Unity (OATUU) and the World Confederation of Labour (WCL) ILO, Report of the Committee on Freedom of Association (292nd and 293rd Reports) Official Bulletin 1994, Vol. LXXVII, Series B, No. 1, paras 567-614. <www.ilo.org/ public/libdoc/ilo/ > accessed 17th April 2015

See also, International Labour Conference, Information and Reports on the Application of Conventions and Recommendations, 82nd Session 1995, III (Parts 1, 2 and 3) pp. 182-183.

[134] ILO Case No.1935, "Complaint Against the Government of Nigeria", presented by the International Confederation of Free Trade Unions (ICFTU), the Organisation of African Trade Union Unity (OATUU), the World Confederation of Labour (WCL) and the International Federation of Chemical, Energy, Mine and General Workers' Union (ICEM) see ILO, Report of the Committee on Freedom of Association (313rd, 314th and 315th Reports) Official Bulletin 1999, Vol. LXXXII Series B, No. 1, pp. 234-237, <www.ilo.org/public /libdoc/ilo/> accessed 17th April 2015. See also, ILO Governing Body Report (First Report) (Observance by Nigeria of the Freedom of Association and Protection of the Right to Organise Convention No. 87, 1948. Report on the direct contacts mission to Nigeria, 17 to 21 August, 1998).
GB 273 15/1, 273rd Session, Geneva, November 1998, para 6, <www.ilo.org/public/english/standards/relm/gb /docs/gb273/gb-15-1.htm> accessed 29th September 2014

[135] The International Transport Workers Federation (ITF), the International Metalworkers' Federation (IMF), the International Textile Garment and Leather Workers Federation (ITGLWF), the International Federation of Chemical, Energy and General Workers' Unions (ICEF), the International Federation of Journalists (IFJ), the Public Services International (PSI), the International Union of Food and Allied Workers' Associations (IUF), the International Federation of Commercial Clerical, Professional and Technical Employees (FIET) and the International Federation of Building and Wood Workers (IFBWW). See also ILO, Report of the Committee on

against the government of Nigeria regarding Trade Unions (International Affiliation) Decree No. 35, of 1989. The Decree banned all Nigerian workers' organisations from affiliating with international workers' organisations with the sole exception of the Central Labour Organisation being able to affiliate with three permitted bodies.[136] Any contravention was an offence liable on conviction to a fine of N5, 000 (Five Thousand Naira) or to imprisonment for a term of five years or to both such fine and imprisonment.[137] And where the offence was committed by a trade union or association, it was liable on conviction to a fine of not less than N10, 000 (Ten Thousand Naira) and also the removal of the name of the trade union or association from the register of trade unions.[138] The effect of the Decree was that unions were forced against their will to terminate their international affiliations or face draconian sentences in the Decree.[139]

Both the CFA[140] and CEACR[141] found that the Decree was a violation of Article 5 of Convention 87 and ILO principles[142] which guaranteed workers organisations the right to affiliate with international organisation of workers. And both the CFA and CEACR[143] recommended the repeal of the Decree and also urged government in this regard. The efforts of the ILO yielded a favourable result in that the military government repealed the Decree, a

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Freedom of Association (277th Report) Official Bulletin, 1991 Vol. LXXIV, Series B, No. 1, Para 192 http://www.ilo.org/public/libdoc/ilo/P/09604/09604(1991-74-series-B).pdf accessed 8th August 2015

[136]The permitted bodies were: Organisation of African Trade Union Unity; the Organisation of Trade Unions for West Africa and 'any other International Labour Organisation specifically approved by the Armed forces Ruling Council'. See section 3(1) of the Trade Unions (International Affiliation) Decree No. 35 of 1989.

[137] See section 4(1) Trade Unions (International Affiliation) Decree No. 35 of 1989.

[138] See section 4(2) Trade Union (International Affiliation) Decree No. 35 of 1989.

[139]ILO, Report of the Committee on Freedom of Association (277th Report) Official Bulletin 1991 (n135) Para.. 198 and 199

[140] ILO: Report of the Committee on Freedom of Association (277th Report), Official Bulletin 1991 (n135) Paras. 205 and 207

[141] ILO, International Labour Conference, Information and Reports on the Application of Conventions and Recommendations 78th Session, 1991, Report III (Parts 1, 2, 3) pages 195-196, http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1991-78).pdf accessed 10th August 2015

[142] The other ILO principles are enshrined in the General Survey on Freedom of Association and Collective Bargaining, International Labour Conference, 69th session 1983 Report of the Committee of Experts on the Application of Conventions and Recommendatiions (Report III Part 4B) paras.250-251 http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1983-69-4B).pdf accessed 10th August 2015 and in the Digest of Decisions and Principles of the Freedom of Association Committee, 3rd edition, 1985, Paras. 518-524 http://www.ilo.org/public/libdoc/ilo/1985/85B09_118_engl.pdf accessed 10th August 2015

[143]ILO Report of the Committee on Freedom of Association (277th Report) Official Bulletin 1991 (n135) para 209 (b), see also International Labour Conference, Information and Reports on the Application of Conventions and Recommendations 78th Session 1991, Report III (Parts 1, 2 and 3) (n141)pages 195-196

fact noted by the CEACR 'with satisfaction that Decree No. 35 of 1989 prohibiting the international affiliation of trade unions has been repealed by Decree No. 32 of 1991.[144]

4.9.2 Case No. 1793

This was a complaint against the military government of Nigeria made to the ILO by the International Confederation of Free Trade Unions (ICFTU), the Organisation of African Trade Union Unity (OATUU), and the World Confederation of Labour (WCL) in 1994. Following strike action by workers in the oil sector, the then Military Head of State (General Sani Abacha) promulgated two decrees dissolving the national executive councils of the NLC, NUPENG and PENGASSAN and replacing them with government-appointed administrators.[145] Furthermore, some of the leaders of NLC, NUPENG and PENGASSAN were arrested and detained without trial.

The CEACR found that the government action was a clear violation of Convention 87, particularly Article 4 which enjoined the administrative authority not to dissolve worker organisations and Article 3 which provides for right of organisations to elect freely their representatives.[146]

Both the FOA and CEACR urged the government to repeal Decrees and to allow independently elected officials to exercise their trade union functions once again without interference by the public authorities and to bring the law and practice into conformity with the provisions of Convention 87.[147] While case No. 1793 was still pending, there was another

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[144]ILO,International Labour Conference, Information and Reports on the Application of Conventions and Recommendations 79th Session, 1992, Report III (Parts 1, 2 and 3) page 225, http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1992-79).pdf see also Eric Gravel, Isabelle Duplessis and Benard Gernigon, *The Committee on Freedom of Association: Its impact over 50 years* (ILO, Geneva 2001) 41. The Trade Unions (International Affiliation) Decree No. 35 of 1989 was repealed by the Trade Unions (International Affiliation Repeal) Decree No. 32 of 1991.

[145]ILO,Report of the Committee on Freedom of Association (292nd and 293rd Reports) Official Bulletin 1994, Vol. LXXVII, Series B, No. 1, paras 567-614. See also, ILC, Information and Reports on the Application of Conventions and Recommendations, 82nd Session 1995, III (Parts 1, 2 and 3) (n133) pp. 182-183.

[146] ILO International Labour Conference Information and Reports on the Application of Conventions and Recommendations 82nd Session 1995, Report 111 (Parts 1, 2 and 3) page 183 http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1995-82).pdf accessed 10th August 2015 See also,ILO, International Labour Conference Report of the Committee of Experts on the Application of Conventions and Recommendations, 83rd Session 1996, Report III (Part 4A) pages 156-157, http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1996-83).pdf accessed 10th August 2015

[147]ILO, Report of the Committee on Freedom of Association (306th Report) Official Bulletin, 1997, Vol. LXXX, series B, No. 1, para 45, http://www.ilo.org/public/libdoc/ilo/P/09604/09604(1997-80-series-B).pdf accessed

new complaint against the military government's violation of the principles of freedom of association and the provisions of Conventions Nos. 87 and 98 leading to case No. 1935.[148]

4.9.3 Case No. 1935

The complaint was against the then military government's further promulgation of anti-union Decrees and detention of trade unionists.[149] The Decrees promulgated proscribed and prohibited participation in any trade union activities of the following unions: Non-Academic Staff Union of Educational and Associated Institutions, the Academic Staff Union of Universities, Teaching Hospitals, Research Institutes and Associated Institutions and also dissolved their national and branch executive councils operating within any University in Nigeria. They also restructured the 41 previously registered industrial unions into 29 trade unions affiliated to the Central labour Organisation. They granted the Minister of Labour and Productivity the power to revoke the registration of any trade union in the interest of overriding public interest and also replaced the right of appeal to the appropriate High Court which was previously guaranteed with a right of appeal limited to the Minister. And they specified the international trade union organisations with which the Nigerian Labour Congress (NLC) and any other trade union may affiliate. The Decrees further nullified existing affiliation to unapproved international trade union organisations unless approval had been granted by the Provisional Ruling Council (ruling council of the military government). They also banned future affiliations without the express approval of the government-appointed administrator running the affairs of the NLC. Finally they provided for a fine of

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10th August 2015, see also ILO International Labour Conference, Report of the Committee of Experts on the Application of Conventions and Recommendations, 86th Session, 1998 Report III (part 1A) page 183, http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1998-86).pdf accessed 10th August 2015

[148] The new complaints was brought in 1st August 1997 by the following: International Confederation of Free Trade Unions (ICFTU); International Federation of Chemical, Energy, Mine and General Workers Union (ICEM); The International Union of Food, Agricultural, Hotel,Restaurant, Catering, Tobacco and Allied Workers' Association (IUF); International Textile, Garment and Leather Workers Federation (ITGWLF) and International Federation of Commercial, Clerical Professional and Technical Employees (FIET) associated themselves with this complaint in communication dated 29th August, 24th September and 10th December 1997 respectively.

[149] ILO, Report of the Committee on Freedom of Association (313th, 314th and 315th Reports) Official Bulletin 1999, pages 234-237, (n134) See also, ILO Governing Body Report (First Report) (Observance by Nigeria of the Freedom of Association and Protection of the Right to Organise Convention No. 87, 1948. Report on the direct contacts mission to Nigeria, 17 to 21 August, 1998).
GB 273 15/1, 273rd Session, Geneva, November 1998, para 6, <www.ilo.org/public/english/standards/relm/gb/docs/gb273/gb-15-1.htm> accessed 29th September 2014

N10, 000 (Ten Thousand Naira) or five years imprisonment for any contravention, as well as the revocation of the trade union registration certificate.[150]

Following the complaints the ILO decided to institute the procedure in Article 26(4) of its Constitution[151] and to proceed to appoint a Commission of Inquiry to consider the complaints against the government of Nigeria in cases Nos. 1793 and 1935.[152] While appointing the members of the Commission of Inquiry, the Governing Body nevertheless decided that the commencement of the work of the Commission should be delayed for 60 days in order to send a direct contact mission to Nigeria.[153] The mission took place from 17th to 21st August 1998 and was headed by Justice Rajsoomer Lallah, chair designate of the appointed Commission of Inquiry.[154]

The report of the direct contact mission showed that the mission had great effect as it led to the repeal of Decrees Nos. 9 & 10[155] and in October 1998 the ILO received copies of the Decrees which repealed Decrees Nos. 9 & 10 (that is Nigerian Labour Congress (Dissolution of National Executive Council) Repeal Decree No.14 1998 and the NUPENG and PENGASSAN (Dissolution of Executive Council) Repeal Decree No.13 1998).[156]
Following the report of the direct contact mission, the work of the Commission of Inquiry was suspended.[157] The ILO may have been satisfied with the work of the direct contact mission especially as the obnoxious decrees which violated trade union rights were repealed by the military government.

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[150] ILO, Report of the Committee on Freedom of Association (313th, 314th and 315th Reports) Official Bulletin 1999, (n134) pages 236-237
[151] Article 26(3) and (4) of the ILO's Constitution empowers the Governing Body on its own motion to appoint a Commission of Inquiry to consider a complaint and to report therein.
[152] ILO, Report of the Committee on Freedom of Association (313th, 314th and 315th Reports) Official Bulletin 1999, (n134) page 235
[153] See ILO Freedom of Association Cases (Case No.1793 concerning Nigeria) (n133)
[154] See ILO Freedom of Association Cases (Case No.1793 concerning Nigeria) (n133)
[155]Nigerian Labour Congress (Dissolution of National Executive Council) Decree No. 9[155] of 1994, dissolved the national bodies of the NLC; and the NUPENG & PENGASSAN (Dissolution of Executive Councils) Decree No. 10[155] of 1994 dissolved the respective national and state executive councils of the National Union of Petroleum and Natural Gas Workers (NUPENG) and the Petroleum and Natural Gas Association of Senior Staff of Nigeria (PENGASSAN).
[156]See ILO,Report of the Governing Body Direct Contact Mission to Nigeria (17 to 21 August 1998) , GB.273/15/1 , 273rd Session Geneva, November 1998,<http://www.ilo.org/public/ilo/GB/273/> accessed 10th September, 2013
[157]See ILO, Freedom of Association Cases (Case No. 1793 concerning Nigeria) Report No. 315, March 1999, (n133) here it was clearly stated that on the basis of the direct contact mission the Governing Body decided "to suspend the work of the Commission of Inquiry pending such examination and until such time as the Governing Body may decide otherwise"

With respect to the these Decrees earlier mentioned (in paragraphs (a)-(d)) the position is that: While the Trade Disputes (Essential Services Deregulation, Proscription and Prohibition from Participation in Trade Union Activities) Decree No. 24[158] 1996 was repealed,[159] the Trade Unions (Amendment) Decree No. 4[160] 1996 was amended[161] and restricting references to only 29 unions was deleted. Also the Trade Unions (Amendment No.2) Decree No 26[162] of 1996 was amended[163] by inserting the possibility for appeal to an appropriate court in cases of denied or cancelled registration of trade union. And the Trade Unions (International Affiliation) Decree No. 29 of October 1996 was also amended[164] to provide that any trade union may affiliate with any international labour organization or trade secretariat in accordance with the Decree.

With respect to the amendments, the CEACR observed that there was a contradiction between section 3(2) of the Trade Unions Amendment Decree No. 1 of 1999, which restricts the possibility of other trade unions being registered to represent workers in a place where a trade union already exists and the annexed list of industrial unions that allow for the registration of other unions.[165] It therefore requested the government to take the necessary measures to rectify that contradiction by amending section 3(2) in order to ensure that workers have the right to form and join the organisation of their own choosing even if another organisation already exists.[166] The government is yet to take action on this but it is hoped that the National Industrial Court (NICN) when it has the opportunity will adopt an interpretation that will remove the contradiction.

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[158]Trade Disputes (Essential Services Deregulation, Proscription and Prohibition from Participation in Trade Union Activities) Decree No. 24 1996

[159] It was repealed by The Trade Disputes (Essential Services Deregulation, Proscription and Prohibition from Participation in Trade Union Activities) (Repeal) Decree No. 12, 1998

[160] Trade Unions (Amendment) Decree No. 4, of 1996

[161] It was amended by the Trade Unions (Amendment) Decree No. 1 of 1999

[162] Trade Unions (Amendment No. 2) Decree No. 26, 1996

[163] It was amended also by the Trade Unions (Amendment) Decree No.1 of 1999

[164] It was amended by the Trade Unions (International Affiliation) (Amendment) Decree No.2 of 1999

[165]ILO,Observation of CEACR on Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87) Concerning Nigeria, Observation (CEACR), adopted 2004, published 93rd ILC Session (2005), <http://www.ilo.org/dyn/normlex>/ accessed 9th August 2013

[166]ILO,Observation of CEACR on Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87) (concerning Nigeria), adopted 2004, published 93rd ILC Session (2005), http://www.ilo.org/dyn/normlex/ accessed 9th August 2013

Thus the intervention of the ILO during the military era shows the importance of freedom of association as a fundamental right. One which enables workers to attain other rights and denial of that right can hinder other rights from being attained. The ILO's intervention is also important as it show extent of ILO's influence in ensuring labour principles (freedom of association) are conformed to. It not only set labour standards, but influences government of countries to respect and implement those standards.

4.10 Court (NICN) decisions and judicial reasoning

Apart from legislation, ILO jurisprudence has also influenced the interpretations, reasoning and decisions of the NICN. The influence is pronounced in the following situations: (a) where there is no domestic legislation upon which the court can rely for its judgment; (b) where the domestic legislation is too terse to guide in interpretation; and (c) to further confirm and reinforce domestic legislation already cited.

4.10.1 Where there is no domestic legislation which the court can rely on for its judgment

In *Ejieke Maduka v Microsoft Nigeria Limited and Others*,[167] the plaintiff, an employee of Microsoft Nigeria, brought an action against the Country Manager of Microsoft Nigeria, Microsoft Corporation and her immediate line manager alleging that she had been consistently sexually harassed by the Country Manager and that, in response to her objections and warnings to desist, her employment was terminated.

The court (NICN) having found a case of sexual harassment noted that:

> The Labour Law in Nigeria as at now has no specific provision for sexual harassment in the work place, except for the Third Alteration Act 2010 that grants this Court jurisdiction over it. I am not aware of any Nigerian decision that has given a judicial definition of the term sexual harassment. It is therefore not unexpected that there is a dearth of decisions in the field of sexual harassment in employment in Nigeria.

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[167] *Ejieke Maduka v Microsoft Nigeria Limited and Others*, unreported Suit No: NICN/LA/492/2012, judgment delivered by Justice O.A.Obaseki-Osaghae on December 19th 2013, judgment.nicn.gov.ng/ accessed 8th April 2015

In this instance the NICN was moved to rely on international conventions for its decision and said particularly:

> Having been so empowered, I shall have recourse to international conventions particularly the United Nations Convention on The Elimination of All Forms of Discrimination against Women (CEDAW) and ILO Discrimination (Employment and Occupation) Convention 1958 No 111 which have been ratified by Nigeria

By these Conventions the NICN held that the actions of the Country Manager amounted to sexual harassment for which damages were awarded to the plaintiff.

Although this case is not related to freedom of association it has implications for it insofar as it suggests that if there is a case before the NICN which facts are related to freedom of association, and there is no domestic legislation to rely on, it will rely on conventions 87 and 98.

4.10.2 where the domestic legislation is too terse to guide in interpretation

In *Attorney-General of Enugu State v National Association of Government General Medical and Dental Practitioners (NAGGMDP) and Another*,[168] one of the issues before the Court was whether the defendants (medical employees of the plaintiff) were engaged in essential services with the consequence that they were prohibited from embarking on any strike action. The NICN found that the definition of "essential services" provided in section 48(1) and listed in the First Schedule of the Trade Dispute Act[169] lacked necessary details that could help any interpretation. The definition provided in section 48 (1) of the Act is: "essential service" means any service mentioned in the First Schedule to this Act". And the First Schedule also without providing a definition, amongst other services mentioned: "hospitals", "treatment of the sick", "the prevention of disease," "health matters." Thus there was no comprehensive definition other than mere mention of various services in the First Schedule to

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[168] *Attorney-General of Enugu State v National Association of Government General Medical and Dental Practitioners (NAGGMDP) and Another*, Unreported suit No: NIC/EN/16/2010, judgment delivered by Justice B.B.Kanyip (presiding judge) on 20th June 2011, http://judgment.nicn.gov.ng/ accessed 8th April 2015

[169] Trade Dispute Act

the Act. For this reason, the NICN was moved to rely on the conception of "essential services" in ILO jurisprudence, and particularly noted that:

> The concept of essential services has not been espoused under our labour jurisprudence beyond the statutory provisions on it …may be worth the while to take a look at the concept as espoused under ILO jurisprudence …Overtime the supervisory bodies of the ILO have brought greater precision to the concept of essential services in the strict sense of the term (for which strike action may be prohibited) In 1983 the Committee of Experts defined such services as those "the interruption of which would endanger life, personal safety or health of the whole or part of the population…"[170]

The court found by this definition that the defendants (being medical employees of the plaintiff) were engaged in essential services and were thus restrained from taking part in any strike.[171] Thus, the NICN was able to reach its decision in this case by its understanding of "essential service" in ILO jurisprudence.

4.10.3 To further confirm and reinforce domestic legislation already cited.

It is the usual practice that NICN judges further confirm domestic legislation cited with relevant ILO conventions that have been ratified. And this is so even when domestic legislation sufficiently covers the field. In *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa Ibom State University and Another*,[172] one of the issues before the court was whether the plaintiff (a union) is not entitled to automatic recognition under the Constitution and Trade Union Act to unionize its members in the 1st defendant (a University). The court found that the plaintiff is a registered trade union and is

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[170] Attorney-General of Enugu State v National Association of Government General Medical and Dental Practitioners (NAGGMDP) and Another (n168)

[171] Attorney-General of Enugu State v National Association of Government General Medical and Dental Practitioners (NAGGMDP) and Another, (n168) See also Aero Contractors Co. of Nigeria Limited v National Association of Aircrafts Pilots and Engineers (NAAPE) and others. Unreported Suit No: NICN/LA/120/2013, judgment delivered by Justice B.B.Kanyip on 4th February 2014, http://judgment.nicn.gov.ng/ accessed 8th April 2014

[172] Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa-Ibom State University and Another.Unreported suit No:NICN/CA/58/2013, Judgment delivered by Justice O.A.Obaseki-Osaghae on 1st April 2014, http://judgment.nicn.gov.ng/ accessed 7th April 2015

listed as No. 27 with its jurisdictional scope defined in the Third Schedule, Part B of the Trade Union Act. The NICN relying on sections 5(7) and 25(1) of the Trade Union Act (which provide for automatic recognition) held that since the plaintiff is a registered trade union, it is entitled to automatic recognition by the combined effect of those two provisions.[173]

It is important to note that section 5(7) and 25(1) of the Trade Union Act which the NICN relied on was sufficient reason for the decision. But as is the practice, it went further to reinforce those provisions by also citing ILO Conventions 87 and 98 thus:

> By virtue of the provisions of Section 254 C(2) of the 1999 Constitution as amended, this court is empowered to apply International Conventions Nigeria has ratified relating to labour… The combined effect of Section 40, 1999 Constitution, Article 10 ACHR, ILO Conventions No. 87 and No. 98 and Section 25(1) of the Trade Union Act is that the non-academic staff of the 1st defendant have an unfettered …right recognised and guaranteed locally and internationally to form or belong to a trade union and participate in trade union activities without fear of intimidation.[174]

The reliance on ILO Conventions have been further strengthened by sections 254C (1) (f-h) and 254 C (2) of the Constitution (as amended) which empower the NICN to enforce labour treaties that have been ratified notwithstanding any provision of the Constitution which require domestication of treaties.

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[173] *Non-Academic Staff Union of Education and Associated Institutions (NASA) v Akwa Ibom State University and Another.(*172*)*

[174]*Non-Academic Staff Union of Education and Associated Institutions* (*NASU) v Akwa Ibom State University and Another*, Judgment by Justice O. A. Obaseki-Osaghae. See also: *Adebusola Adebayo Omole v Mainstreet Bank Microfinance Bank Ltd*, unreported Suit No: NICN/LA/341/2012, judgment delivered by Justice J. D. Peters on 3rd April 2014, http://judgment.nicn.gov.ng/ accessed 6th April, 2015; *Bola Muyiwa Omilabu v Topbrass Aviation Limited and Anor*, unreported Suit No: NICN/LA/528/2012, judgment delivered by Justice J. D. Peters on 22nd September 2014, http://judgment.nicn.gov.ng/ accessed 9th April, 2015. *Oyo State government v Alhaji Bashir Apapa and Others*, Unreported Suit No: NIC/36/2007, judgment delivered 15th July, 2008 by Justice B. B. Kanyip, http://judgment.nicn.gov.ng/ accessed 9th April 20i5; *Senior Staff Association of Nigerian universities v Federal Government of Nigeria*, unreported Suit No: NIC/8/2004, judgment delivered by Justice B. A. Adejumo on 8th May, 2007, http://judgment.nicn.gov.ng/ accessed 9th April, 2015.

4.11 The African (Banjul) Charter

There are indications which seem to suggest that the ILO and its standards may have influenced the idea and content of the African Charter. Firstly, the ILO has existed since 1919 and first projected the idea of rights in its Conventions beginning with Hours of Work (Industry) Convention (No.1) 1919. The African Charter was drawn up much later being adopted by the Organization of African Unity (OAU) now known as African Union (AU)[175] on 28th June 1981 and came into force in October 1986 and also projecting the idea of rights. While ILO Conventions and Recommendations are couched in the language of rights (though restricted to labour), the African Charter went beyond labour and social rights to include political, civil, economic and development rights in one document. Thus, the scope of rights provided in the African Charter is much wider than that in ILO standards.

Secondly, most African Member States in the ILO are also members of the African Union that ratified the African Charter. Out of the 53 African countries that have ratified the African Charter, 49 are also members of the ILO[176]suggesting that their link or relationship with the ILO may have led to the idea of drawing up a regional document on rights.

Thirdly, the idea and right to freedom of association had been recognized in ILO jurisprudence before the African Charter (which also provides for freedom of association) was drawn up.[177] The African Charter like the ILO also guarantees freedom of association.[178] While the concept of freedom of association in ILO conventions 87 and 98 is more detailed,

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[175] The African Union (AU) replaced the former Organization of African Unity (OAU) in May 2001 after the Constitutive Act (Organisation of the African Unity Constitutive Act of the African Union, July 2000) came into force and was launched in July 2002 in Durban, South Africa. The main difference between the OAU and the AU is that while the OAU was seen as a union of leaders of Africa, the AU is conceived as a union of Africa's peoples. This is demonstrated in the AU's Constitutive Act (Articles 17 and 22) which includes institutions for people's participation such as the Pan African Parliament and the Economic Social and Cultural Council (ECOSOCC) See Southern African Regional Poverty Network,"From OAU to AU and NEPAD: Regional Integration Processes in Africa and African Women", www.sarpn.org/documents /d0000608/ accessed 21st April 2015

[176]See African Commission on Human and Peoples Rights, "Ratification Table: African Charter on Human and Peoples' Rights"www.achpr.org/instruments/achpr/ratification accessed 10th April 2015, see also ILO, "Alphabetical list of ILO Member Countries" www.ilo.org/public/english/standards/relm/country accessed 10th April 2015

[177] In its preamble, the ILO Constitution of 1919 set forth the principle of freedom of association, see also, the Declaration of Philadelphia in 1944, the Freedom of Association and Protection of the Right to Organize Convention (No.87) 1948 and the Right to Organize and Collective Bargaining Convention (No. 98) 1949

[178] African (Banjul) Charter, Article 10

that in the African Charter is rather terse. Also while freedom of association in ILO conventions 87 and 98 cover "workers and employers" only, that in the African Charter covers "every individual" and is thus wider in its application.

Fourthly, in Article 22 of the ILO Constitution, member states are required to report annually on "the measures which it has taken to give effect to the provisions of conventions to which it is a party."[179] Similarly, Article 1 of the African Charter enjoins member states to "recognize the rights, duties and freedoms enshrined in this chapter and shall undertake to adopt legislative or other measures to give effect to them."[180] This also suggests a possible influence of the ILO on the African Charter. It is important to note that Nigeria has enacted the African Charter as the African Charter (Ratification and Enforcement) Act.[181]

Fifthly, Article 22 of the ILO Constitution further requires member states to make annual reports to the ILO on measures which it has taken to give effect to the conventions which it has ratified; similarly African member countries which have ratified the African Charter are also required in Article 62 to submit every two years a report to the African Commission on the measures taken to give effect to the rights guaranteed in the African Charter. The difference between the ILO and the African Charter in this regard is that while reporting in the former is annual, in the latter it is biennial.

A further possible influence of the ILO on the African Charter is demonstrated in the inclusion of some labour rights in it. For instance freedom of association is guaranteed.[182] Others include the right to work under equitable and satisfactory conditions and equal pay for equal work.[183] Regarding freedom of association, Article 10 (1) provides that "Every individual shall have the right to free association provided that he abides by the law". This provision can be understood to cover workers and trade unions because of the use of the phrase "every individual."

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[179] ILO Constitution, Article 22
[180] African (Banjul) Charter, Article 1
[181] African Charter (Ratification and Enforcement) Act
[182] African (Banjul) Charter on Human and Peoples' Rights, Article 10(1)
[183] African (Banjul) Charter on Human and Peoples' Rights, Article 15

It is important to note that the foregoing provision is terse when compared to ILO Conventions 87 and 98 on freedom of association. However, it is usually interpreted by NICN judges in the light of freedom of association contained in section 40 of the Constitution and ILO Conventions 87 and 98 so that freedom of association under the African Charter has no separate interpretation from the interpretation of it under the Constitution and ILO Conventions 87 and 98. Also, the NICN will usually cite the African Charter as an additional source of law on freedom of association with no separate interpretations.[184]
Thus, the NICN interprets freedom of association in the light of all Nigerian legislations and ILO Conventions (87 and 98) which gurantees freedom of association.

4.12 Conclusion

The main focus of the chapter is the ILO's conceptualisation of freedom of association and its influence on Nigeria law particularly: (i) Nigerian labour legislation, (ii) court reasoning and decisions and (iii) provisions of the African Charter. As a preliminary to the main discussion, Conventions 87 and 98 and the ILO's supervisory bodies' interpretations of both conventions were analysed, using Nigerian examples to illustrate the supervisory bodies' interpretations of conventions 87 and 98. Both conventions lay out the general principles of freedom of association in ILO jurisprudence. The ILO's concept of freedom of association comprises the provisions of both Conventions 87 and 98 together with the supervisory bodies' interpretation of them.

With respect to the ILO's influence on labour legislation in Nigeria, this is manifested in some provisions of the Constitution, Trade Unions Act, Labour Act and the Wages Board and Industrial Councils Act. However the analysis revealed that only bits and some articles and not the whole of the conventions were enacted. The ILO's influence also helped to repeal some military decrees which violated workers' freedom of association in the 1990s.

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[184] *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa-Ibom State University and Another*.Unreported suit No:NICN/CA/58/2013, Judgment delivered by Justice O.A.Obaseki-Osaghae on 1st April 2014, judgment.nicn.gov.ng/ accessed 7th April 2015. In this case the NICN (in relation to freedom of association) cited section 40 of the Constitution , Article 10 of the African Charter on Human and Peoples' Right, ILO Conventions 87 and 98 and section 25 (1) of the Trade Union Act

The influence of the ILO on the interpretation, reasoning and decisions of the court (NICN) is demonstrated in *Attorney-General of Enugu State v National Association of Government General Medical and Dental Practitioners (NAGGMDP) and Another*[185] and *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa Ibom State University andAnother.*[186]

It is observed that the NICN will rely on ILO jurisprudence to interpret cases before it in two situations: (a) Where there is no domestic legislation upon which the court can rely on for the judgment (b) To guide the court in the interpretation of domestic legislation that is too terse (c) to further confirm domestic legislation already cited as the usual practice.

Regarding the African Charter, there are indications which seem to suggest ILO influence on the idea of the African Charter: the ILO had been established before the African Charter came into force. Most African Members of the ILO are also members of the OAU (now African Union). Freedom of association had been guaranteed as a labour right before the African Charter. States are required to give effect to ratified labour conventions in ILO jurisprudence and same procedure has been adopted by the African Charter.

Thus, the ILO's interpretation of the principles of freedom of association is very important because of the way it has influenced and continues to influence labour legislation and reasoning of domestic court (NICN) in Nigeria.

The influence of the ILO has reinforced the notion that freedom of association is a human right. And this is reflected in the contents of Conventions 87 and 98 (which express freedom of association as a right of workers and employers) and ILO Declaration on Fundamental Principles and Rights at Work, 1998 (which also expresses freedom of association as one of the fundamental principles to be romoted in the work place.). It is important to note that even though freedom is guaranteed as a fundamental human right both in the Constitution and other legislations, the court (NICN) seem to afford its protection on formal workers.I have

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[185] *Attorney-General of Enugu State v National Association of Government General Medical and Dental Practitioners (NAGGMDP) and Another (168)*

[186] *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa-Ibom State University and Another*. (170)

argued that rights of informal workers can enforced through ILO Conventions 87 and 98, and the African Charter which made no distinction among workers entitled to its protection,

Chapter 5

Freedom of Association and the Role of the Courts: The National Industrial Court of Nigeria in Focus

5.0. Introduction

In Nigeria, the National Industrial Court of Nigeria (NICN) has exclusive jurisdiction to hear labour matters. However, there is currently a Bill before the National Assembly - Constitution of the Federal Republic of Nigeria 1999 (Fifth Alteration Bill[1] - which seeks to remove the exclusive jurisdiction of the NICN on labour matters, instead conferring concurrent jurisdiction upon the NICN and other High courts (State High Courts and Federal High courts).[2]

The possibility of the removal of the exclusive jurisdiction of the NICN raises the question of the importance of an independent system of tribunals and/or courts to the effective and fair resolution of labour disputes and to the upholding of workers' rights. This is a question that has been addressed by scholars and policy-makers alike in various jurisdictions at various points in time.[3] In the 1980s, for example, Lord Wedderburn argued that specialised labour courts were a vital element of the "autonomy of labour law" in the UK and elsewhere – autonomy being carefully chosen by him in this context as a "more forceful, more revealing word" to express his idea of "freeing" labour law from the rules and methods of civil law which prejudice workers.[4]

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[1] Constitution of the Federal Republic of Nigeria 1999 (Fifth Alteration) Bill <http://www.nials-nigeria.org/journals/APPENDIX%20B.pdf> accessed 22nd July 2015 See also Bimbo Atilola, Mayowa Adetunji and Michael Dugeri 'Powers and Jurisdiction of the NICN under the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010: A Case for its Retention", (2012) 6 (3) Nigerian Journal of Labour Law and Industrial Relations 1.

[2] See the proposed section 254 C (1A) of the Constitution of the Federal Republic of Nigeria 1999 (Fifth Alteration) Bill 2012

[3] K. W. Wedderburn, 'Labour Law: From Here to Autonomy?' *Industrial law Journal* (1987) 16 (1)1, W. E. J. McCarthy, The Case for Labour Courts' Industrial Relations Journal (1990) 21 (2) 98, Bob Hepple, 'Labour Courts: Some Comparative Perspectives' in Roger Rideout and Jeffrey Jowell (eds.), Current Legal Problems (1988) Vol. 41 (Stevens and Sons 1988) 169

[4] Wedderburn "Labour Law: From Here to Autonomy?"(n3) 1, 2

For reasons developed in the course of the chapter, it is argued here that the removal of the exclusive jurisdiction of the NICN would be retrogressive, and that it must be hoped that the Bill will not be signed into law. To sign it into law would be like taking two steps backward after taking one step forward. It is much better for the NICN to be retained as a specialised labour court with exclusive jurisdiction than exercising concurrent jurisdiction with the State High Court and the Federal High Court. Of course "separate labour courts" can add little or nothing to the "autonomy of labour law" and its implementation unless they themselves operate effectively.[5] With this fact in mind, the Chapter also seeks to identify a number of principles which are significant for the effective functioning of labour courts.

The Chapter is divided into several parts. Part I examines the question: Labour courts or ordinary courts? In Part II, a brief history of labour courts and the NICN will be explored. Part III analyses three principles which are necessary for the effectiveness of a labour court using the NICN to illustrate the argument. And Part IV attempts to answer another question: are there now two final Courts in Nigeria: the Supreme Court and the NICN? By "final court" can be understood one whose judgments are not subject to appeal. Throughout, reference is made in places to the UK and to British labour law literature. This is appropriate because Nigeria operates a common law system like the UK, and more importantly as a former British Colony, common law was introduced in 1863 first in the Colony of Lagos and the rest of the country by 1900. After independence, the common law was retained by Nigerian statutes.[6]

5.1. Labour Courts or Ordinary Courts?

An attempt to answer this question has produced arguments in scholarship advocating the establishment of specialised labour courts.[7]

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[5] Wedderburn "Labour Law: From Here to Autonomy?"(n3) 1, 27

[6] Interpretation Act Cap 192, Laws of the Federation of Nigeria, 1990, section 32 (1)-(3). See also A. E. W. Park, *The Sources of Nigerian Law*, (African Universities Press Limited 1963) 16-18, A. N. Allot, 'The Common Law of Nigeria' in *Nigerian Law: Some Recent Developments* (British Institute of International and Comparative Law 1965) Pages 32-33.

[7] Wedderburn, 'Labour Law: from Here to Autonomy?'(n3) 1, McCarthy (n3) 98; Hepple (n3) 169; Atilola, Adetunji and Dugeri, (n1) 17-37, see also Wedderburn, 'The Social Charter in Britain-Labour Law and Labour Courts?' (1991) 54 (1) Modern Law Review 1, John Donaldson, The Role of Labour Courts' (1975) 4 Industrial Law Journal 63, K. D. Ewing, 'The Right to Strike' (1986) 15 Industrial Law Journal, 143, 157-160, Manfred

Otto Kahn-Freund once famously observed that 'the main object of labour law has always been… to be a countervailing force to counteract the inequality of bargaining power which is inherent… in the employment relationship'.[8] He also stated that 'the principal purpose of labour law, then, is to regulate, to support, and to restrain the power of management and the power of organised labour'.[9] Kahn-Freund had, of course, an 'almost passionate belief in the autonomy of industrial forces'[10] which he called 'collective laissez-faire.'[11] The main characteristics of collective laissez-faire were 'aversion to legislative intervention, its disinclination to rely on legal sanctions…'[12]

Though Kahn-Freund did not follow up his observations (on the purpose of labour law being to regulate the power of management and labour) with any detailed argument for specialised labour courts, it will appear that his scholarship formed part of the groundwork for the argument for the autonomy of labour law and labour courts. In particular, Lord Wedderburn relied heavily on the idea of collective laissez-faire when he developed his arguments in favour of specialist labour courts.[13]

As was mentioned above, the word "autonomy" was carefully chosen by Wedderburn as a "more forceful, more revealing word" to express his idea of "freeing" labour law from the rules and methods of civil law which prejudice workers.[14] Lord Wedderburn identified the rationale for this approach as being that labour law should work to counteract the inequality in the employment relationship.[15] He argued that common law approaches to the employment relationship based on the 'contract of law' are conceptually inappropriate,[16] and further that the common law functioned to preserve what he described as the subordination inherent

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Weiss,'Labour Dispute Settlement by Labour Court in Germany' (1994) 15 (Pt. 1) Industrial Law Journal, 1 at 3-4 Babatunde Adejumo,'The National Industrial Court of Nigeria: Past, Present and Future", <http://nicn.gov.ng/> accessed 24th February 2014

[8] Otto Kahn-Freund, *Labour and the Law*, (Stevens and Sons London 1972) 1, 8

[9] Kahn-Freund, *Labour and the Law*, (n8) 1, 5

[10] Otto Kahn-Freund,'Labour Law' in Morris Ginsberg (ed.) *Law and Opinion in England in the 20th Century* (Stevens and Sons Limited 1959) 224

[11] Kahn-Freund, 'Labour Law', (n10) 224, 224

[12] Kahn-Freund, 'Labour Law', (n10 224, 224

[13] Wedderburn, 'Labour Law: From Here to Autonomy?'(n3) 5, see also.Wedderburn, 'The Social Charter in Britain-Labour Law and Labour Courts? (n7), 6-7, 10-14, Justice Michael Moore, 'The Role of Specialist Courts- an Australian perspective'(2000-2001) LAWASIA Journal 144

[14] Wedderburn "Labour Law: From Here to Autonomy? (n3) 1 , 2

[15] Wedderburn, 'Labour Law: From Here to Autonomy?' (n3) 4

[16] Wedderburn, 'Labour Law: From Here to Autonomy?' (n3) 5, see also Moore (n13) 144

within the employment relationship.[17] Lord Wedderburn advocated the creation of judicial institutions which develop their jurisprudence on some basis other than the common law.[18] And he further emphasised that '…if labour law is to escape from the clutches of common law thinking and procedures, the compass seems to point in a direction… towards labour courts'.[19]

Thus, the argument for specialist labour courts is hinged on the idea of the autonomy of labour law. The need for the autonomy of labour law, in turn, can be explained as follows. Firstly, the concepts, rules and methods of the common law restrict labour law and thus prejudice workers. For example, under the common law, contract of employment is a free choice to enter an employment relationship, so that any threat to strike can be regarded as a breach of the contract, the only way to terminate the contract is to give notice to quit and resign from the employment. The employer does not normally sue his striking employees for damages but he may dismiss the worker for the breach,[20] thus 'shrouding a relationship of subordination'.[21]

The common law is also unable to deal with the so-called 'a-typical' or 'marginal' relationships between workers and those for whom they produce value: the part-time worker, casual, temporary, home worker, the trainee, or the police cadet who unless special laws are passed are left unprotected because they are in the eyes of the judges as reflected in the common law glass *sui generis*, 'in a class by themselves", unable to satisfy the test of a contract either for service or for services.[22]

Added to the concepts and rules of the common law is the 'refusal or inability (or both) of the judges of the ordinary courts (which follow the common law) to bow the knee of the common law to a balance of power that offends its philosophy'.[23] In other words the common law

[17] Wedderburn, 'Labour Law: From Here to Autonomy?' (n3) page 9, see also Moore (n14) 144
[18] Wedderburn, 'Labour Law: From Here to Autonomy?' (n3) 22-23, see also Moore (n14) 144-145.
[19] Wedderburn, 'Labour Law: From Here to Autonomy?' (n3) 1, 26
[20] Lord Wedderburn,'Freedom of Association and Philosophies of Labour Law' (1989) 18 Industrial Law Journal 5
[21] Lord Wedderburn, 'Labour Law: From Here to Autonomy?' (n3)1, 5
[22] Lord Wedderburn, 'Labour Law: From Here to Autonomy?' (n3) 6
[23] Wedderburn, 'Labour Law: From Here to Autonomy?'(n3) 1, 16

tradition also governs the judges' interpretation of parliament's employment protection laws.[24]

In Nigeria, it is evident that the common law has also created hardship for employees. For example at common law an employee's misconduct may justify summary dismissal. But the problem is that there is no fixed definition of the term "misconduct". In *Oyedele v Ife University Teaching Hospital Management Board,*[25] the Court of Appeal observed that "under our law there is no definition of what is misconduct anywhere, misconduct is what the employer considers to be a misconduct…".[26] The implication of this foregoing statement is that it gave the ordinary courts (which are the final arbiters) the latitude to decide whether a particular misconduct is sufficient to justify a dismissal. In *British-American Insurance Company (Nig) Ltd v Omolaya*[27] while the Court of Appeal held that absence from work was gross misconduct which entitled the employer to dismiss summarily, the Supreme Court in *Nwobosi v ACB Ltd*[28] held that an employee who had granted loans and overdrafts in disregard of express instructions committed misconduct which justified summary dismissal. The Supreme Court further held that a clause of the contract of employment which provided that that staff may be dismissed for certain offences, including certain listed ones, was not exhaustive and did not preclude the application of the general common law. By this, the categories of offences for which an employee is dismissed are not fully known leading to job insecurity.

Apart from the unsuitability of the common law and its procedures to labour related issues, three other reasons speak in favour of the exclusive jurisdiction of the NICN. In the first place, the State High Courts (ordinary courts) delay in the determination of labour matters and this is a great concern to many. For example, in the case of *Isaac Obiuweubi v Central Bank of Nigeria*[29] (which has to do with termination of employment), it took the State High Court (ordinary court) twenty-three years to decide which court, as between the State High

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[24] Wedderburn, 'The Social Charter in Britain-Labour Law and Labour Courts?' (n7) 1,13
[25] *Oyedele v Ife University Teaching Hospital Management Board* [1990] 6 NWLR 194 see also Egerton E. Uvieghara *Labour Law in Nigeria* (Malthouse Press Limited, Lagos 2001) 65-66
[26] *Oyedele* (n25) 194,199
[27] *British-American Insurance Company(Nig) Ltd v Omolaya* [1991]2NWLR 721
[28] *Nwobosi v ACB Ltd* [1995] 6NWLR 658 see also Uvieghara (n26) 66-67
[29] *Isaac Obiuweubi v Central Bank of Nigeria* (2011) 7 NWLR (Pt. 1247) 465 SC. Also in easylawonline.files.wordpress.com/2011/03/Isaac Suit No: SC.266/2006, judgment delivered by Bode Rhodes Vivour JSC on 11th March 2011, accessed 4th June, 2014.

Court and the Federal High Court, had jurisdiction. Also in *Amadi v NNPC*[30] (a case of wrongful dismissal from employment), it took thirteen years to resolve the issue of which court had jurisdiction to hear the matter. It is important to say that most matters at the NICN are now determined speedily.

Secondly, prior to when the NICN was conferred with exclusive jurisdiction on labour matters, both the State High Courts and Federal High Courts heard labour matters because they were not precluded from doing so under the Constitution.[31] This led to 'forum shopping' by litigants resulting in conflicting judgments and this also created hardship and expense for workers. Thirdly, the jurisdiction of the NICN is important for the reason it is much more effective tool to enforce workers' right in these times that globalisation is making it difficult for workers to unionise.

5.2. *The ILO and Labour Courts*

The only international standards for the settlement of labour disputes existing at present[32] are those contained in ILO Recommendation 130 of 1967.[33] Without detailing or prescribing the nature and operation of dispute settlement machinery, the Recommendation mainly echoes the philosophy that all attempts must be made to settle disputes at the level of the particular undertaking.[34] It further provides that provision should be made for the final settlement of a dispute either by conciliation, arbitration, adjudication or 'any other procedure which may be appropriate under national conditions',[35] where all efforts to settle the dispute within the undertaking have failed.[36] In a nutshell, Recommendation 130 goes on to state that as far as possible grievances should be settled within the undertaking itself, in accordance with procedures which are effective and are adapted to the conditions of the particular country and undertaking concerned, and which gives every assurance of objectivity.[37] Where efforts to

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[30] *Amadi v NNPC* (2000) 5 WRN 47 SC

[31] Constitution 1999, sections 272 (1) and 251 (1) for the jurisdictions of the State High Courts and Federal High Courts respectively.

[32] B. Jordaan and D. Davis, 'The Status and Organisation of Industrial Courts: A Comparative Study' (1987) 8 Industrial Law Journal Juta 199.

[33] Recommendation Concerning the Examination of Grievances within the Undertaking with a view to their Settlement.

[34] Jordaan and Davis, (n32) 199-200

[35] Recommendation 130 of 1967 para.17(d)

[36] An important proviso is added however, viz that '[the] right of a worker to apply to a labour court or other judicial authority' must not be limited. See para. 9 and 17(c) of Recommendation 130 of 1967

[37] Jean-Michael Servais, 'ILO Law and the Right to Strike' (2009-2010) 15 Canadian Labour and Employment Law Journal 162

settle a grievance within the undertaking have failed, there should be provision for final settlement through other resolution mechanism which includes labour courts.

The implication of Recommendation 130 is that the ILO recognises the various mechanisms (including labour courts) for the resolution of trade disputes but leaves the question of which particular mechanisms to use to the discretion of member states. It is important to note that all the mechanisms (including labour courts) are recognised under Nigerian labour law.

5.3. The Origins of Labour Courts and the Establishment of the NICN

The common view is that specialised labour courts owe their origin to the *Conseil de prud' Ommes* set up at Lyons, France in 1806.[38] The idea behind this court was simply to have certain labour disputes settled promptly and without expense by a council composed of representatives of employers and workers.[39]

British Industrial Tribunals, re-named Employment Tribunals by the Employment Rights (Dispute Resolution) Act in 1998, were created in 1964 under the Industrial Training Act,[40] to provide a forum for resolving disputes between employers and employees; namely, at that time, disputes concerning the payment of an industrial training levy.[41] Under the Industrial Relations Act,[42] the jurisdiction of the tribunals broadened to include unfair dismissal claims and since then they have been empowered to hear claims on all aspects of employment legislation.[43]

The NICN was established in 1976 (i.e. 16 years after Nigerian's independence) but became functional in 1978 pursuant to the Trade Disputes Decree (now Trade Disputes Act 1976.) Delay in its establishment may perhaps be attributed to the civil war of 1967- 1970 and the

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[38]Martian Vranken and Kevin Hince, 'The Labour Court and Private Sector Industrial Relations' Victoria University of Wellington Law Review 18 (1988) 122, Thilo Ramm, 'The Structure and Function of Labour Courts' in Dispute Settlement Procedures in Five Western European Countries (Institute of Industrial Relations University, University of California, Los Angeles 1969) 13-15.
[39] Vranken and Hince, (n38) 122
[40]Industrial Training Act 1964, section 12.
[41]Jane Johnson and Geraldine Hammersley 'Access to Justice: Employment Tribunal Contingency Fees, what chance of Justice' (2005) 14 Nottingham Law Journal 19.
[42]Industrial Relations Act, 1971
[43] Johnson and Hammersley (n42) 19

following reconstruction and rehabilitation works in the country. At inception, the Court suffered from a number of short comings.

Firstly, the court was not included in both the 1979 and 1999 Constitutions as a Superior Court of Record. Even though subsequently section 19 (2) of the Trade Dispute Act (now repealed) which was inserted by Decree 47 of 1992 provided that the NICN shall be a Superior Court of Record, lawyers disregarded these provisions perceiving them to be contrary to the Constitution and therefore asked the Federal High Court to judicially review decisions reached by the NICN in a number of cases.[44]

Secondly, other problems of the NICN could be traced to its enabling law then the Trade Disputes Act which impacted adversely on the workings of the court. Section 14 (1) provided that 'a trade dispute shall be commenced by reference from the Minister of Labour and Productivity to the NICN'[45] . The effect of this was that litigants could not on their own (except when activating the interpretative jurisdiction of the NICN), initiate a matter unless the Minister of Labour referred it to the NICN.[46] The referral and other discretionary powers of the Minister of Labour called to question the constitutional principle of the separation of power.[47] Also the referral requirement precluded the NICN from directly assuming jurisdiction over cases transferred from other courts to it.[48]

Section 19(4) (now repealed) required the President of the NICN to preside over all the sittings of the court. The effect of this was that if for any reason the President was unable to sit, cases had to be adjourned.[49] The full import of this anomaly was brought to the fore in

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[44] One of such cases is: *SGS Inspection Services (Nigeria) Limited v Petroleum and National Gas Senior Staff Association of Nigeria (PENGASSAN)*, unreported suit No: NIC/3/2000 judgment delivered on 25th July 2001 by Justice Borisade <http://nicn.gov.ng/accessed> accessed 10th June, 2014.
See also Adejumo 'The National Industrial Court of Nigeria: Past, Present and Future' (n7)

[45] Trade Dispute Act, section 14 (1)

[46] Adejumo, "The National Industrial Court of Nigeria: Past, Present and Future" (n7), see also, Benedict Bakwaph Kanyip 'The National Industrial Court: Journey So Far' <http://nicn.gov.ng/> accessed 10th June, 2014.

[47] Adejumo "The National Industrial Court of Nigeria:Past, Present and Future" (n7), see also Kanyip "The National Industrial Court: The Journey So Far" (n46)

[48] Adejumo "The National Industrial Court of Nigeria: Past, Present and Future" (n7), see also, Kanyip "The National Industrial Court: The Journey So Far" (n46). For example the NICN had to decline original jurisdiction in the case of *Incorporated Trustees of Independent Petroleum Association v Alhaji Ali Abdulrahman Himma and 2 Others*, unreported Suit No: FHC/ABJ/CS/313/2004, ruling on it was delivered on January 23rd 2004 by NICN.

[49] Adejumo, "The National Industrial Court of Nigeria:Past, Present and Future"(n7)

2002 when the court lost its president. For almost a year the court could not sit as a successor was not appointed.[50]

There was also the problem of dual procedures for the appointment of the president and other judges of the court. By virtue of sections 19 and 25, of the Trade Dispute Act 1990 while the president of Nigeria appoints the President of the court on the recommendation of the Federal Judicial Service Commission, the other judges were appointed by the President of Nigeria on the recommendation of the Minister of Labour. The effect of this was the seeming dual control over the court by both the Labour Ministry and the National Judicial Council even when the 1999 Constitution vests control on the latter.[51]

There was continuing doubt as to the scope of jurisdiction of the NICN. The Court of Appeal had held that for the NICN to have jurisdiction on inter and intra union disputes, the disputes must qualify as trade dispute.[52] The absence of clarity of the jurisdiction of the NICN made other courts (High and Federal High Courts) to share concurrent jurisdiction with the NICN in labour disputes. And this encouraged forum shopping by litigants.[53]

The foregoing was the picture of the NICN before the innovations introduced by the National Industrial Court Act.

5.3.1.. *National Industrial Court Act 2006: Innovations*

The National Industrial Court Act came into force on 14th June 2006. The hallmark of the NICN Act is that it took the NICN out of the Trade Dispute Act and gave it a separate enabling law of its own. In this respect, it resolved some of the short comings identified earlier with the NICN under the Trade Disputes Act dispensation.[54] For instance the appointment of the president and other judges of the NICN were normalised and put under the authority of the National Judicial Council.[55] Other innovations include: a single judge can

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[50] Adejumo, "The National Industrial Court of Nigeria: Past, Present and Future" (n7)
[51] Adejumo "The National Industrial Court of Nigeria: Past Present and Future"(n7), see also Kanyip "The National Industrial Court: The Journey So Far" (n46) Constitution 1999, sections 231 (1), 238 (1), 250 (1), 256 (1), 261 (1), 266 (2) and 271 (1).
[52] *Kalango v Dokubo (2003)* 15 NWLR 32
[53] kanyip, "The National Industrial Court: The Journey So Far" (n46)
[54] kanyip, "The National Industrial Court: The Journey So Far" (n46)
[55] Adejumo "The National Industrial Court of Nigeria: Past, Present and Future" (n7). See also the National Industrial Court Act 2006, section 3(2)

now competently sit over some matters pending;[56] a plethora of cases[57] which held that the NICN cannot grant injunctive and declaratory orders is no longer good law;[58] part II of the Trade Dispute Act was repealed and the remaining provisions of the Trade Dispute Act must now be read with such modifications as to bring them into conformity with the National Industrial Ccort Act and where the provisions of the Trade Dispute Act are in conflict with those of the National Industrial Court Act, the latter shall prevail,[59] and exclusive jurisdiction in civil causes and matters relating to labour was conferred on the NICN.[60] It is important to note that in spite of the innovations introduced the National Industrial Court Act posed fresh challenges most of which have been addressed by the amendment of the constitution in 2010 through the Constitution (Third Alteration) Act 2010.

5.4. Principles Important for the Effectiveness of a Labour Court

In 1968, De Givry[61] (a former officer in the Social Institutions Development Department of the International Labour Office) identified a number of principles 'which appear to be of particular significance for the proper functioning of labour courts'.[62] De Givry's principles were based on the conclusions contained in the Resolutions which the Fourth Conference of America States Members of the ILO adopted on the subject in 1949,[63] and were expressed to be his views not committing the International Labour Office in any way.[64] The first was that:

Labour courts should be established on a permanent basis and should be completely independent of executive authorities.[65]

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[56] National Industrial Court Act section 21 (4) and (5)
[57] For example *Kalango v Dokubo* (n52) 32
[58] National Industrial Court Act sections 16-19. See also Kanyip, "The National Industrial Court: The Journey So Far" (n46).
[59] National Industrial Court Act sections 53 and 54 (4)
[60] National Industrial Court Act section 7 (1)
[61] J. De Givry, 'Labour Courts As Channels for the Settlement of Labour Disputes: An International Review (1968 November) Vol. 6 (3) British Journal of Industrial Relations 364-375, see also Jordaan and Davis (n32) 219, Dullah Omar, and Others (speeches) 'Labour Court Inauguration' (1998) 19 Industrial Law Journal Juta 984.
[62] De Givry (n61) 371
[63] See International Labour Office, Report on Labour Courts in Latin America (Fourth Conference of American States Members of the International Labour Organisation 1949)76-89, <www.ilo.org/public/libdoc/ilo/ILO-SR/ILO-SR_NS13_engli> accessed 23rd July 2014
[64] De Givry (n61) 364
[65] De Givry (n61) 372

This means that the independence of a labour court should be fully guaranteed in its statutes and its operations and decisions should demonstrate that independence.[66] The independence may not necessarily be only in the statute that created the court but may also be implied from the Constitution if judicial independence has been guaranteed therein. In Nigeria, the independence of the judiciary is provided for in sections 6(1), 36 (1), and 39(3) (a), and this can also be read into all statutes[67] connected with the NICN.

Labour judges should be selected from persons who have special experience and knowledge of labour questions.[68]

The selection of persons who are lawyers and also have special experience and knowledge of labour questions is ideal. But what happens where there are not sufficient labour lawyers (that is those who have special experience and knowledge of labour questions) for all the courts? In such a situation, it is suggested that lawyers without special knowledge of labour questions can be selected either from the bar or academia and further trained in labour related courses. This is to prevent a vacuum in the courts that may result from a lack of labour lawyers.

In Nigeria, although section 254B (4) of the Constitution (as amended by the Constitution Third Alteration Act has stipulated a judge to be appointed to be a legal practitioner with "considerable knowledge and experience in the law and practice of industrial relations and employment conditions,"[69] in practice it is rarely followed as non labour lawyers have been appointed as judges. For example none of the 12 new judges appointed at the NICN in May 2013 are specialised in labour matters (as at the date of appointment) though they are lawyers of not less than 10 years at the bar.[70] As said earlier, this is to prevent a vacuum being caused by a lack of labour lawyers.

Labour courts should have exclusive jurisdiction over the interpretation and application of individual contracts of employment, collective agreements and social legislation, but must not be siesed with collective disputes before agreed procedures have been exhausted;[71]

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[66] De Givry (n61) 371
[67] That is the Trade Dispute Act, National Industrial Court Act, Constitution (Third Alteration) Act
[68] De Givry (n61) 372
[69] See also National Industrial Court Act section 2
[70] National Industrial Court of Nigeria,"Judicial Cadre" <http://nicn.gov.ng/cadre.php> accessed 23rd July 2014
[71] De Givry (n61) 373

"Exclusive jurisdiction" means jurisdiction should not be shared with other courts. And this can be further strengthened by not allowing appeals from the judgments of labour courts. Wedderburn has suggested that "…decisions of the specialist labour courts should not end up in the hands of the common law Court of Appeal or Judicial Committee of the House of Lords"[72] And this should be so even on questions of law since this "would hardly change the status quo and put little or no brake on their power"[73] to wield the common law.

With respect to a labour court having jurisdiction over individual and collective employment disputes, Wedderburn has also suggested that if "the case for labour courts has merit as an answer to the problem of the common law courts, it plainly suggest that their jurisdiction should include both individual and collective employment disputes"[74] The jurisdiction of the NICN covers both individual and collective disputes.[75]

Labour courts should seek the settlement of labour disputes of a legal character by agreement or conciliation of the parties before judicial awards or decisions are rendered;[76]

Wedderburn in this regard has also noted that the "…labour court would have as one of its major tasks…protection and promotion of autonomous collective bargaining …maintenance of close relations with conciliation…"

It is important to note that where the parties are not able to resolve their disputes through other mechanisms such as collective bargaining arbitration or conciliation it has to be determined by the labour court.

The formalities and procedures of labour court should be simplified and all possible measures should be taken to expedite the procedure as far as possible;[77]

Simplified procedure will ensure that the "rules of the common procedure should not apply to labour courts".[78]

The services of the labour court should be available to the parties free of charge;[79]

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[72] Wedderburn, 'The Social Charter in Britain-Labour Courts?' (n7) 1, 33
[73] Wedderburn, 'The Social Charter in Britain-Labour Courts?' (n7) 1,33
[74] Wedderburn, 'The Social Charter in Britain-Labour Courts?' (n7)1, 27
[75] Constitution 1999 as amended section254C(1)
[76] De Givry (n61) 373
[77] De Givry (n61) 373
[78] De Givry (n61) 373

It has been suggested that special legal aid services in labour courts should also be set up and their assistance should be made available without charge to the parties concerned.[80] In Nigeria, while the services rendered by the NICN (being a government institution) is free, parties to any action are obliged to pay prescribed fees (in the rules of court)[81] for filing of court processes and also legal fees where lawyers represent them. That is, the cost of litigation is borne by the parties themselves. And this discourages casual workers from going to court individually. If they can raise a claim collectively, the cost of litigation is reduced as it is borne collectively.

Workers should enjoy adequate legal protection against any act of discrimination in respect of their employment likely to prevent them from having recourse to the labour courts, from giving evidence as witnesses or experts or, in relevant cases, from acting as members of labour courts.[82]

5.5. The Effectiveness of the NICN

Since 2006, improvements have been made to the NICN in line with the following principles: exclusive jurisdiction, appointment of professional judges with knowledge of labour matters and simplified court procedure.[83]

5.5.1 *Exclusive Jurisdiction*

Jurisdiction is said to be exclusive when a court is vested with the powers to hear matters related to specific areas of the law, to the exclusion of all other courts. This principle was first introduced in 2006 by the National Industrial Court Act[84] and extended in 2010 by the Constitution.[85] Prior to the enactment of the National Industrial Court Act, there was continuing doubt regarding the scope of the jurisdiction of the NICN and this resulted in

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[79] De Givry (n61) 373
[80] De Givry (n61) 373
[81] National Industrial Court Rules, 2007, Order 31
[82] De Givry (n61) 373
[83] The introduction of these principles first started with the enactment of the National Industrial Court Act and further enlarged in 2010 by the Constitution 1999 (as amended by the Constitution (Third Alteration) Act 2010) section 254C(1)
[84] National Industrial Court Act,section 7
[85] Constitution 1999 as amended section 254 C (1), (2) and (5)

other coordinated courts (High Courts and Federal high Courts) becoming involved in the resolution of labour disputes. And this encouraged forum shopping.[86]

Regarding exclusive jurisdiction, what then are the differences between the National Industrial Court Act and the Constitution (Third Alteration) Act? It will appear that while the 2010 Act covers more labour matters (including ratified Conventions, interpretation and application of International Labour Standards), the 2006 Act is restricted to matters in national labour legislations. Also while the 2010 Act covers both civil and criminal matters (that is criminal causes arising from labour matters), the 2006 Act is restricted to only civil causes.

One positive effect of the introduction of this principle is that it eliminated forum shopping and facilitated the quick conclusion of large numbers of cases.[87] It is helpful to compare the number of cases decided before and after the principle was introduced.

The NICN was established in 1976 but became functional in 1978. Data for decided cases is available from that date, excluding 1998, 1999 and 2000 when there was no available data. As is shown in Table 5.1 below, while only 123 cases were decided between 1978 and 2005 (in 25 years:[88] an average of 4.92 cases per year,[89]) 280 cases were decided between 2006 (when the principle was introduced) and 2014 (in 9 years: an average of 31.11 cases per year.[90]) The total number of cases decided from 1978 to 2014 (excluding the missing years) is 403. Of this total, 30.52 per cent[91] of these cases were considered from 1978 to 2005 (in 25 years) while 69.48 per cent[92] of the total cases were considered from 2006 to 2014 (in 9 years).

[86] Kanyip, "The National Industrial Court: The Journey So Far" (n46)
[87] See Table 5.1.
[88] This excludes the three years: 1998, 1999 and 2000.
[89] 4.92 cases per year = $\frac{123}{25}$.
[90] 31.11 cases per year = $\frac{280}{9}$.
[91] 30.52 per cent = $\frac{123}{403}$ x 100.
[92] 69.48 per cent = $\frac{280}{403}$ x 100.

Table 5.1: Number of Decided Cases in the National Industrial Court of Nigeria between 1978 and 2014

Year	No of decided cases
1978	5
1979	7
1980	1
1981	5
1982	7
1983	6
1984	6
1985	2
1986	6
1987	6
1988	10
1989	4
1990	14
1991	10
1992	5
1993	2
1994	1
1995	2
1996	3
1997	1
1998	-
1999	-
2000	-
2001	6
2002	3
2003	1
2004	6
2005	4
2006	6
2007	6
2008	9
2009	13
2010	14
2011	18
2012	36
2013	53
2014	125

Source: compiled by researcher using data from National Industrial Court of Nigeria (NICN) http://judgment.nicn.gov.ng/ (accessed 19th January, 2015). NB: Data for 1998, 1999 and 2000 are not available.

The rate of decided case has increased between these two periods by over six times per year from 2006 to 2014 over 1978 to 2005.[93] It can be argued that the reason for the large number as from 2006, is the introduction of exclusive jurisdiction, as litigants were then bound by law to resolve labour disputes only at the NICN.

One relevant question is: to what extent is the exclusive jurisdiction vested in the NICN? This will be discussed carefully in Part IV, and it suffices to say here that the only exemptions to the exclusive jurisdiction conferred on the NICN are: when a litigant wishes to appeal on questions of fundamental rights (contained in chapter IV of the Constitution) arising from labour matters,[94] and appeals on criminal causes arising from labour matters.[95]

5.5.2 Professional Judges

The principle of appointing professional judges was first introduced in the NICN in 2006 by the National Industrial Court Act and retained in the Constitution (Third Alteration) Act. Prior to this, under the Trade Dispute Act 1976, only the president of the court was required to be a professional judge with the knowledge of employment conditions in Nigeria.[96] Other members were ordinary persons who only had knowledge of employment conditions in Nigeria.[97] Also under the Trade Dispute Act, there was dual procedure for the appointment of the president and other ordinary members of the court. The Head of State of Nigeria appointed the president of the court on the recommendation of the Federal Judicial Service, while the other ordinary members were appointed by the Head of State of Nigeria on the recommendation of the Minister of Labour.[98] Given that Nigeria is a populous country and the number of labour cases can be expected to be high, it is a herculean task for a single professional judge to bring about the quality judgments that is needed to ensure the effectiveness of the NICN. Perhaps this is why both the NIC Act and the Constitution (Third Alteration) Act provided for the appointment of only professional judges drawn from legal practitioners who have been so qualified for a period not less than ten years and also have considerable knowledge and experience in the law and practice of industrial relations and

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[93] Six times is = $\frac{31.11}{4.92}$ = 6.27 approximately six times.
[94] Constitution 1999 as amended section 243 (2)
[95] Constitution 1999 as amended section 254 C (6)
[96] Trade Dispute Act section 25(2), see also Uvieghara 424
[97] Trade Dispute Act, section 19(2), see also Uvieghara 424
[98] Trade Dispute Act sections 19 and 25

employment conditions in Nigeria.[99] One positive effect of these amendments is that the number of professional judges in the NICN has increased (now twenty).[100] It is also important to note that unlike under the Trade Dispute Act where different bodies recommend the president and other members of the NICN, under both the National Industrial Court Act and the Constitution (Third Alteration) Act the procedure of appointment has been harmonized so that only the National Judicial Council makes recommendations. Also the judges of the NICN enjoy the same status with their counterparts in the Federal High Court and High Court of the Federal Capital Territory.[101]

As a direct consequence of appointing professional judges at the NICN, there seems to be a shift from common law principles (which 'scuttle' the implementation of labour law principles) to allowing the enforcement of labour law principles. The important case of *Folarin Oreka Maiya v The Incorporated Trustees of Clinton Health Access Initiative, Nigeria and Others,*[102] is illustrative. In that case, the Applicant's employment was terminated on the ground of pregnancy whereupon she raised an action to enforce her fundamental human right to human dignity and freedom from discrimination as guaranteed by sections 34 and 42 of the Constitution. One issue before the court was whether the provisions of the Constitution allegedly infringed are applicable to the contract of employment, and if so whether the Respondent had breached the laws. The Applicant's counsel argued that the constitutional provisions are applicable to the master/servant or employment relationship. The Respondent's counsel argued that the common law principle that he who hires can fire at will was applicable, and that the Respondent was not in breach of the constitutional provisions on fundamental human rights. The court held that:

> The Common Law of Contract under which the Respondents have acted is no doubt in force in Nigeria and in its practical application has affected the Applicant negatively by infringing her right of freedom from discrimination on account of sex… the provision (Section 42) is

[99] National Industrial Court Act, sections 2(1-4a) and Constitution 1999 as amended, section 254B .Although section2 (4b) of the National Industrial Court Act provides that a graduate with knowledge of labour law may be appointed. It is important to note that this provision was never followed in practice because of sections 21 (4-5) and 25 which require only judges drawn from legal practitioners to sit over cases.

[100]< http://nicn.gov.ng/cadre.php >accessed 23rd June 2014

[101] National Industrial Court Act, sections1-5, and 16-19

[102]*Folarin Oreka Maiya v The Incorporated Trustees of Clinton Health Access Initiative, Nigeria and Others* <http://judgment.nicn.org.ng/ > judgment delivered 21st December 2011 by Justice B. A. Adejumo, accessed 21st of June, 2014.

> applicable to the master/servant relationship. The law of contract must of necessity be read subject to the provisions of the 1999 Constitution… and in this particular instance sections 34 (1)(a) and 42 of the 1999 constitution. The Applicant is a woman and her pregnancy has been found to be the reason for her sack by the Respondents. Therefore she has been discriminated against by reason of her being a woman and therefore subjected to disability…[103]

Professional judges because of their training are in a better position to give judgments on labour disputes than lay persons. A lay person wouldn't have been able to reason as the judge did here, having not been a trained lawyer. It is important to note that this case was decided in 2011, that is, after the laws which required the appointment of only professional judges.[104]

5.5.3. *Flexible or Simplified Court Procedure*

Court procedure comes into play with the filing of processes to commence an action and continues to govern matters until the execution of judgement. The principle of flexible or simplified court procedure was first introduced in the NICN by the Trade Dispute Act[105] (the enabling law) and retained by both the National Industrial Court Act[106] and the National Industrial Court Rules.[107] According to the principle, the NICN is not bound to act in any formal manner and the court may direct the departure from the rules of procedure when that is required in the interest of justice.[108] In *Mix and Bake Flour Mill Industries Ltd v National Union of Food, Beverage and Tobacco Employees (NUFBTE)*[109] the NICN held that:

> The National Industrial Court is a specialized court and differs from the regular courts in a number of respects. It is not bound by rules of evidence or procedure, although it may be informed by them, neither

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[103] *Folarin Oreka Maiya* (n102)
[104] National Industrial Court Act, sections 2(1-4a) and Constitution 1999 as amended section 254B .Although section2 (4b) of the National Industrial Court Act provides that a graduate with knowledge of labour law may be appointed,. It is important to note that this provision was never followed in practice because of sections 21 (4-5) and 25 which require only judges drawn from legal practitioners to sit over cases.
[105] Trade Dispute Act, section 36(3)
[106] National Industrial Court Act sections 12 and 15
[107] National Industrial Court Rules ,Order 15
[108] Trade Dispute Act, section 36(3),
[109] *Mix and Bake Flour Mill Industries Ltd v National Union of Food, Beverage and Tobacco Employees (NUFBTE*), unreported Suit No: NIC/4/2000, judgment delivered by Hon Justice B.A. Adejumo on 2nd April 2004, 2004,<http://judgment.nicn.gov.ng/> accessed 8th July 2015

> is it bound by strict rules of legality or formalism. The concern of the court must always be justice and fairness[110]

The aim of the principle is to ensure the speedy dispensation of matters[111] and by this the Court focuses on the substance of the case rather than rules of procedures. In *Oyo State Government* v *Alhaji Bashir Apapa and Ors,*[112] the argument raised by the respondents was that the matter was commenced by way of originating summons instead of by complaint as enjoined by the National Industrial Court Rules.[113] The applicant argued that the modern tendency is not to be slavish to forms of actions and urged the court to give any directive that would enable the matter to be justly resolved. The court ruled that since the infractions contained in the processes of the applicant were all curable and are not so weighty as to require striking out the matter, the respondents were not put at any disadvantage as to the substance of the case. It further ruled that the applicant's originating process did not in any way entrap the respondents.

To further speed up trials at the NICN, there is a new Practice Direction –"National Industrial Court of Nigeria Practice Direction 2012"- which has modified the National Industrial Court Rules 2007. The innovations of the Practice Directions are that statements on oath by witnesses and addresses must be written and filed. By these new procedures lengthy oral submissions in court by parties are eliminated and the court's time is saved for other businesses. The Practice Direction also prescribes time for filing such processes and penalties for non-compliance.

That the simplified or flexible court procedure has accelerated the hearing of cases is illustrated in Table 5.2 below.

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[110] *Mix and Bake Flour Mill Industries Ltd* (n109)
[111] National Industrial Court Rules Order1 Rule 1(3)
[112] *Oyo State Government* v *Alhaji Bashir Apapa and Ors*, unrepoted Suit No: NIC/36/2007, Ruling on interlocutory application delivered on 3rd October 2007 by Justice B.B.Kanyip, (who presided) <http://judgment.nicn.gov.ng/pdf.php? accessed 25th June 2014
[113] National Industrial Court Rules Order 3 Rule 1

Table 5.2: Duration of time for hearing cases at the National Industrial Court of Nigeria between 1978 and 2014[114]

Years it took for judgment to be delivered	No. of Judgments	Cumulative No. of Judgments	Percentage	Cumulative Percentages
$x < 1$	57	57	14.32	14.32
$1 \leq x < 2$	190	247	47.75	62.07
$2 \leq x < 3$	81	328	20.35	82.42
$3 \leq x < 4$	38	366	9.55	91.97
$4 \leq x < 5$	8	374	2.01	93.98
$5 \leq x < 6$	5	379	1.26	95.24
$6 \leq x < 7$	9	388	2.26	97.50
$7 \leq x < 8$	3	391	0.75	98.25
$8 \leq x < 9$	2	393	0.50	98.75
$9 \leq x < 10$	2	395	0.50	99.25
$10 \leq x < 11$	2	397	0.50	99.75
$11 \leq x < 12$	0	397	0.00	99.64
$12 \leq x < 13$	1	398	0.25	100.00
Total	**398**		**100.00**	

Source: compiled by researcher using data from National Industrial Court of Nigeria (NICN) (judgment.nicn.gov.ng/cat.php?). NB: 'x' represents number of years

From 1978 to 2014, excluding data from the missing years indicated above (that is: 1998, 1999 and 2000) and another eight cases in respect of which information was incomplete, the total number of cases with complete information is 398 (see: Table 5.2). Of the 398 cases with complete information, 57 cases (14.32 per cent[115]) were completed in less than one year, 190 cases (47.75 per cent[116]) were in between one and two years and 81 cases (20.35 per cent[117]) were completed in between two and three years. The corresponding cumulative proportion of the cases completed in less than one year, less than two years and less than three years were 14.32 per cent[118] (57 judgments), 62.07 per cent[119] (247 judgments) and 82.42 per cent[120] (328 judgment) respectively. Over 91 per cent (366 of 398 cases) of the

[114]NB: Data for 1998, 1999 and 2000 are not available and where x in table 5.2 is a variable representing the time in years which it took to complete each case.

[115] 14.32 per cent = $\frac{57}{398}\ x\ 100$.

[116] 47.75 per cent = $\frac{190}{398}\ x\ 100$.

[117] 20.35 per cent = $\frac{81}{398}\ x\ 100$.

[118] See footnote 116 above.

[119] 62.07 = 14.32 + 47.75.

[120] 82.42 = 14.32 + 47.75 + 20.35.

judgments were actually completed in less than four years while less than 9 per cent (32 of 398 cases) span over four years before judgment was delivered.

In spite of the fact that some cases span over four years, the completion of over 91 per cent (366 out of 398 cases) in less than four years is an improvement when compared with the two labour cases- *Isaac Obiuweubi v Central Bank of Nigeria*[121] and *Amadi v NNPC*[122] that were heard in the High Court (ordinary court) that took twenty–three and thirteen years respectively. There is the likelihood that had other labour cases continued to be held in the High Court, they would have taken as much time.

It is important to note that despite the flexibility and simplicity of procedural rules, the NICN will not depart from its previous decisions or judgments which are sound except for compelling reasons.[123] The purpose of this is to ensure certainty and consistency in Nigerian labour law.

5.6 Supreme Court and NICN: Two Final Courts?

Are there now two final courts in Nigeria? This question arises in view of the provisions of the Constitution which seem to suggest that apart from the Supreme Court, the NICN may also be another final court. The Constitution has clearly stated that the Supreme Court is a final court, that is, that no appeal shall lie to any other body or person from any determination of it.[124] Also the Constitution (by an amendment of it in 2010), provides that an appeal shall only lie from the decisions of the NICN as may be prescribed by an Act of the National Assembly,[125] and since the latter is yet to enact a law in this regard, the wording of the provision seems to suggest that NICN is also a final court. This has prompted the question whether there are two final courts in Nigeria. Before attempting an answer, it is also important to address the following relevant question: should labour courts have the final word in labour matters?

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[121] *Isaac Obiuweubi* (n29) 465
[122] *Amadi* (n30) 47
[123] B.B.Kanyip"Form and Formlessness:An Appraisal of the National Industrial Court Rules 2007", <http://nicn.gov.ng/ > accessed 27th June, 2014
[124] Constitution 1999 as amended, section 235
[125] Constitution 1999 as amended section 243(3)

It would appear that most labour scholars hold the view that a labour court should be a final court.[126] Various reasons had been advanced for this position. Lord Wedderburn had reasoned that ordinary Appeal Courts can control the whole system through the common law principles and emphasised that:

> If the new labour court is to be part of a solution, it is scarcely logical to hand over its decisions at the outset to the control of courts which are prominent parts of the problem. There is, in other words, a compelling case that decisions of the specialist labour courts should not end up in the hands of the common law court of Appeal or Judicial Committee of the House of Lords.[127]

Keith Ewing had also suggested that a final labour court 'would enable a specialist jurisdiction to develop, not constrained by the potentially damaging intervention of the Court of Appeal'.[128]

A further reason why labour courts judgments should be final is undue delay of cases in the ordinary courts. This has also been earlier expounded in other parts of this chapter and needs no further repetition herein. Thus, the understanding is that an appeal from a labour court of first instance is not necessary. Alternatively, as Wedderburn reasons, 'if an appellate body were in consequence thought necessary, there would be no need to rupture the logic of the system. The legislature could still make it abundantly clear... that the jurisdiction of ordinary appellate court is excluded'.[129] The reason for excluding the ordinary appellate courts is to prevent them from applying the common law to labour principles at the appeal level thereby defeating the decisions of the labour court of first instance. An appellate labour court would more likely follow labour law principles than the ordinary appellate courts.

In Nigeria, the Supreme Court is the highest court in the hierarchy of courts and its decisions are final.[130] What this means is that its decisions are not subject to an appeal to any other

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[126] Wedderburn, 'The Social Charter in Britain-Labour Courts?'(n7) 32-34, see also Bob Hepple, 'Restructuring Employment Rights' (1986) 15, Industrial Law Journal 83, .Ewing (n7) 158.
[127] Wedderburn, 'The Social Charter in Britain-Labour Law and Labour Courts?'(n7) 1, 33
[128] Ewing, (n7) 158
[129] Wedderburn, 'The Social Charter in Britain-Labour Law and Labour Courts? (n7) 1,33
[130] Constitution 1999 (as amended) section 235, see also *Architects Registration Council of Nigeria v Fassassi* (No 4) (1987) 3 NWLR (Part 59) 42 at 46 where ESO J. S. C said 'in the Supreme Court, the decision of that

body or person. However, the finality of the decision of the Supreme Court does not affect the right of the President or Governor to exercise the prerogative of mercy.[131]

Whether the NICN is a final court depends on the interpretation of the following provisions of the Constitution as amended. Section 243 (2) – (3) provides that:

> (2) An appeal shall lie from the decision of the National Industrial Court as of right to the Court of Appeal on questions of fundamental rights as contained in chapter IV of this Constitution as it relates to matters upon which the National Industrial Court has jurisdiction.
> (3) An Appeal shall only lie from the decision of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly: Provided that where an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal.

Section 254 C (5) – (6) also provides that:

> (5) The National Industrial Court shall have and exercise jurisdiction and powers in criminal causes and matters arising from any cause or matter of which jurisdiction is conferred on the National Industrial Court by this Section or any other Act of the National Assembly or by any other law.
>
> (6) Notwithstanding anything to the contrary in this Constitution, appeal shall lie from the decision of the National Industrial Court from matters in sub-section 5 of tthis Section to the Court of Appeal as of right.

The NICN is yet to have an opportunity to interpret these provisions. But some statements made by two learned Justices of the NICN (outside the court) seem to

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court in so far as that case is concerned is final for all ages... it is final in the sense of real finality. It is final forever. Only a legislation *ad hominen* can alter it'.

[131] Constitution 1999 (as amended) section 235 see also *Olatunbosun v NISER* (1988) 3 NWLR (Pt. 80) 25.

be in conflict regarding whether the decisions of the NICN are final. In a seminar, Hon. Justice Babatunde Adejumo (President of the NICN) said:

> The controversy on the finality of the decision of the National Industrial Court has been clarified as section 243 (3) of the Constitution provides that an appeal shall lie from the decision of the NICN to the Court of Appeal as may be prescribed by an Act of the National Assembly...[132]

Hon. Justice Benedict Kanyip on the other hand (also in a seminar) said:

> The right of appeal from the decisions of the NICN to the Court of Appeal remains circumscribed. Only in respect of issues of fundamental rights or criminal causes and matters is the appeal as of right. In all other cases, an Act of the National Assembly must first provide for an appeal even here the appeal is possible only upon the leave of the Court of Appeal...[133]

The statements of the two learned justices seem to conflict. While Hon. Justice Babatunde Adejumo relying on section 243 (3) is of the view that an appeal cannot lie from the decision of the NICN unless an Act of the National Assembly prescribes it, Hon. Justice Benedict Kanyip's statement seems to downplay the force of section 243 (3) to the effect that the subsection applies to all 'other cases' apart from fundamental rights and criminal causes. The effect is that while Hon. Justice Babatunde Adejumo's statement projects the NICN as a final court (that is no appeals from NICN decisions pending an Act of the National Assembly), Hon. Justice Benedict Kanyip's statement tends to suggest that the NICN is not a final court as appeals on fundamental rights and criminal causes as of right go to the Court of Appeal.

A possible way out of this confusion is to interpret sections 243 (2)–(3) and 254 (5)–(6) together as follows:

a) Section 243(3) appears to be the leading provision because a condition precedent has been prescribed for appeals and reinforced by the words 'shall only'. Therefore since there is

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[132] Adejumo, 'The National Industrial Court of Nigeria: Past, Present and Future', (n7)
[133] Benedict Kanyip, 'The National Industrial Court: Yesterday, Today and Tomorrow',<www.nicn.gov.ng/ >accessed 7th July, 2014.

yet to be an Act of the National Assembly in this regard, the NICN can be regarded as a final court, however, only on labour matters.

It is important to note that the Supreme Court had held in *Chief Dominic Onuorah Ifezue v Livinus Mbadugha*[134] that the word 'shall' in a statute is commanding enough to be regarded as mandatory rather than directory. And this became obvious when 'shall' was further reinforced by 'only' in section 243 (3).

b) If section 243(3) is not appreciated as in (a) above it will lead to further confusion as to the nature of matters for which appeal can lie to the Court of Appeal apart from fundamental rights and criminal matters.

To avoid leaving the final answer to the question whether the NICN is a final court to judges' interpretation, it is suggested that the National Assembly should further make a law which clearly makes the NICN a final court for labour matters.

5.7 Conclusion

This Chapter gave consideration to the question of the importance of specialised courts or tribunals to the effective and fair resolution of labour disputes and the upholding of workers' rights. It noted that a variety of arguments has been made over the years by scholars advocating the establishment of specialised labour courts. Lord Wedderburn for example advocated the creation of judicial institutions to enforce labour law so that labour law might escape from the clutches of the common law thinking and procedures.[135] Building on such arguments, the Chapter then considered the matter of the *effectiveness* of labour courts. Using De Givry's explanation of the principles necessary for the proper functioning of a labour court as a framework for discussion, three principles were identified and discussed as

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[134] *Chief Dominic Onuorah Ifezue v Livinus Mbadugha* (1984) 1SCNLR 427, also in Suit No. SC.68/1982, judgment of Supreme Court delivered by Anthony Nnaemezie Aniagolu JSC on 18th May, 1984, www.nigeria-law.org/Dominic accessed 8th July, 2014. This decision can be compared to a Supreme Court Ruling delivered by Francis Fedode Tabai JSC in *Associated Discount House Limited v Amalgamated Trustees Limited,* Suit No. SC.289/2002, delivered on 13th July 2007, www.nigeria-law.org/Associated accessed 1st July, 2014, where he said that there is no laid down rule as to whether the word 'shall' used in a statute carries mandatory or merely connotation and that its real purport depends by and large on the particular context in which it is used. It is important to note that *Chief Dominic Onuorah Ifezue v Livinus Mbadugha* has not been overruled and such is still good law.

[135] Wedderburn, 'Labour Law: From Here to Autonomy?' (n3) 26

essential to the effectiveness of labour courts in general, and the NICN in particular. These were: exclusive jurisdiction, professional judges and flexible or simplified court procedure

The principle of exclusive jurisdiction was first introduced in the NICN by the National Industrial Court Act in 2006 and further enlarged in 2010 by another legislation-Constitution (Third Alteration) Act. This resulted in a large number of cases being decided. In order to show that the introduction of the principle increased the number of cases decided, a comparison was made between the number of cases decided before 2006 and after 2006 (when the principle was first introduced). It was observed (as shown in Table 5.1) that while only 123 cases were decided between 1978 and 2005 (in 25 years, an average of 4.92 cases per year), 280 cases were decided between 2006 (when the principle was first introduced) and 2014 (in 9 years, an average of 31.11 cases per year). Thus the total number of cases decided after the principle was introduced did not only increase by 157[136] in 9 years but also the rate per year (an average of 31.11 cases per year).

The principle of appointing professional judges was first introduced in the NICN in 2006 by the National Industrial Court Act and retained in the Constitution (Third Alteration) Act. The effect is that the judges adopt an interpretation which seems to be a shift away from common law principles (which "scuttle" implementation of labour principles) allowing the enforcement of labour law principles.[137]

The principle of flexible or simplified court procedure was first introduced in the NICN by the Trade Dispute Act and retained by both the National Industrial Court Act[138] and the National Industrial Court Rules.[139]This accelerated hearings of cases as shown in Table 5.2. In the 398 cases examined (1978 to 2014), over 91 per cent (that is 366 out of 398) were completed in less than four years while less than 9 per cent (32 out of 398 cases) span over four years before judgment was delivered.

An ancillary question also examined in this Chapter is whether the NICN is a final court like the Supreme Court in view of the constitutional provision which stipulates that an appeal shall only lie from the decisions of the NICN as may be prescribed by an Act of the National

[136]280-123=157, derived by subtracting the total number of cases decided before 2006 from total number of cases decided from 2006-2014
[137] *Folarin Oreka Maiya* (n102)
[138] National Industrial Court Act sections 12 and 15
[139] National Industrial Court Rules Order 15

Assembly[140] and currently there be no law in this regard. It was argued that whether the NICN is a final court depends on the interpretation of the following constitutional provisions: sections 243 (2)-(3) and 254C (5)-(6) (which prescribed situations where Appeal can only lie from the decisions of the NICN). It was argued that if the foregoing constitutional provisions are examined holistically, it will appear that the NICN can be regarded as a final court, however, only on labour matters since there is yet to be an Act of the National Assembly in this regard. It was suggested that to avoid leaving the final answer to the question whether the NICN is a final court to judges' interpretation, the National Assembly should make a law which clearly make the NICN a final court for labour matters. It is to be hoped, meanwhile, that the Bill currently before Parliament, which woud remove the exclusive jurisdiction of the NICN to hear labour matters, will not be passed

[140] Constitution 1999 section 243 (3)

Chapter 6
The Constitutional Protection of Freedom of Association as a Labour Right

6.0. Introduction

This chapter examines the constitutional protection of freedom of association as a labour right in Nigeria. Building on the arguments contained in previous chapters, it seeks to compare the reasoning of the labour court (NICN) with that of the ordinary courts, and to assess the readiness of the courts (i) to uphold freedom of association as a human right; (ii) to accord it to all workers, informal as well as formal; and (iii) to interpret the freedom broadly, in line with international law and human rights charters including the African Charter.

In critically analysing the reasoning of the courts, reference is had to Ronald Dworkin's explanation of "purposive interpretation": the idea that a judge is expected to look beyond the letters of a statute into the purpose or intention of the law.[1] It is argued that the reasoning of the judges of the labour court (NICN) appears to look beyond the letters of labour statutes to include the underlying purposes of labour statutes and labour law generally. This understanding has guided and influenced the reasoning of the NICN judges, making their interpretations purposive and judgments to reflect labour principles more than the ordinary courts. In the ordinary courts, the judges do not tend to base their decisions on the underlying purposes of labour statutes. This is partly why their decisions are at variance with that of the labour court (NICN).

The chapter is divided into several parts. The first part discusses rules of interpretation and the concept of coherence in law, focussing on the work of Dworkin. The second and third parts analyse the key case law of the ordinary courts and the labour court (NICN) respectively.

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[1] Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 51-53

6.1. Judicial Reasoning: Rules of Interpretation and the Concept of Coherence

Before turning to examine the case law of the courts dealing specifically with freedom of association, the chapter first briefly discusses modes of judicial interpretation and the importance of coherence to judicial reasoning. This discussion is then used as a framework for analysing the interpretations and reasoning of both the ordinary and labour courts.

A vast literature exists addressing questions of interpretation and legal reasoning, how one reasons from the rules that the sources of law provide, and how one understands the interface between reasoning about facts and reasoning about rules.[2] From the many texts and authors, what is of most use to our discussion concerns the rules of interpretation of statutes, in our case the rules that inscribe key principles of labour protection and the protection more generally of rights in the Constitution. In this respect it is important to ask two questions: what is the relation of (constitutional) rules to principles of the constitutional order (that clearly also have a moral and political dimension); and why, in that respect is coherence an important value? Both questions will be discussed with reference to the legal theory of Ronald Dworkin.

While often the discussion of the interpretation of rules revolves around certain rules of thumb, the 'literal rule', the 'golden rule' and the 'mischief rule,[3] for all their wide use, these rules have been said to be 'limited in value'.[4] And this has been said to be so because the 'golden rule' did not explain what is 'unreasonable' enough to trump the 'literal' interpretation;[5] also the "literal rule" in turn misses the basic insight that what is the 'ordinary' meaning of any statement 'can only account as that given a context, and that the meaning of any statement that may be deemed 'ordinary' in some context is only relevant in those contexts'.[6] It has also been said that the 'mischief' or 'purposive' rule either states the

[2]Scott Veitch, Emilios Christodoulidis and Lindsay Farmer, *Jurisprudence : Themes and Concepts* (2nd edn Routledge 2012) 116
[3] Veitch, Christodoulidis and Farmer, (n2) 116
[4] Veitch, Christodoulidis and Farmer (n2) 117
[5] Veitch, Christodoulidis and Farmer (n2) 117
[6] Veitch, Christodoulidis and Farmer (n2) 117

obvious that a rule is enacted for a purpose which should inform its meaning or points to very difficult questions over the 'original intention of legislators'.[7]

A richer tradition of legal reasoning refers to canons of interpretation which include criteria about the 'intention' of the legislator (historical interpretation), the (current) purpose of the rule (purposive or teleological interpretation), or the place of the rule in the body as a whole (systemic interpretation). It is the latter of these that concern the question of coherence and to which Ronald Dworkin offers the most interesting current theorisation.

According to Dworkin an interpretation is best if it 'provides the best constructive interpretation of the community's legal practice'.[8] The implication of this is that all rules must be interpreted in light of the community's principles of justice and fairness. Dworkin had also further explained that 'all interpretations strives to make an object the best it can be... and that interpretation takes different forms in different contexts only because different enterprises (courts) engage different standards of value or success'.[9] While a number of interpretations of law are therefore possible in difficult cases, only one of these interpretations will give the 'right answer', and it is the one that makes sense of the law as a coherent system.

Dworkin tends to use the terms 'best interpretation',[10] 'creative interpretation'[11] and 'constructive'[12] interpretation interchangeably:

6.1.1. Best Interpretation

'...propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best ...interpretation of the community's

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[7] Veitch, Christodoulidis and Farmer (n2) 117
[8] Dworkin,(n1) 225
[9] Dworkin, (n1) 53
[10] Dworkin,(n1) 53
[11] Dworkin (n1) 51 and 53
[12] Dworkin, (n1) 51 and 53

legal practice'.[13] The aim of the best interpretation is to project the community's legal practice, and can be likened to 'purposive' interpretation

6.1.2 Creative Interpretation

To Ronald Dworkin: 'creative interpretation aims to decipher the author's purpose or interpretations in writing...',[14] and that '...creative interpretation ...is a matter of interaction between purpose and object'.[15] Dworkin's explanation of creative interpretation here can be understood as "purposive rule of interpretation" since a judge is expected to go beyond the letters of a statute into the purpose or intention of the law understood as a coherent body of principle.

6.1.3 Constructive Interpretation

Ronald Dworkin explained constructive interpretation as "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong...".[16] This can also be understood to be purposive interpretation since a judge would have to look at the purpose for which a statute is made and guide himself by it.

It is important to note that whichever the rule of interpretation that is employed, a judge must ensure that decisions reached are *coherent*. In ordinary parlance, 'coherence' suggests consistency that is the absence of logical contradiction.[17] The requirement of coherence in the law is more than just consistency. It must rather be *consistency in principle* that is, coherence must 'express a single and comprehensive vision of justice'.[18] For Dworkin, 'coherence is synonymous with 'integrity' and in explaining 'coherence' in this light, it was put thus:

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[13] Dworkin (n1) 225
[14] Dworkin,(n1) 51
[15] Dworkin, (n1) 52
[16] Dworkin, (n1) 52
[17] Stephen Guest, *Ronald Dworkin*, (e-book, 2nd ed. Edinburgh University Press 1997) 35, see also Aldo Schiavello, "On 'Coherence' and 'law': An Analysis of Different Models" (2001) Ratio Juris, Vol. 14 (2) 233 at 236.
[18] Dworkin,(n1) 134

> Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single coherence scheme of justice and fairness in the right relation.[19]

The implication of this is that in adjudication, judges should take the decisions (in particular in hard cases) that put the fundamental principles of a legal system 'in the best light possible'.[20]

One relevant question here is whether judges can wholly ignore the principle of precedent? Dworkin's answer is that:

> The practice of precedent which no judge's interpretation can wholly ignore presses toward agreement: each judge's theories of what judging really is will incorporate by reference through whatever account and restructuring of precedent he settles on aspects of other popular interpretations of the day....[21]

A qualification may be usefully inserted here: While it may be possible for judges of the highest court to sometimes ignore the principle of strict precedent and lay down new rules in fresh cases, in a way that reflects the fundamental values of the legal system, it is difficult for judges in lower courts to do so otherwise their decisions may be overruled or set aside by the highest court by the doctrine of *stare decisis*. The only exception is when there is no appeal by either of the parties in the lower court. But it will appear that only judges of the highest court can effectively make new interpretations capable of projecting the fundamental values of the society since their judgments are final or not subject to appeal.

In essence, the principle of coherence not only accommodates but in fact enhances the principle of precedent. For Dworkin, integrity (coherence) therefore demands that the rationalising principle of the decision at hand be part of a pattern that coheres as a whole and shows it in its best light.[22] In his view, 'law as integrity' (which is coherence) is 'both the

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[19] Dworkin, (n1) 219
[20] Dworkin, (n1) 243, see also Aldo Schiavello, "On 'Coherence' and 'Law': An Analysis of Different Models" (n17) 241
[21] Dworkin, (n1) 88
[22] Veitch, Christodoulidis and Farmer, (n2) 117 see also Dworkin (n1) 219

product of and the inspiration for comprehensive interpretation of legal practice'[23] by judges. It also asks judges to 'continue interpreting the same material that it claims to have successfully interpreted itself.'[24]

At this juncture, I turn now to the analysis of the courts' interpretation and enforcement of freedom of association with a view to making the argument that the labour court is better suited to enforcing labour rights (in this case freedom of association) than the ordinary courts. I will begin with the cases decided by the ordinary courts and then turn to those decided by the labour courts.

6.2. Ordinary Courts

The purpose of analysing the two following decisions of the ordinary court (Supreme Court) is to show how the reasoning and interpretations of the judges restricted workers' freedom of association. And this was the attitude and position until 2010 when the labour court (NICN) was empowered exclusively to hear labour matters.[25]

6.2.1 Osawe v The Registrar of Trade Unions[26]

The facts were that the Appellants applied to the Registrar of Trade Unions for the registration of a proposed trade union called "The Nigerian United Teaching Services Workers Union" later renamed "Nigerian Administrative Staff Union of Primary and Post Primary Schools". The Registrar refused, stating that a union already existed for that category of worker. Section 3(2) of the Trade Unions Act was challenged on the ground that it infringed section 37 of the 1979 Constitution (now section 40 in the 1999 Constitution). The High Court held that it was indeed an infringement. But both the Court of Appeal and the Supreme Court held otherwise

[23] Dworkin, (n1) 226
[24] Dworkin (n1) 226
[25] Constitution 1999 section 254C (1-4)
[26] [1985] 4NWLR Pt. 4 755

on the ground that the power conferred on the Registrar was necessary to maintain public order.

6.2.1.1 Supreme Court's Judgment in Osawe

In this regard, relying on section 3(2) of the Trade Union Act (as amended) and the derogation on freedom of association in section 41 of the 1979 Constitution (now section 45 of the 1999 Constitution) Kazeem JSC (as he then was) who read the lead judgment of the Supreme Court held that:

> Having regard to the facts of this case, I am of the view that the Registrar was right to have rejected the application for registration…the fundamental right enshrined under Section 37 of the Constitution is not absolute as it cannot invalidate any law that is reasonably justifiable in a democratic society "in the interest of defence, public safety, public order, public morality. Or public health…Section 3(2) of the Trade Unions Act, 1973 as amended by Section 1(1)(a) of the Trade unions (Amendment) Act was a law reasonably justified in a democratic society…I am therefore unable to agree that Section 3(2) of the Trade Union Act as amended, contravenes Section 37 of the Constitution 1979[27]

6.2.1.2 The Reasoning of the various judges in Osawe

The Judges of both the Supreme Court and Court of Appeal reasoned that section 3(2) of the Trade Union Act (which empowered the registrar to refuse registration of a proposed union whose interests is already catered for by an existing union) is reasonably justifiable in a democratic society. And by this they relied on the derogation on freedom of association contained in section 41 (now 45) of the Constitution to refuse registration of the proposed trade union. In contrast, the High Court relied on section 37 (now 40 of the Constitution) which guaranteed freedom of association and formation of trade unions and ordered that the proposed trade union be registered. Thus, while the reasoning of the judges of the Supreme

[27] *Osawe v Registrar of Trade Union* (n26) 755,763 Kazeem JSC

Court and Court of Appeal stood on one side, that of the High Court stood on the other side, that is favoured freedom of association. Unfortunately, the judgment of the High court was set aside by the Court of Appeal.

The reasoning of the judges of both the Supreme Court and Court of Appeal seem to show that purposive interpretation was not applied hence the decision did not reflect the principle of freedom of association even though it is guaranteed as a fundamental human right in the Constitution.

6.2.2 *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors. v Medical and Health Workers Union of Nigeria.*[28]

Pursuant to the Trade Union Act, the appellant in this case (*The Registered Trustees of National Association of Community Health Practitioners of Nigeria*, hereinafter known as RTNACHPN) applied to the 2nd and 3rd respondents (Honourable Minister of Labour and Productivity, and the Registrar of Trade Unions respectively) that it be registered as a trade union. The application was refused, consequent upon which the appellant brought an application *ex parte* by which it sought and obtained leave to apply for judicial review of the decision of the Honourable Minister of Labour and Productivity and the Registrar of Trade Unions. The appellant claimed *inter-alia* a declaration that it was unconstitutional and illegal, for the Minister of Labour and Productivity and the Registrar of Trade Unions to refuse to register the applicant as a senior staff trade union. The Medical and Health Workers Union of Nigeria (MHWUN) then prayed the trial court for an order joining it as a defendant/respondent.

The second and third appellant (Minister of Labour and Productivity and the Registrar for Trade Unions) adduced reasons for not registering the first appellant (RTNACHPN) as a trade union. They argued that members of the RTNACHPN were still members of MHWUN and another union, the National Union of Local Government Employees (NULGE); and that MHWUN and NULGE had been contesting for the unionization of RTNACHPN in the civil courts in some states of the country and at the Industrial Arbitration Panel as well as the National Industrial Court; and that as such there was an existing union which catered for the

[28] [2008] 2 NWLR (Pt 1072) 575

interest of RTNACHPN. They relied on section 3(2) and section 5(4) of the Trade Union Act. Section 3(2) of the Trade Union Act provides that:

> No combination of workers or employees shall be registered as a trade union save with the approval of the Minister on his being satisfied that it is expedient to register the union either by regrouping existing trade unions, registering a new trade union or otherwise howsoever, but no trade union shall be registered to represent workers or employees in a place where there exists a trade union.

Similarly, section 5(4) of the same Act provides that:

> On the receipt of application for registration- The Registrar shall not register the trade union if it appears to him that any existing trade union is sufficiently representative of the interests of the class of persons whose interests the Union is intended to represent.

RTNACHPN on the other hand contended that by virtue of section 40 of the 1999 Constitution, it had the right to form or belong to any trade union of its choice. It will be recalled that section 40(1) of the 1999 Constitution provides that:

> 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, a trade union or any other association for the protection of his interests.

It was also the contention of RTNACHPN that sections 3 and 5 of the Trade Union Act were inconsistent with the provisions of section 40 of the 1999 Constitution, and to that extent null and void. It is important to note that MHWUN was only joined as a necessary party by an Order of the trial court after the close of arguments by RTNACHPN on one hand and the Minister of Labour and Productivity and the Registrar of Trade Unions on the other. However upon being joined as a co-defendant, MHWUN filed a counter affidavit and all the parties were again heard on the substantive case.

6.2.2.1 Supreme Court's Judgment in the Registered Trustees

On the issue of whether the interests of the appellant were represented by the respondent, the Supreme Court held that:

> …as I have found earlier, there are many materials in the documents before this Court that confirm that the 1st appellant had all along been catered for by a wider and encompassing body, which is the 1st respondent. After an investigation, there is no way the 1st appellant would have been registered in the circumstances. Besides, the law is not such that registration is automatic. It is at the discretion of the registrar after he would have made his investigations and become satisfied…[29]

Also it relied on section 45 of the Constitution (which is derogation on freedom of association) and its previous decision in *Osawe v Registrar of Trade Unions*[30] to dismiss the appeal.

It will be important at this juncture to recapitulate the words of Aniagolu JSC (as he then was) in the *Osawe* case:

> the proliferation of Trade Unions clearly lends itself to chaos in labour circles,[31] a fact which has the tendency of destabilizing society by its tendency to wild cat strikes and work stoppages called by all sorts of desperate and unviable trade unions. It is therefore in the interest of public order that systematic cohesive and responsive trade unions be established for the good of society.[32]

The phrase "public order" was defined by the Supreme Court in *Osawe relative* to the historical antecedent of the government's restructuring of trade unions. Prior to 1978, there were 800 registered trade unions. The Government held the view that the situation was chaotic and in order to prune down the number of registered trade unions, it promulgated the

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[29] Lead judgment was delivered by Mukhtar JSC in the *Registered Trustees* (n28) 575, 610-611
[30] *Osawe* (n26) 755
[31] Underlined emphasis mine
[32] Emphasis mine, *Osawe* ,(n26) 755, 766 Aniogolu JSC

Trade Union (Amendment) Decree.[33] This Decree (now an Act)[34] amended the existing Trade Unions Act and reduced the number of registered trade unions to 71. According to the Federal Military Government, this exercise was carried out 'to maintain public order'. To the Military Government, 'public order' is maintained when the number of trade unions is reduced.

Surprisingly, the Supreme Court aligned itself with this meaning of 'public order' in *Osawe*, stating that the "proliferation of trade unions lend itself to chaos in labour circles".[35] It is important to note that there has been no recorded "chaos" among the registered trade unions other than the large number (800); neither were there cases of "chaos" mentioned in *Osawe*. To workers, trade union activities help them to 'fight' for their basic rights in places of work. To the government large numbers of trade unions represent "chaos".

The Supreme Court in this situation ought to have weighed the interest of government against that of trade unions and proffered its own definition of the phrase "public order" rather than simply aligning itself with government's view.

It is important to note that in *INEC v Musa*[36] (though a case relating to registration of political parties), the Supreme Court supported the proliferation of political parties through a liberal interpretation of section 40 of the Constitution. Ayoola JSC held that:

> Plurality of parties…provides the citizen with a choice of forum for participation in governance, whether as a member of the party in government or of a party in opposition. Unduly to restrict the formation of political parties or stifle their growth ultimately weakens the democratic culture…[37]

It can be argued that if a liberal interpretation was adopted to support 'proliferation" of political parties and "the democratic culture" in *INEC* then the same liberal interpretation

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[33] 1978, now Act No. 22 of 1978

[34] Decrees made by the Federal Military Government are regarded as Acts of the National Assembly in Civilian Administration

[35] *Osawe* (n26) 755,766 Aniagolu JSC

[36] *INEC v Musa* [2003] 3 NWLR (Pt.506) 72 <http://lawpavillionpersonal.com/newfulla> accessed 20 March, 2012

[37] *INEC* (n36) *Ayoola* JSC as he then was, underlined emphasis mine

ought to been made applicable to trade unions since sections 40 and 45 of the Constitution cover the registration of any type of association. This is an example of a liberal interpretation which was never extended to trade unions registration.

The first reason proffered by the Supreme Court for not following *INEC* in *the Registered Trustees' Case* was that the *Osawe's* case had not been overruled and in this regard Mukhtar JSC said that "…even though Sections 40 and 45 of the constitution formed the basis of the decision and influenced it…the INEC case did not overrule The Osawe's case…!.[38] Ogbuagu JSC also supported the learned justice when he said that "I have noted in this judgment that the *Osawe case*… has not been overruled and therefore extant…"[39]

These statements express the judges' views that *INEC has* not overruled *Osawe.* By these comments the judges seem to hold the view that *Osawe* was still the law hence it followed it in the *Registered Trustees* case. If it is so, the question arises: when can a decision be said to have been overruled? Is it when a higher court expressly mentions the word 'overruled', or is it when it deviates from previous principles or legal position without mentioning the word overruled? A case is overruled when a higher court deviates from its previous principles and legal position in a current judgment even though the word 'overruled' is not expressly mentioned. It will appear that the Supreme Court in *INEC* without expressly mentioning the word 'overruled', deviated from its previous decision in *Osawe to* adopt a liberal interpretation to favour registration and proliferation of political parties. By following *Osawe* to deny registration and the proliferation of trade unions, the Supreme Court in *Registered Trustees* adopted a kind of double standard or applying different laws and standards for two cases which have same facts. The facts common to both cases were that applications were made for registration of associations guaranteed by section 40 of the Constitution.

The second reason which the Supreme Court stated for not following *INEC* was that it had no relevance to the *Registered Trustees' Case.* Ogbuagu JSC reasoned that:

> I note however that the case of *INEC v Alhaji Musa and Ors*… relied on by the trial court with respect has no relevance or bearing with the subject matter of this suit leading to this appeal as it relates to the

[38] *Registered Trustees'* (n28) 575, 612-613 Mukhtar JSC delivered the lead judgment
[39] *Registered Trustees'* (n28) 575, 640 Ogbuagu JSC

> issue of registration of political parties under Section 79(2) of the Electoral Act.[40]

The decision in *INEC* is relevant to the *Registered Trustees* case. The facts of both cases relate to the right to form or register an association: while the association desired in *INEC* was a political party that desired in *Registered Trustees* was a trade union. Moreover both are guaranteed by the fundamental human right provisions in sections 40 and 45 of the Constitution. The subject matter is the registration of an association and not the type of association as the learned justice would want us to think or believe.

Even though the judgment of the Supreme Court in *Registered Trustees* bind the lower courts (Court of Appeal and High Court) it is important also to examine the reasoning and interpretations of the judges of the lower courts particularly what influenced their reasoning.

6.2.2.2 Court of Appeal and High Court Judgments in Registered Trustees

The Court of Appeal reasoning and decision were very similar to that of the Supreme Court. The reasoning and judgment of the High Court was at variance with that of the Supreme Court and Court of Appeal.

In his judgment, the High Court Judge held *inter alia*:

> I therefore hold that the non-registration of the applicant is also invalid because it has denied the applicant the right to associate and belong to a trade union of choice recognized by the Constitution and the African Charter on Human Rights … In the light of the foregoing this application succeeds.[41]

His judgment stood on one side and that of the Court of Appeal and the Supreme Court on the other side. His reasoning seems to show that he applied purposive interpretation one which made the judgement to reflect labour principle. Unfortunately, this judgment was set aside by

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[40] *Registered Trustees'* (n28) 575, 640 Ogbuagu JSC.The Electoral Act therein is that of 2001
[41] *Registered Trustees'*(n28) 575 Per P. F. Olayiwola, judgement was delivered on Friday 16th July, 2004

the Court of Appeal and the Supreme Court. It is important to note that the High Court judge refused to follow the Supreme Court's decision in *Osawe* but distinguished it. The facts of *Osawe's case*[42] were similar to the *Registered Trustee's Case*[43]. The only difference was that while the Appellant in the latter sought to rely on not only on the right to freely associate under section 40 of the 1999 Constitution but also on the ILO Conventions 87, 98 and the African (Banjul) Charter, the former relied only on section 37 of the 1979 Constitution (now 40 in the 1999 Constitution).

And his reasoning was that:

> The powers conferred on the registrar of Trade Unions to refuse registration of a trade union are not limited by the provisions of section 5(2).[44] This country has however since then moved forward as the Country embraces democracy and the rights of the citizens have since been enhanced through legislations and pronouncements. The African Charter on Human and Peoples' Rights have since been incorporated into the laws of the Country as Cap. 10 LFN 1990.[45]

From the underlined statement, it is interesting to note that the High Court judge was more willing to follow and confirm 'the rights of the citizens which have since been enhanced...' than any rule of precedent. Although the particular 'pronouncements' the judge was referring to were not stated, they may perhaps include the declarations that are made in various judicial colloquia or conferences[46] in which judges are exhorted to inform themselves of decisions made by other courts national and international and to "incorporate international

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[42] *Osawe* (n26) 755

[43] *Registered Trustees' Case* (n28)

[44] Section 5(2) of the Trade Unions Act provides that 'The Registrar shall cause a notice of the application to be published in the federal gazette stating the objection to the registration of the trade union in question may be submitted to him in writing during the period of three months beginning with the date of the gazette in which the notice is published'

[45] Underlined emphasis mine

[46] The judge may have been influenced by pronouncements from some of these following conferences: Developing Human Rights Jurisprudence.
Second Judicial Colloquium on the Domestic Application of International Human Rights Norms; Harare, Zimbabwe, 19-22, April 1989.
Third Judicial Colloquium on the Domestic Application of International Human Rights Norms: Banjul, the Gambian 7-9 November 1990.
Fourth Judicial Colloquium on the Domestic Application of International Human Rights Norms: Abuja, Nigeria 9-11 December 1991.
Fifth Judicial Colloquium on the Domestic Application of International Human Rights Norms: Balliol College, Oxford, UK, 21-23 September 1992.

jurisprudence into their own legal thinking as judges cannot afford to be parochial in this age of globalization as the world is now characterized by justice without borders."[47]

The reasoning of the judge shows that he was more interested in an interpretation that advances the law than merely applying the rule of precedent. Most lawyers expect the reasoning for which a judge give a decision to be warranted by the law as it is, that is a sufficiently legal warrant exists to justify a legal decision.[48] While this may be so in most of the cases, it is important to note that there are some cases in which some judges will rather follow an interpretation Dworkin calls "make an object the best it can be"[49] than following precedent that may not introduce progressive change. And the High Court judge demonstrated this by not following the decision of the Supreme Court in *Osawe.*[50]

Even though the decision of the High Court judge was reversed by the Court of Appeal and the Supreme Court, it may have been influenced by democracy and legislations such as the African Charter on Human Rights that have been domesticated which guarantees the individual's rights.

Having distinguished *Osawe* the High Court judge relied on *INEC (*this was a Supreme Court decision). Perhaps, the reason why the High Court judge followed *INEC* was the liberal interpretation of section 40 of the Constitution relating to freedom of association. The liberal interpretation enabled the widening of the political space through the eventual registration of 54 political parties. It also offered an alternative platform for politicians who could not fit into existing parties or associations to pitch tents with other parties or form new ones.[51]
It may be worthwhile to state the facts of *INEC.* In this case, the plaintiffs (now respondents) each applied to the Independent National Electoral Commission (INEC) for registration as a political party. On the 17th day of May 2002, INEC released guidelines for the registration of political parties. Being of the view that the guidelines were inconsistent with the provisions of

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[47]Claire L' Heureux-Dube´, retired Justice of the Supreme Court of Canada "Connecting International and National Justice": The 1st West African Judicial Colloquium, Dakar, Senegal. January 2006. <http://www.brandeis.edu/globalbrandeis/documents/WAfricacolloq.pdf> accessed 20th March, 2012.
[48] Neil MacCormick, *Legal Reasoning and Legal Theory*, (OUP 1978) 107
[49] Dworkin (n1) 53
[50] O*sawe* (n26)
[51]Tahir Mamman and Chibueze Okorie'Nurturing Constitutionalism through the Courts: Constitutional Adjudication and Democracy in Nigeria'<http://www.jalsnet.org/meetings/consist/papers/Mamman_&Okorie(Nigeria).pdf.> accessed on 16th of March, 2012.

the Constitution relating to the registration of political parties and that they should not be made to comply with the guidelines, the plaintiffs commenced the proceedings from which this appeal arose whereby they sought among other things declarations of invalidity of those impugned guidelines and also section 74 of the Electoral Act.[52]

One of the provisions that came up for interpretation was section 40 of the Constitution[53] and an issue that arose is the extent to which the National Assembly could legislate to regulate political parties or by legislation authorise INEC so to do. The trial judge Adah J. (as he then was) did not grant most of the reliefs sought by the appellant. The Court of Appeal held that all except one of the impugned provisions of the Electoral Act[54] and of the guidelines released by INEC were unconstitutional. It further held that even though the National Assembly is empowered by section 228 of the Constitution[55] to make laws regarding an association seeking to be registered as a political party, it has no power to make any law outside the items listed in section 222 and perhaps section 223 of the Constitution[56]

On appeal to the Supreme Court, it held that large number of political parties will provide the citizens with the opportunity of participating in politics and governance and that unnecessary restriction of political parties will suppress their growth and finally weaken the democratic culture. It held further that any attempt to regulate political parties not by the Constitution itself or by its authority is invalid.[57]

It is important to state that the 'regulation' under section 222 of the Constitution has to do with what an intending political party has to provide for it to function. For example, it has to provide names and addresses of its national offices, every citizen of Nigeria can become a

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[52] Electoral Act, 2001

[53] Section 40 of the 1999 Constitution provides that '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 other association for the protection of his interests...'

[54] Electoral Act

[55] This section empowers the National Assembly to make laws in relation to political parties.

[56] Section 222 provides for constitutional requirements for functioning of political parties , e.g. political parties are required to provide names and addresses of their national officers, register their constitutions , symbols and logos , their names should not contain ethnic or religious connotation, their headquarters should be situated in the federal capital territory Abuja and membership should be opened to every Nigerian etc. Section 223 provides that political parties should conduct regular elections, and members of their executive committees are to reflect federal character.

[57] The only constitutional regulations are contained in sections 222 and 223. See footnote 55

member, it should have a constitution registered with INEC, its name and logo should not bear ethnic or religious connotation, its headquarters must be situated in the federal capital territory, Abuja.[58] These 'regulations' do not hinder the right to register a political party under section 40 of the Constitution since all that is stipulated under section 222 is that to make a political party to function. The effect of this decision is that Nigeria now has 54 registered political parties as at the 2011 elections[59] and as the decision stands today, once a person or group of persons comply with section 222 of the Constitution, the Independent National Election Commission (INEC) is bound to recognize it as a political party. The interpretation given to section 40 of the Constitution by the Supreme Court in *INEC* is more liberal than the interpretation of the same provision in the *Registered Trustees* case[60] and the *Osawe* case.[61]

With respect to the Justices of the Supreme Court, why should they give two different interpretations to section 40 of the Constitution- one in the *Registered Trustees Case*[62] and the other in *INEC?*

The High Court judge was right to have relied on *INEC* for the law is that where there are two conflicting decisions of a higher court, the lower court is free to choose which of the decisions to be followed.[63] The reason which the Supreme Court proffered for not following *INEC* in the *Registered Trustee's Case*[64] was that the former relates to political parties but it is important to note that the right to freedom of association under section 40 of the Constitution cover both trade unions and political parties.

It can be said that the High Court judge employed an interpretation that Dworkin calls "making an object the best it can be".[65] This also implies purposive interpretation. This is borne out of the judge's desire to interpret the law by looking beyond relevant legislations to include a new perspective rather than following the rule of precedent literally. The High Court

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[58] Constitution 1999 section 222
[59] Independent National Electoral Commission, <http://www.inecnigeria.org/politicalparties/> accessed on 22nd March, 2012
[60] *Registered Trustees* (n28)
[61] *Osawe* (n26)
[62] *Registered Trustees* (n28)
[63] *Adegoke Motors v Adesanya* (1988) 2NWLR Pt. 74, 108
[64] *Registered Trustees* (n28)
[65] Dworkin ,(n1) 53

judge may have been influenced by the fact that Nigeria has embraced democracy and ratified treaties like the African Charter and ILO Convention 87 and perhaps was of the view that the courts should enforce them. This type of interpretation advances the law, but where it is employed by a judge of a lower court the decision can sometimes be reversed by judges of a higher court as in the *Registered Trustees' Case*[66]where the High Court's decision was reversed by the Court of Appeal and confirmed by the Supreme Court. But this should not discourage a judge who is interested in moving the law forward.

6.3 Labour Court (NICN)

The analysis of the following decisions of the NICN is undertaken in order to further strengthen or support the argument that the reasoning and interpretations of a labour court lean more towards the enforcement of labour principles than the ordinary courts analysed above. The amendment of the Constitution in 2010 had the effect of empowering the NICN to the exclusion of any other court to enforce labour matters (including labour treaties that have been ratified). While this further enhanced the performance of the NICN, it is important to note that the decisions of the NICN had always leant in favour of the enforcement of labour rights even before exclusive jurisdiction was conferred on it in 2010. This is why the analysis will involve pre-2010 and post-2010 NICN decisions to demonstrate that a labour court is more suitable to enforce labour rights. The analysis of the case law herein seem to reveal that the judges of the NICN employ purposive interpretation which is also one of the reasons why the generality of their decisions reflect labour law/principles.

[66] *Registered Trustees'*(n28)

6.3.1 Pre-2010 NICN decisions:

6.3.1.1 Mix and Bake Flour Mill Industries Ltd v National Union of Food ,Beverage and Tobacco Employees (NUFBTE)[67]

The respondent union sought to unionize the appellant's workers, which it claimed, were eligible to be its members. All efforts in that direction were rebuffed by the appellant. In the course of the respondent's efforts at unionizing the appellant's workers, the appellant laid off some of its workers. As a result of the dispute, the respondent declared a trade dispute, which was referred to the Industrial Arbitration Panel. The Appellant was dissatisfied with the Panel's award and appealed to the NICN.

It held that by section 5(7) of the Trade Unions Act, notwithstanding anything contained in the Act (and this includes section 24(1)), all unions specified in the Third Schedule of the Act have automatic registration and recognition with full powers and duties of trade unions accorded to them. And that since the respondent union was listed as No.11 in both Parts A and B of the Third Schedule to the Trade Unions Act, it had automatic registration and recognition under the Act with all the incidents of a trade union accorded it. The NICN further held that compulsory recognition of trade unions and automatic deduction of check-off dues are the norms in the current labour law regime in the country. And that once a trade union indicates its willingness to unionize workers who are eligible to be its members, an employer is obliged to accord recognition and not pose obstacles in the way of such unionization. And that in refusing to accord recognition to the respondent to unionize eligible members in the appellant Company, an industrial dispute thereby arose which was properly brought before the Industrial Arbitration Panel and the NICN. Also, that the complaint that a good number of such eligible members were unlawfully terminated is one that the respondent could validly take as a trade dispute.

The NICN statement that: "compulsory recognition of trade unions and automatic deduction of check-off dues are the norms in *the current labour law regime* in the country" [my

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[67] *Mix and Bake Flour Mill Industries Ltd v National Union of Food ,Beverage and Tobacco Employees (NUFBTE)*, unreported Suit No: NIC/4/2000, lead judgment delivered 2nd April 2004 by Justice B.A. Adejumo, http://judgment.nicn.gov.ng/ accessed 7th November 2013

emphasis] seems to suggest that it considered not only the relevant legislation (sections 5 and 24 of the Trade Union Act) but also other labour legislations.

6.3.1.2 Bemil Group Limited, Ikeja, Lagos v National Union of Hotels and Personal Services Workers[68]

The facts were that the appellant refused and prevented the respondent union from organizing their members in the appellant's employment particularly those posted as security guards to the American Embassy owing to the diplomatic status of the embassy. The appellant argued that the embassy enjoys diplomatic immunity and so is not always subject to certain rules and regulations of the country of abode and urged the court to apply the same privileges or immunity on this issue. The respondents relied on the automatic recognition of trade unions contained in sections 5(7) and 24 of the Trade Unions Act 1990 and section 8 of Trade Unions (Amendment) Act No. 1 of 1999, and submitted that the employees of the appellant including those posted to the American Embassy are eligible and deemed automatic members of the respondent union.

The court found that the appellant Bemil Group had a contract with the American Embassy to provide security guards for the protection of the embassy. And these security guards posted to the embassy can be recalled or changed and that they remain employees of Bemil Group and were not employees of the American Embassy. The court held that their right to be unionized arose by virtue of their being employees of the Bemil Group, and not the American Embassy. As the respondent had argued, the labour law of the country (Nigeria) grants compulsory recognition, and this must apply to the employees of Bemil without any exception. It further held that eligible members of the respondent union who are posted to work at the American Embassy have the right to be treated as members of the respondent union subject only to the limitation that they will not engage in any union activity while at their duty post at the Embassy. The decision of the court reflects the labour law principle that casual workers can unionize.

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[68] *Bemil Group Limited, Ikeja, Lagos v National Union of Hotels and Personal Services Workers,* unreported Suit No:NIC/13/2006, lead judgment delivered 23rd January 2008 by Justice B.A. Adejumo http://judgment.nicn.gov.ng accessed 7th November 2013

6.3.2 Post-2010 NICN Decisions:

6.3.2.1 Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta.[69]

The facts have been previously stated.[70] The NICN held that:

> …no employer is permitted to interfere, no matter how minutely it may be, in the internal running and management of a trade union… This statement of principle accords with Section 40 of the 1999 Constitution, as amended, and the International Labour organisation (ILO) jurisprudence regarding the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), which establishes the right of workers' and employers', organisations "to organise their administration and activities and to formulate their programmes", (Article 3) and recognises the aims of such organisations as 'furthering and defending the interests of workers and employers' (Article 10). This freedom entails a number of principles, which have been laid down over time and which (according to the trio of B. Gernigon, A. Odero and H. Guido – 'Freedom of Association' in International Labour Standards: A Global Approach, 75th anniversary of the Committee of Experts on the Application of Conventions and Recommendations, First Edition 2002 at pp. 27 – 40)…[71]

The use of purposive interpretation is manifested by the judge not only relying on section 40 of the Constitution (on freedom of association) but the content of it as set out in ILO Convention 87 and even the work of labour law scholars – B. Gernigon, A. Odero and H. Guido – on the principles of freedom of association. The judge has interpreted freedom of association – as protected in the Nigerian Constitution – as a fundamental human right, and

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[69] *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor University of Agriculture, Abeokuta*, unreported suit No. NIC/LA/15/2011 <http://judgment.nicn.gov.ng> accessed 6th January, 2015

[70] See section 2.2

[71] *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta* (n69)

has had reference to international human rights standards to interpret the extent of the protection.

6.3.2.2 *Nest Oil Plc. v National Union of Petroleum and Natural Gas Workers*.[72]

In this case, the plaintiff employer instituted an action in court to investigate whether the defendant union was the appropriate union to unionise its staff. The NICN confirmed its previous decision in *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta*. Relying again on section 40 of the Constitution and ILO Convention 87, it held that an employer has no right whatsoever to interfere in union matters. It further held that the plaintiff has no *locus standi,* and it is a 'busy body' regarding the question whether the defendant is the appropriate union to unionize its staff.[73]

It will appear that the NICN has now moved away from *Registered Trustees* (decided before exclusive jurisdiction was conferred on the NICN) as the following decision seems to show this.

6.3.2.3 Senior Staff Association of Universities Teaching Hospitals, Research Institutes and Associated Institutions (SSAUTHRIAI) v Academic Staff Union of Research Institutions and Others.[74]

This was a 2011 decision and the facts were that the first defendant was a newly registered trade union. Prior to the registration of the first defendant as a trade union, the plaintiff (SSAUTHRIAI) had been the only trade union to which the members of the first defendant belonged, having their interests and rights protected as senior members and staff of research institutes. When the plaintiff discovered that the first defendant had been registered as a trade union, it protested the said action as being contrary to the provisions of the Trade Unions Act.

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[72]*Nestoil Plc. v National Union of Petroleum and National Gas Workers*, nreported Suit No NIC/LA/08/2010, Judgment delivered 8th March 2012 by Justice B. B. Kanyip. Also http://judgment.nicn.gov.ng/ accessed 8th November, 2013.
[73]*Nestoil Plc* (n72)
[74] *Senior Staff Association of Universities Teaching Hospitals, Research Institutes and Associated Institutions (SSAUTHRIAI) v Academic Staff Union of Research Institutions and Others*, Unreported Suit No: NIC/34/2008 judgment delivered on 10th march, 2011, by Justice B. B. Kanyip. Also in http://judgment.nicn.gov.ng/ accessed 7th February, 2014

It is on this ground that the plaintiff instituted the action to challenge the registration, asking the court to declare it illegal and to cancel same.

The plaintiff argued that first defendant should not have been registered as a separate union since it (the plaintiff) had always unionized and protected the interests of the members of the first defendant. In making this argument it relied on *Registered Trustees*, where the Supreme Court held that:

> In the instant case ...the 1st appellant had all along been catered for by a wider and encompassing body, which is the 1st respondent. After an investigation there was no way the 1st appellant would have been registered in the circumstances. Besides the law is not such that registration is automatic. It is at the discretion of the Registrar after he would have made his investigations and become satisfied.[75]

Deviating from the *Registered Trustees* case, the NICN held that:

> This decision [*Registered Trustees*] does not say that the Registrar of Trade Unions cannot register new unions. In fact it acknowledges that registration of a new trade union by the Registrar of trade unions is at his discretion after he has made his investigations and is satisfied as to the necessity of registering a new trade union ...even when section 3 (2) ...provides that 'no combination of workers or employers shall be registered as a trade union save with the approval of the Minister on his being satisfied that it is expedient to register the union either by regrouping existing trade unions, registering a new trade union or otherwise howsoever, but no trade union shall be registered to represent workers or employers in a place where there already exists a trade union', it must be appreciated if the Minister of labour thinks it expedient, then the new trade union may be registered. The 2nd and 3rd defendants have indicated to us that it was expedient to register the 1st

[75] *Registered Trustees* (n28) 575 , 610-611, lead judgment delivered by Mukhtar JSC

> defendant and that the jurisdictional scope of the claimant (plaintiff) does not cover the 1st defendant, a fact we agree with.[76]

In this judgment, the NICN relied on the Minister of Labour & Productivity's power of discretion to register a new trade union contained in section 3(2) of the Trade Union Act to deviate from the *Registered Trustees* case. It is important to note also that the *SSAUTHRIAI* decision was in 2011 by the NICN (that is after the constitutional amendment conferring exclusive jurisdiction on it). No reason was proffered by the learned judge for this deviation other than the *Registered Trustees* case 'acknowledges that the registration of a new trade union by the Registrar of trade union is at his discretion'.[77] It is likely that the 2010 constitutional amendment may possibly have influenced this decision; though that was not expressly stated in the judgment. Another possible explanation for the decision is a desire by the court to enforce right to form trade unions guaranteed by the Constitution. Since NICN decisions are not appealable,[78] it is likely that the *SSAUTHRIAI'S* decision is the current position.

6.4 Analysis of the decisions of both the ordinary court (Supreme Court) and the labour court (NICN*)*

In considering the same labour legislation (section 40 of the Constitution on freedom of association), it was observed that while the ordinary court both in *Osawe* and *Registered Trustees* declined to enforce the labour right therein (freedom of association), the labour court (NICN) enforced it in the following cases: *Senior Staff Association of Universities Teaching Hospitals, Research Institutes and Associated Institutions (SSAUTHRIAI); Non-Academic Staff Union of Educational and Associated Institutions (NASU)* and *Nest Oil Plc.* From this, we can conclude that it may not be sufficient to accord labour rights legal or constitutional

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[76]*Senior Staff Association of Universities Teaching Hospital, Research Institutes and Associated Institutions* (SSAUTHRIAI) (n74)

[77]*Senior Staff Association of Universities Teaching Hospitals, Research Institutes and Associated Institutions (SSAUTHRIAI)* (n74)

[78]Generally an appeal will not lie from the decision of the National Industrial Court except: (1) on questions of fundamental human rights (contained in chapter IV of the Constitution) as it relates to labour matters, see section 243(2) of the Constitution. (2) as prescribed by an Act of the National Assembly, see section 243(3) of the Constitution,(3) on criminal causes and matters arising from labour matters ,see section254C(5) of the Constitution.The implication is that since currently there is no Act of the National Assembly prescribing appeals from National Industrial Court decisions all civil causes relating to labour matters end at the National Industrial Court except questions of fundamental human rights arising from labour matters.

protection as human rights. In addition, a labour court should be in place to enforce the right guaranteed.

The interpretation of the ordinary court is restrictive when compared to the labour court (NICN). For instance, in the interpretation of section 3(2) and section 5(4) of the Trade Union Act regarding registration of a new trade union by both the ordinary court and labour court (NICN), the Supreme Court (ordinary court) in the *Registered Trustees* held that:

> In the instant case ...the 1st appellant had all along been catered for by a wider and encompassing body, which is the 1st respondent. After an investigation there was no way the 1st appellant would have been registered in the circumstances. Besides the law is not such that registration is automatic. It is at the discretion of the Registrar after he would have made his investigations and become satisfied.[79]

In contrast, the NICN (labour court) in *SSAUTHRIAI* held that:

> ...even when section 3 (2) ...provides that 'no combination of workers or employers shall be registered as a trade union save with the approval of the Minister on his being satisfied that it is expedient to register the union either by regrouping existing trade unions, registering a new trade union or otherwise howsoever, but no trade union shall be registered to represent workers or employers in a place where there already exists a trade union', it must be appreciated if the Minister of labour thinks it expedient, then the new trade union may be registered. The 2nd and 3rd defendants have indicated to us that it was expedient to register the 1st defendant and that the jurisdictional scope of the claimant (plaintiff) does not cover the 1st defendant, a fact we agree with.[80]

While a restrictive interpretation adopted by the Supreme Court (ordinary court) herein refused an application for the registration of a proposed trade union, a favourable interpretation by the NICN (labour court) led to the registration of a new trade union. Again

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[79] *Registered Trustees* (n28) 575, 610-611 lead judgment delivered by Mukhtar JSC

[80] *Senior Staff Association of Universities Teaching Hospital, Research Institutes and Associated Institutions* (*SSAUTHRIAI*) (n74)

this supports the argument that the interpretations of a labour court favour the enforcement of labour rights and thus better suited to enforce labour principles than the ordinary court.
In the first section of this part of the chapter, we saw that Dworkin used the terms "best interpretation", "creative interpretation" and "constructive interpretation" interchangeably. It will appear that the term that binds these terms together is "purposive rule of interpretation"- one which a judge is expected to look beyond the letters of a statute into the purpose or intention of the law. Relating this to the interpretations of the judges (ordinary courts and labour court), it seems that an interpretation with the purpose for which a statute is made will likely produce the best interpretation only for that area of the law and not necessarily best or good for another area of the law which have another statute and thus another purpose governing it.

For instance, in interpreting a statute intended to give effect to a common law concept and a labour statute, if a purposive interpretation is applied to the first statute, it will produce a best interpretation with reference to the common law and thus confirm common law principles. The same reasoning applies to a labour statute, for a purposive interpretation will also produce the best interpretation for labour principles and labour law. The implication is that once an interpretation does not follow the purpose for which a labour statute is made, most likely it will not be the best interpretation for labour principles and labour law. That was why the interpretations of the judges of the ordinary court (Supreme Court) which did not follow the purpose for which labour statutes were made were never best for labour law and labour principles. Although a few judges of the lower court (High Court and Court of Appeal) made some interpretations which reflected labour concepts and labour law like the judges of the labour court their decisions on appeal were overruled by the Supreme Court (being the apex court in the hierarchy of courts).

The interpretations of the judges of the Supreme Court were not purposive and also did not consider the purposes for which labour laws were made hence their judgments were at variance with the interpretations and judgment of the labour court whose interpretations go beyond labour statutes and principles to also include the purposes for labour statutes. Although the underlying purposes for which labour statutes are made are usually not expressly stated in labour statutes, labour judges and scholars understand the underlying purposes to include:

(i) "to promote industrial harmony and peace between employers and employees, in the work place, government being cognizance of the fact that dispute between them is capable of undermining economic stability of a country"[81]

(ii) …labour law was distinguished...by its collective character, its umbilical cord to the social facts. It must deal in categories of collective negotiation rather than of contract… In the enforcement of the laws,(labour laws) the aim must always be the search for acceptable, collective compromises… [82]

(iii) the main object of labour law has always been… to be a countervailing force to counteract the inequality of bargaining power which is inherent… in the employment relationship'[83]… 'the principal purpose of labour law, then, is to regulate, to support, and to restrain the power of management and the power of organised labour.[84]

(iv) …a wider realisation that the common law is by itself unable significantly to support new forms of modern social relationship. In particular, though, the labour lawyer's attitude is frequently a reaction to the restriction, nullification or evasion of purposive legislation by the application of inappropriate concepts or doctrines, so often based upon the "contract of service.[85]

(v) … rapid fragmentation of the labour market, especially by the growth of myriad, so-called "a-typical" or "marginal" relationships between workers and those for whom they produce value-the worker part-time, casual, temporary, lump labour, home worker, outworker, or the subcontractor, let alone the trainee or the police cadet who are… left unprotected... common law concepts restrict labour law.[86]

(vi) "…the erosion of workers' rights by common law orientations in meaning and interpretation (sometimes by the very adoption in the statute itself of common law terms) is now notorious…"[87]

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[81] Adejumo B.A, "The Role of the Judiciary in Industrial Harmony"
(being a Paper delivered at the All Nigeria Judges Conference organized by the National Judicial Institute at Ladi Kwali Hall of the Abuja Sheraton Hotel and Towers Abuja FCT on 5th-9th November 2007)
It is important to note that Adejumo B.A is the President of the National Industrial Court of Nigeria
nicn.gov.ng/ spdf accessed 23rd June 2015

[82] K. W .Wedderburn, 'Labour Law: From Here to Autonomy?' *Industrial law Journal* (1987) 16 (1) 1, 3

[83] Otto Kahn-Freund, 'Labour and the Law, (Stevens and Sons London 1972) 1, 8

[84] Kahn-Freund,'Labour and the Law, (n83) 1, 5

[85] Wedderburn, 'Labour Law: From Here to Autonomy?'(n82) 1, 5

[86] Wedderburn, "Labour Law: From Here to Autonomy?' (n82) 1, 6

[87] Wedderburn, 'Labour Law: From Here to Autonomy?' (n82) 1, 7

Since it is most likely that judges of the labour court know the purposes for which labour statutes are made and also the purpose for which the labour court was established (which is to hear labour matters) then in their interpretation of labour statutes using the purposive rule of interpretation their decisions reflect labour principles and thus produce the best interpretation for labour law than the ordinary court (Supreme Court) which appears not to consider the purposes of labour law in their interpretations.

6.5 Conclusion

This chapter examined the constitutional protection of freedom of association, particularly as a labour right. Building on the arguments contained in previous chapters, it argued that in the interpretation of freedom of association, the type of reasoning adopted by the labour court (NICN) makes it more open to enforcing labour rights/principles, than the ordinary courts.

In order to show that the reasoning and interpretations of the labour court (NICN) make it more open to enforcing labour rights/principles than the ordinary courts, the relevant case law of the NICN and the ordinary courts were critically analyzed. And Dworkin's explanation of "purposive interpretation" was used as a framework since the interpretations and reasoning of the labour court appears to be purposive. The results of the analysis showed that: firstly, in considering the same labour legislation (section 40 of the Constitution on freedom of association) it was observed that while the the labour court (NICN) enforced it in the following cases: *Senior Staff Association of Universities Teaching Hospitals, Research Institutes and Associated Institutions (SSAUTHRIAI); Non-Academic Staff Union of Educational and Associated Institutions (NASU)* and *Nest Oil Plc,* ordinary court both in *Osawe* and *Registered Trustees* declined to enforce it. And by this it was confirmed that guaranteeing labour right as human right in a legislation is not sufficient a labour court should be in place to enforce the right guaranteed.

Secondly, the interpretations of the labour court (NICN) go beyond labour statutes to consider also the underlying purposes of labour law. The ordinary court appears not to have this consideration, hence their interpretations were restrictive and do not reflect labour law/principles. Thus the results of the analysis confirmed the central argument of the thesis that a specialised labour court is better suited in the enforcement of workers' rights (in this case freedom of association) than the ordinary court.

Chapter 7
Implementation of freedom of association: Alternative Dispute Resolution (ADR) Procedures

7.0 Introduction

As an alternative to the resolution of labour disputes by the courts workers, can also have recourse to Alternative Dispute Resolution (ADR) procedures, where the settlement of labour disputes is referred to mediation, conciliation or arbitration.[1] ADR has been said to present the parties with several benefits including: saving the cost of litigation, avoiding the time, irritation, and emotion of a trial in the court, affording the parties immediate use of money, allowing the payor to avoid the possibility of a larger verdict, eliminating all uncertainties about the final outcome of a trial,[2] procedural and substantive flexibility.[3]

Acknowledging these potential benefits, I wish to argue nonetheless that ADR may afford employers the opportunity to deny workers their fundamental human rights. This is because of the "the inequality of bargaining power which is inherent … in the employment relationship",[4] and which is exacerbated in this era of globalisation. Building on the arguments made in previous chapters, I suggest here that the NICN's interpretations of labour law, principles and judgments may be better than ADR settlements in protecting workers' fundamental human rights and checkmating the powers of employers in relation to workers' rights. This suggestion is supported in two ways. Firstly, by an anlysis of judgments of the NICN in which the Court has protected workers' rights. Secondly, by the NICN's consistency in following its previous decisions in enforcing workers' human rights. This is not to say that the NICN has enforced all the rights that workers are entitled to (for instance the right to strike is interpreted restrictively) but rather to make a comparison between NICN's decisions

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[1] ILO: Meetings of the European Labour Court Judges, http://www.ilo.org/ifpdial/events/meetings/lang--en/index.htm, accessed 28th January 2016

[2] H. Lee Sarokin, "Justice Rushed is Justice Ruined" (1985-1986) 38 Rutgers Law Review 431-433 see also Monica L. Warmbrod, " Could an Attorney Face Disciplinary Actions or even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?" (1996-1997) 27 Cumberland Law Review 794

[3] Thomas **0.** Main, "Adr : The New Equity" (2005-2006) 74 University of Cincinnati Law Review 354-366

[4] Otto Kahn-Freund, *Labour and the Law*, (Paul Davies and Mark Freedland eds, Stevens and Sons Third edn 1983) 1,18 The "inequality of the bargaining power" is manifested thus: on the side of the employer he owns and controls the factors of production such as money, land and the business while the worker has only his labour to give and also has rights protected by law.

and ADR settlements. It is important to note that unlike in the NICN, there are no no rules that guide who should get what or protect workers' rights in ADR settlements, and no provision for consistency (that is precedents which can guide future matters in ADR settlements), so that the party who has a higher bargaining power (usually the employer) can "manipulate" or influence the terms of the settlement to make the weaker party (usually workers) to either abandon or compromise their rights.

Although the reports of ADR settlements (including NICN ADR Centre settlements) are not available (as far as I can discover) to make this argument, I rely on the NICN's interpretations and prompt applications of the law in instances of violation of workers' rights leading to the enforcements of those rights.

The Chapter is divided into the following parts. Part I explores the concept of ADR. Some forms of ADR in Nigerian labour law are examined in Part II. Part III examines the NICN on ADR and Part IV inquires whether ADR settlements can be enforced and Part V analyzes some decisions of the NICN to support the argument that the resolution of labour disputes through the court (NICN) may likely protect workers' fundamental human rights more than ADR settlements.

7.1 What is Alternative Dispute Resolution?

ADR has no generally accepted abstract or theoretical definition,[5] but it is regarded as a set of practices and techniques that aim to permit legal disputes to be resolved outside the courts for the benefit of all disputants; or to prevent legal disputes that would otherwise likely be brought to the courts.[6] It has also been described as "a collection of techniques to take disputes out of court and settle them more quickly and economically…"[7] or methods and

[5] Jethro K. Lieberman and James F. Henry, " Lessons from the Alternative Dispute Movement" (1986) 53 University of Chicago Law Review 425-426
[6] Jethro K. Lieberman and James F. Henry, (n5) 425-426
[7] Frank EA. Sander & Stephen B. Goldberg, "Making the Right Choice," (1993) 79 American Bar Association Journal 66

procedures used in resolving disputes either as alternatives to the traditional dispute resolution mechanism of the court or in some cases supplementary to such mechanisms.[8]

Two conceptual methods in which ADR procedures can be characterized have been put forward.[9] The first conceptual method is to characterise ADR as "rights based" or "interests based".[10] For example, interest based negotiations are negotiations which focus on the underlying needs and requirements of the parties, whatever form they may take. Thus, wage negotiations are regularly resolved by staging a wage increase over the life of a contract or by linking an increase to a particular cost-of-living formula.[11] These outcomes seek to capture the employer's interest in containing costs and the employees' interest in obtaining fair compensation. The aim of interest based negotiations is to uncover, understand and explore the underlying interests of all necessary parties, in contrast to their stated positions and asserted rights. While positions or rights usually conflict, the underlying interests of parties often overlap in material ways. In contrast, it is said that rights based negotiations focus primarily on the legal rights of the parties.[12] The parties attempt to anticipate the outcome in court, and the dispute is approached using that prediction as a benchmark. Settlement may be facilitated by obtaining a neutral party's opinion as to the relative merits of the parties and positions in order to better predict the outcome if the case went to trial.[13] Sometimes what is required to settle a lawsuit may have less to do with a vindication of abstract legal rights and more to do with the underlying practical needs and interests of the party bringing the lawsuit.[14]

A second conceptual framework analyses alternative dispute resolution processes across a "spectrum of intervention", with the different procedures arranged, for example, in descending order of the degree of influence and control which the parties to the dispute exercise over the final resolution. For example, the parties have the greatest control when the

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[8] Eunice Oddiri, "Alternative Dispute Resolution" in a Paper presented at the Annual Delegates Conference of the Nigerian Bar Association, from 22nd -27th August 2004 at Le Meridien Hotel Abuja Nigeria. http://www.nigerianlawguru.com/articles/arbitration/ ALTERNATIVE%20DISPUTE%20RESOLUTION.htm accessed 2nd February 2016

[9] George W. Adams and Naomi L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time for Change" (1995) 17 (2) Advocates' Quarterly, 135-136

[10] George W. Adams and Naomi L. Bussin, (n9) 135-136

[11] George W. Adams and Naomi L. Bussin, (n9) 135-136

[12] George W. Adams and Naomi L. Bussin, (n9) 135-136

[13] George W. Adams and Naomi L. Bussin, (n9) 135-136

[14] George W. Adams and Naomi L. Bussin, (9) 135-136

dispute is resolved by the parties themselves and the least control when the dispute is resolved **by** a third party in formal trial.[15]

Whichever way ADR may be characterized one important factor to the parties is the eagerness to settle quickly and this sometimes may influence parties to waive their legal rights or interests.

7 .2 Some forms of ADR Procedures in Nigerian Labour Law

I turn now to the various forms of ADR in Nigerian labour law. The most common ADR techniques used in Nigeria are: Mediation, Conciliation and Arbitration.

7.2.1 Mediation

Mediation is the intervention in a negotiation or a conflict of an acceptable, impartial and neutral third party who has limited or no authoritative decision-making power, but who assists parties to the dispute in voluntarily reaching a mutually acceptable settlement of issues in dispute.[16] In addition to addressing substantive issues, mediation may also strengthen or establish relationships of trust and respect between the parties, or terminate relationships in a manner that minimises costs and psychological harm.[17] Mediation is useful in highly polarised disputes where the parties have either been unable to initiate a productive dialogue, or where the parties have been talking and have reached a seemingly insurmountable impasse. A mediator makes primarily procedural suggestions regarding how the parties can reach agreement. Occasionally, a mediator may suggest some substantive option as a means of encouraging the parties to expand the range of possible resolution under consideration. He

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[15] George W. Adams and Naomi L. Bussin, (n9) 135-136

[16] Moore C,W, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass Publishers, San Francisco 1991) 15, see also:" Conciliation in Nigeria" http://www.babalakinandco.com/documents/ConciliationinNigeria.pdf accessed 5th February 2016

[17] Moore C,W, *The Mediation Process: Practical Strategies for Resolving Conflict* (n16) 15, see also:" Conciliation in Nigeria" (n16)

often works with parties individually; in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to resolution.[18]

The process is more informal than arbitration and entirely voluntary and the parties may withdraw at any time. Lawyers can take part in the mediation process but parties do not require legal representation in order to make use of this service.[19] Thus, the mediator is only actively involved in the negotiation process, he has no power to impose a settlement, rather he assists in shaping solutions to meet the parties' mutual interests and achieve reconciliation.[20]

The Trade Dispute Act provides for the appointment of a mediator and specifically states that if there exists agreed means for settlement of a dispute apart from the Act, (whether by virtue of the provisions of any agreement between organisations representing the interests of employers and organisation of workers or any other agreement), the parties to the dispute should first attempt to settle it by that means. And if the attempt to settle the dispute by such agreed means of settlement fails, the parties should within seven days of the failure (or, if no such means exists, within seven days of the date on which the dispute arises or is first apprehended) meet together by themselves or their representatives, under a mediator mutually agreed upon and appointed by or on behalf of the parties, with a view to the amicable settlement of the dispute.[21]

7.2.2 Conciliation

Conciliation is a process by which one or more independent person(s) is selected by the disputing parties to facilitate a settlement of their dispute through a particular procedure. Essentially, the role of the conciliator is facilitative.[22] It is also a technique of dispute

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[18] Moore C,W, *The Mediation Process: Practical Strategies for Resolving Conflict* (n17) 15, see also:" Conciliation in Nigeria" (n16)

[19] Security, Justice and Growth Programme Nigeria, Alternative Dispute Resolution: Multi Door Court houses http://www.sparc-nigeria.com/SJG1/ accessed 5th February 2016

[20] Bimbo Atilola and Michael Dugeri, "National Industrial Court of Nigeria and the Proposed Alternative Dispute Resolution Centre: A Road Map", http://www.nicn.gov.ng/publications/ARTICLE accessed 4th February 2016.

[21] Trade Dispute Act, section 4 (1) &(2)

[22] Bimbo Atilola and Michael Dugeri, (n20)

resolution wherein a third party or conciliator is used by the parties to help build positive relationships.[23]

A Conciliator can be appointed in the Trade Dispute Act either by the parties or the Minister of Labour and Productivity[24] for the purpose of effecting settlement of dispute. Conciliation is also recognised by the Arbitration and Conciliation Act.[25] Under the Act, the word 'conciliation' is not defined. The Act merely provides that the parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation.[26]

7.2.2.1 Conciliation and Mediation: Similarities and Differences

Conciliation and mediation are similar in that the dispute is resolved by consensus and is entirely a decision of the parties and not of the third party, i.e. the conciliator or mediator. In both cases, the parties appoint a neutral person. For example, section 4 of the Trade Dispute Act provides for the appointment of a mediator jointly by the employer and the workers for the settlement of a trade dispute. Section 6 of the same Act provides for the appointment of a conciliator by the Minister of Labour where the mediator fails.

The usual distinction between the two is that in conciliation all that the conciliator does is to explore the opportunity for settlement. He is not an adviser to the parties, who should turn to their lawyers and experts for advice. He merely provides the environment for negotiation. He may assist the parties by helping to establish communication, clarifying mis-perceptions, dealing with strong emotions, and building the trust necessary for cooperative problem solving. Some of the techniques used in conciliation include providing for a neutral meeting place, carrying initial messages between or among the parties, and affirming the parties' abilities to work together.[27] Mediation in its normal form on the other hand, demands that the mediator be more leading in that he may make recommendations for the consideration of the parties. His role is to persuade the parties to focus on their underlying interests and concerns

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[23] "Conciliation in Nigeria" http://www.babalakinandco.com/documents/ ConciliationinNigeria.pdf accessed 5th February 2016

[24] Trade Dispute Act, section 8

[25] Arbitration and Conciliation Act , Cap 19 Laws of the Federation of Nigeria 1990, sections 37-42, and the Third Schedule

[26] Arbitration and Conciliation Act , Cap 19 Laws of the Federation of Nigeria 1990, section 37

[27] Orojo, C.O. and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, (Mbeyi and Associates. Lagos) see also Conciliation in Nigeria" http://www.babalakinandco.com/documents/ ConciliationinNigeria.pdf accessed 5th February 2016

and move away from fixed positions that often cloud the real issues. His function is to act as a facilitator or broker[28]

7.2.3 Arbitration

Arbitration is a formalised setting where participants present legal arguments and evidence to an appointed arbitrator who will arrive at a binding decision, termed an „award", the entire proceedings, including the award, are confidential.[29]

Arbitration is a much more formalised method of ADR. In order to make use of arbitration there will almost always be an arbitration clause within a contract that both parties would have agreed to. The process for selecting an arbitrator is usually specified within such a contract for example, someone nominated by the Chartered Institute of Arbitrators, which is an organisation founded in London that has chapters and branches all over the world, including one in Lagos Nigeria.[30]

Arbitration also follows a set procedure which is more court-like in its process both prior to and during the arbitration itself. Full legal arguments are presented and the proceedings can be fully recorded and transcribed. Parties must follow the rulings of the Arbitrator including any award set by him or her. Arbitration is particularly well-suited to commercial disputes, as, unlike court proceedings which are open to the public, all arbitrations are conducted in private and the terms of settlement will remain confidential.[31] Arbitration can also put parties in the position that they would have been had things gone according to plan.[32]

The Arbitration and Conciliation Act 1990[33] which applies to both domestic and international arbitrations, regulates arbitration proceedings in Nigeria. It is important to note that the

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[28] Conciliation in Nigeria" (n16)
[29] Security, Justice and Growth Programme Nigeria, Alternative Dispute Resolution: Multi Door Court houses (n19)
[30] Security, Justice and Growth Programme Nigeria, Alternative Dispute Resolution: Multi Door Court houses (n19)
[31] Security, Justice and Growth Programme Nigeria, Alternative Dispute Resolution: Multi Door Court houses (n19)
[32] Security, Justice and Growth Programme Nigeria, Alternative Dispute Resolution: Multi Door Court houses (n19)
[33] Arbitration and Conciliation Act Cap 19, Laws of the Federation of Nigeria 1990

Arbitration and Conciliation Act, distinguishes between domestic and international arbitration.[34] The major differences are: (1) The Arbitration Rules in the Schedule to the Act are mandatory for domestic arbitrations, while in international arbitrations, parties have the right to select the arbitration rules to apply; (2) For domestic arbitrations, the court is the appointing authority in case of default while the Secretary General of the Permanent Court of Arbitration at The Hague is the appointing authority where the parties did not indicate an appointing authority in their arbitration agreement. (3) Domestic arbitration awards may only be set aside on the grounds that the arbitrator exceeded his jurisdiction, or there was misconduct by the arbitrator, or there was improper procurement of the proceedings or the award; international arbitration awards on the other hand may only be set aside on grounds similar to those in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (also known as the New York Convention).[35]

International treaties applicable to arbitration include: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958[36] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[37]

While parties are entitled to make arrangements for settlement of their disputes through the various forms of ADR, the NICN can also encourage settlement outside the court (NICN) through its ADR Centre.

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[34] Olufunke Adekoya and David Emagun, "International Bar Association Arbitration Guide: Nigeria" file://cfsj06.campus.gla.ac.uk/SSD_Home_Data_L/1011058E/My%20Documents/Downloads/IntlArbGuide_-_Nigeria.pdf accessed 5th February 2016

[35] Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 1958 (also known as the "New York Convention") http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf accessed 10th February 2016 , It is important to note that Nigeria ratified this Treaty on the 17th of March 1970. See also Olufunke Adekoya and David Emagun, "International Bar Association Arbitration Guide: Nigeria" file://cfsj06.campus.gla.ac.uk/SSD_Home_Data_L/1011058E/My%20Documents/ Downloads/IntlArbGuide_-_Nigeria.pdf accessed 5th February 2016

[36] Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 1958 (also known as the "New York Convention") (n35)

[37] Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington 1965 Nigeria ratified this Treaty on 23rd August 1965 https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc en-archive/ICSID_English.pdf , accessed 10th February 2016 . See also Olufunke Adekoya and David Emagun, "International Bar Association Arbitration Guide: Nigeria" (n35)

7.3 The NICN on ADR

The Constitution provides that the NICN may establish an ADR Centre within the court (NICN) premises on matters which jurisdiction is conferred on the court (NICN) by the Constitution or any Act or Law.[38] Also the NICN ACT 2006 also provides that the court (NICN) may promote reconciliation among the parties to a dispute and encourage and facilitate amicable settlement.[39]

Pursuant to the foregoing, the NICN has now established[40] an ADR Centre within its premises to resolve certain disputes arising from labour, employment, industrial relations, workplace, etc, between parties using the process of mediation and/or conciliation. The Centre uses mediation and/or conciliation technique(s) to assist parties resolve their dispute and arrive at mutually acceptable agreement.[41]

The ADR in the NICN ADR Centre is regulated by two Rules which guide the ADR procedures at the Centre.[42] It is important to note that the Centre does not accept matters by parties who did not have their case formally filed in the NICN. This makes the Centre truly Court-Connected ADR Centre. By the combined effects of Article 4(4)(a)-(c) of the National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Centre Instrument, 2015 and Order 3 Rules 1-3 of the Industrial Court of Nigeria Alternative National Dispute Resolution (ADR) Centre Rules 2015 matters can only be initiated in the Centre through – the parties or referral by the discretion of the President of the Court or Judge handling the matter. Either of the parties in a dispute can upon filing the action in the NICN apply to the President of the NICN for the matter to be resolved through ADR. Both parties can upon joining issues in the action mutually opt to use the ADR process, in which case the Judge of the Court seised of the matter shall refer the matter to the Centre. By Article 4(6) (c) of the National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Centre Instrument, even a single issue can be referred without the entire matter, thereby

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[38] Constitution (as amended by the 3rd Alteration Act, 2010) in section 254 C (3)
[39] National Industrial Court Act 2006, section 20
[40] The NICN ADR Centre was established on the 18th of December 2015
[41] National Industrial Court of Nigeria, "About the NICN ADR Centre" http://nicn.gov.ng/adr/about-us.php accessed 9th February 2016
[42] Industrial Court of Nigeria Alternative National Dispute Resolution (ADR) Centre Rules 2015 and National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Centre Instrument, 2015

encouraging frankly resolution of dispute in bifurcated proceedings in the Court and the Centre.[43]

One feature of the NICN ADR Centre is that the ADR procedures available are limited to Mediation and Conciliation. Thus, Arbitration is not utilized in the Centre. This may perhaps be, to give clear way for the use of Arbitration in the Industrial Arbitration Panel (IAP), which Award is now enforceable or can be challenged in the NICN, by powers of the NICN under the new Constitution.[44]

Confidentiality is the hallmark of the ADR procedures. No communication of the proceedings is made public.[45] However where the matter have been amicably resolved and entered as judgment of the Court (NICN) that the Court (NICN) can make it available to the public[46]. Parties have their liberty to settle or not to settle their dispute but are expected to appear at the Centre once they have indicated their interst to settle their dispute.[47] Where the matter remains unresolved it will be remitted back to the Court (NICN) and the Court (NICN) is expected to issue hearing notices to the parties or their counsel if any to appear before the Court for a date to be fixed for the continuation of hearing of the matter at the NICN.[48]

It is hoped that in the near future settlement terms of matters before the ADR Centre will be made available. Being a new Centre (established 18th December 2015), there are yet no be recorded cases on ADR procedures.

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[43] Nelson Ogbuanya,The Guardian Newspaper (of 12th January 2016) "Overview of National Industrial Court's ADR Centre Instrument and Rules 2015" **http://www.ngrguardiannews.com/2016/01/overview-of-national-industrial-courts-adr-centre-instrument-and-rules-2015/** accessed 9th February 2016

[44] Nelson Ogbuanya,The Guardian Newspaper (of 12th January 2016) "Overview of National Industrial Court's ADR Centre Instrument and Rules 2015" (n43)

[45] See Order 4 Rule 3 (3)-(4) Industrial Court of Nigeria Alternative National Dispute Resolution (ADR) Centre Rules 2015

[46] See Order 4 Rule 7(2), Industrial Court of Nigeria Alternative National Dispute Resolution (ADR) Centre Rules 2015

[47] Nelson Ogbuanya,The Guardian Newspaper (of 12th January 2016) "Overview of National Industrial Court's ADR Centre Instrument and Rules 2015" (n43)

[48] See Order 3 Rules 5-6, Industrial Court of Nigeria Alternative National Dispute Resolution (ADR) Centre Rules 2015

7.4 Can ADR's Terms of Settlements Be Enforced?

One pertinent question regarding ADR is: Can agreements reached through it be enforced? It will appear that such terms of settlement can be enforced (through the NICN) like any judgment of a court. This understanding is based on the Constitution[49] and the NICN Rules.[50] The implication is that terms of settlement obtained through any ADR procedures either outside or in the NICN ADR Centre can be enforced. Section 254C (4) of the Constitution provides that:

> The National Industrial Court shall have and exercise jurisdiction and powers to entertain any application for the enforcement of the award, decision, ruling or order made by any arbitral tribunal or commission, administrative body, or board of inquiry relating to, connected with, arising from or pertaining to any matter of which the National Industrial Court has the jurisdiction to entertain.

Although the NICN is yet to pronounce on the extent of this provision, that is whether it also cover enforcement of settlements reached through ADR, it can be argued that the provision covers enforcements of settlements reached through ADR. I argue this because the provision states "… enforcement of the award, decision, ruling or order made by any arbitral tribunal or commission, administrative body or board of inquiry…" And "any" commission, administrative body or board of inquiry can be understood to include settlements obtained through ADR arrangements. To futher strengthen this argument, Order 3 Rule 9(1) of the National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Rules 2015 provides that "(U) upon conclusion of the mediation or conciliation processes… the terms of settlement by the parties …if any, the Court (NICN) shall enter the terms of settlement as the judgment of the Court on the matter and such judgment shall be binding on the parties.". So that once the terms of settlement has been entered as a judgment of the NICN it can be enforced. The implication of this is that if the parties made their settlement outside the NICN ADR Centre and failed to apply to the NICN to enter it as a judgment, either of the parties may not be able to enforce it.

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[49] Constitution, section 254C (4)
[50] National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Rules 2015, Order 3 Rule 9(1)

7.5 Analysis of some NICN's Decisions on Interpretations and Enforcements of Workers' Fundamental Human Rights (freedom of association)

I turn now to some of the decisions where workers' fundamental human rights was enforced by the court (NICN). The NICN in several decisions has not only enforced workers rights' right to associate but also consistent in following its previous judgments in current cases. The decisions which enforced right to associate will be examined before those that demonstrate the NICN's consistency.

7.5.1 NICN's Decisions which Enforced Workers' Right to Associate.

It is important to note that the decisions relied on have already been analysed in the earlier chapters particularly chapters: 2, 4, 5 and 6. It suffices to mention without repetition that the NICN enforced workers' right to associate in: *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta,*[51] *Nest Oil Plc. v National Union of Petroleum and Natural Gas Workers,*[52] *Senior Staff Association of Universities Teaching Hospitals, Research Institutes and Associated Institutions (SSAUTHRIAI) v Academic Staff Union of Research Institutions and Others*,[53] and *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa Ibom State University and Another.*[54]

It is unlikely that workers' rights would have been enforced if these cases were settled through ADR procedures. It is important to note that in ADR settlements, there are no insistence on legal rights and as such workers can be influenced by their employers (since the bargaining is not equal) to waive or compromise their rights in the name of settlement.

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[51] *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor University of Agriculture, Abeokuta*, unreported suit No. NIC/LA/15/2011 <http://judgment.nicn.gov.ng> accessed 6th January, 2015. For the earlier analysis of this case see chapters 2 (section 2.2) and 6 (section 6.4.2.1)

[52] *Nestoil Plc. v National Union of Petroleum and National Gas Workers,* nreported Suit No NIC/LA/08/2010, Judgment delivered 8th March 2012 by Justice B. B. Kanyip. Also http://judgment .nicn.gov.ng/ accessed 8th November, 2013. For the facts and judgment of this case see chapter 6 (section 6.4.2.2)

[53] *Senior Staff Association of Universities Teaching Hospitals, Research Institutes and Associated Institutions (SSAUTHRIAI) v Academic Staff Union of Research Institutions and Others*, Unreported Suit No: NIC/34/2008 judgment delivered on 10th march, 2011, by Justice B. B. Kanyip. Also in http://judgment.nicn.gov.ng/ accessed 7th February, 2014. For the earlier analysis of this decision see chapter 6 (sections 6.4.2.3 and 6.5)

[54] *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa-Ibom State University and Another*.Unreported suit No:NICN/CA/58/2013, Judgment delivered by Justice O.A.Obaseki-Osaghae on 1st April 2014, http://judgment.nicn.gov.ng/ accessed 7th April 2015 . For the facts and judgment of this case see chapter 4 (section 4.11.3)

7.5.2 Consistency of the NICN in Following Previous Human Rights Decisions in Current Cases.

Consistency has to do with the doctrine of precedent or *stare decisis* by which a court is bound to follow its previous decisions unless distuinguished.

One importance of consistency is that it contributes to certainty in the law[55] and consistency also favours 'formal' justice, that is two cases which are the same (in relevant respects) should be treated in the same way It would simply be inconsistent to treat them differently.[56] The claim of consistency is also sometimes put in terms of 'equality': to treat the later case differently to the first would be to fail to treat the parties before the courts equally.[57]

This principle of consistency has been demonstated in various decisions of the NICN. For instance its judgment in *Nest Oil Plc v National Union of Petroleum and Natural Gas Workers,*[58] was followed in *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta*[59] (the facts of both cases have been given earlier[60]) Relying on section 40 of the Constitution and ILO Convention 87, the NICN held in both cases that an employer has no right whatsoever to interfere in union matters.

The rule of consistency has no place or consideration in ADR settlements. The implication is that settlements reached in a case may never be used in subsequent cases even if the facts are same.

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[55] Lawmentor, "Discuss the advantages and disadvantages of the doctrine of precedent" http://www.lawmentor.co.uk/resources/essays/discuss-advantages-disadvantages-doctrine-precedent/ accessed 2nd March, 2016

[56] Stanford Encyclopaedia of Philosophy, "Precedent and Analogy in Legal Reasoning" http://plato.stanford.edu/entries/legal-reas-prec/ accessed 2nd March 2016

[57] Stanford Encyclopaedia of Philosophy, "Precedent and Analogy in Legal Reasoning" (n56)

[58] *Nestoil Plc. v National Union of Petroleum and National Gas Workers,* (n52)

[59] *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa-Ibom State University and Another*. (n54). For the facts and judgment of this case see chapter 4 (section 4.11.3)

[60] See Chapters: 6 (section 6.4.2.2), 2 (section 2.2) and 6 (section 6.4.2.1)

7.6 Conclusion

As an alternative to resolution of labour disputes through the courts, workers can also have recourse to Alternative Dispute Resolution (ADR) procedures, where the settlement of labour disputes is referred to mediation, conciliation or arbitration.[61]

ADR has been said to present the parties several benefits which include: saving the cost of litigation, avoiding the time, irritation, and emotion of a trial in the court, affording the parties immediate use of money, allowing the payor to avoid the possibility of a larger verdict, eliminating all uncertainties about the final outcome of a trial,[62] procedural and substantive flexibility.[63]

Pointing to the "the inequality of bargaining power which is inherent …in the employment relationship",[64] I argued that the NICN's interpretations of labour law, principles and judgments may be better than ADR settlements in protecting workers' fundamental human. For this argument, I relied on firstly, a number of NICN's judgments shown to have protected workers' right to associate and secondly, the NICN's consistency in following its previous decisions in enforcing workers' human rights as demonstrated for instance in *Nest Oil Plc v National Union of Petroleum and Natural Gas Workers*,[65] was followed in *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta*.[66] It is important to note that unlike the court (NICN) there are no no rules that guide who should get what or protect workers' rights in ADR settlements, and no consistency (that is precedents which can guide future matters in ADR settlements), so that the party who has a higher bargaining power (usually the employer) can manipulate or

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[61] ILO: Meetings of the European Labour Court Judges, http://www.ilo.org/ifpdial/events /meetings/lang--en/index.htm, accessed 28th January 2016

[62] H. Lee Sarokin, "Justice Rushed is Justice Ruined" (n2) 431-433, see also Monica L. Warmbrod, " Could an Attorney Face Disciplinary Actions or even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?" (n2) 794

[63] Thomas **0.** Main, "Adr : The New Equity" (n3) 354-366

[64] Otto Kahn-Freund, *Labour and the Law*, (n4) 1,18 The "inequality of the bargaining power" is is manifested thus: on the side of the employer he owns and controls the factors of production such as money, land and the business while the worker has only his labour to give and also has rights protected by law.

[65] *Nestoil Plc. v National Union of Petroleum and National Gas Workers,* (n72)

[66] *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa-Ibom State University and Another*.(n54).. For the facts and judgment of this case see chapter 4 (section 4.11.3)

influence the terms of the settlement to make the weaker party (usually workers) to either abandon or compromise their rights.

Chapter 8: Conclusion

This study appraises the implementation of freedom of association as a labour right under Nigerian law. Freedom of association is guaranteed as a constitutional right in Nigerian law. The first question which this thesis addresses is the *extent* of that constitutional guarantee. A second question addressed by the thesis is that of the suitability of the ordinary courts, specialised labour courts, and alternative dispute resolution procedures to the enforcement of rights to freedom of association within Nigeria.

Section 40 of the Constitution guarantees freedom of association (including the right to form trade unions) as a fundamental human right. This protection is accorded to all workers (that is formal and informal) since the wording of section 40 makes no distinction between workers in according this protection. Even though the guarantee covers all workers as it appears, it is not absolute, as it is subject to the derogations in section 45 of the Constitution. The implication of the latter provision is that where any other law or Act of the National Assembly prohibits or limits freedom of association for the purpose of defence, safety, order, morality, health of the public, then that law or Act prevails over the Constitution, and the right to associate guaranteed in section 40 can no longer be invoked. Therefore the extent of the protection of freedom of association as a human right of workers is determined by the derogations set by the Constitution (as contained in section 45) and the courts' (ordinary and NICN) interpretations of it. However, the derogations do not prevent a litigant from invoking the African (Banjul) Charter or the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983[1] or ILO Conventions 87 and 98 for which I argued that informal workers can also enforce their right to associate through them as these statutes and treaties contain no provision adverse to freedom of association.

Having explained the extent to which freedom of association is protected in the Constitution, I then turned to the question whether labour rights in general, and freedom of association in particular, can usefully be understood to be human rights. I argued for conceiving of labour rights as human rights. With reference to the work of Virginia Mantouvalou, it was explained

[1] Section10.The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is a domestication of the African (Banjul) Charter on Human and Peoples' Rights 1981

that scholars have sought to answer that question using three different approaches, namely the Positive Approach, the Instrumental Approach and the Normative Approach. The Positive Approach takes the view that labour rights are human rights to the extent that they are contained in human rights treaties and other instruments. The scholarship of the Instrumental Approach is of the view that labour rights can be endorsed as human rights if institutions (state or international) like courts or civil society organisations like trade unions and NGOs are successful in promoting them as such. The Normative Approach answers the question from a theoretical and normative perspective, by examining the definition of human rights and concluded that labour rights do not have some key elements of human rights contained in this definition and for that reason should not be classed as such.

In support of, and to develop further, the Positive Approach, I argued that some international human rights instruments not only provide for labour rights they also propagate the indivisibility of rights[2] and that if rights are expressed as indivisible in such international human rights instruments then labour rights can be enforced as human rights. Thus the wordings of indivisibility of rights expressed in human rights instruments further strengthened the Positive Approach. With reference to the Instrumental Approach, it characterises the NICN as a labour court which has exclusive jurisdiction to hear labour matters, and thus also to promote and enforce labour rights as human rights.

I then returned to the interpretation and enforcement of freedom of association by the ordinary courts, specialised labour courts, and alternative dispute resolution procedures and their suitability in this regard. Comparing the reasoning of the NICN with that of the ordinary courts, and also referring to Dworkin's notion of "purposive interpretation", I argued that the reasoning of the judges in the NICN appeared to look beyond the letter of labour statutes to the underlying purposes of those statutes and labour law more generally. This approach is contrasted with that of the judges in the ordinary courts, who do not tend to base their decisions on the underlying purposes of labour statutes, giving more weight to principles of the common law.

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[2] See for instance the Preamble to the African Charter

I analysed the interpretation of freedom of association by judges in the NICN and in the ordinary court and observed the following. Firstly, in considering the same labour legislation (section 40 of the Constitution on freedom of association), while the ordinary court both in *Osawe* and *Registered Trustees* declined to enforce the labour right therein (freedom of association), the labour court (NICN) enforced it in *SSAUTHRIAI*, *NASU* and *Nestoil Plc.*

Secondly, the interpretation of the ordinary court is restrictive when compared to the labour court that is favourable to labour law and principles. For instance in the interpretation of sections 3(2) and 5(4) of the Trade Union Act regarding registration of a new trade union by both the ordinary court and labour court (NICN) in *Registered Trustees,* while a restrictive interpretation adopted by the Supreme Court (ordinary court) refused an application for the registration of a proposed trade union, a favourable interpretation by the NICN (labour court) led to the registration of a new trade union. It will appear that in these restrictive interpretations by the ordinary court (the Supreme Court) did not consider the African Charter[3] which also protects freedom of association as a "human and peoples' right"[4] (workers inclusive) and had been domesticated even before they decided *Osawe* and the *Registered Trustees*.[5] . This kind of restrictive interpretation does not favour labour principles (including freedom of association) and thus made them unsuitable for the enforcement of labour rights.

Thirdly, the reasoning of the judges of the labour court appeared to look beyond the letters of labour statutes to include the underlying purposes of labour statutes and labour law generally. This understanding has guided and influenced the reasoning of the NICN judges making their interpretations purposive and judgments to reflect labour principles more than the ordinary courts. In the ordinary courts, the judges do not tend to base their decisions on the underlying purposes of labour statutes. This is partly why their decisions are at variance with that of the labour court (NICN) and thus strengthening the argument that labour court is better suited to enforce labour rights than the ordinary courts.

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[3] The African Charter was domesticated in Nigeria in 1983 as the African Charter on Human and Peoples' Rights Ratification and Enforcement Act. And this was before both *Osawe* and the *Registered Trustees* were decided in 1985 and 2008 respectively.

[4] See Preamble to the African (Banjul) Charter

[5] The African Charter was domesticated in Nigeria in 1983 as the African Charter on Human and Peoples' Rights Ratification and Enforcement Act. And this was before both *Osawe* and the *Registered Trustees* were decided in 1985 and 2008 respectively.

Aso, generally, the NICN's interpretations of labour principles (including freedom of association) has been broader and in line with international law and human rights charters, including especially the African Charter .This is strengthened by the enlargement of the jurisdiction of the NICN to cover enforcement of labour treaties notwithstanding any provision of the Constitution requiring domestication[6] thus paving the way for adoption of a broad interpretation of labour principles. Broad interpretations have been shown to be used in situations where the local provision under consideration is terse[7] or no local provision[8] covers the case or to further confirm international labour standards.[9]

Regarding Alternative Dispute Resolution (ADR) procedures while acknowledging their benefits, I argued nonetheless that "the inequality of the bargaining power which is inherent …in the employment relationship"[10] in this context – an inequality which is all the greater in an era of globalisation – makes them ineffective to secure labour rights and thus unsuitable for the enforcement of labour rights.

Building on the arguments made in previous chapters, I argued further that the NICN's interpretations of labour law, principles and judgments may be better than ADR settlements in protecting workers' fundamental human rights and checkmating the powers of employers in relation to workers' rights. For this argument, I relied on firstly, a number of NICN's judgments shown to have protected workers' right to associate and secondly, the NICN's consistency in following its previous decisions in enforcing workers' human rights as demonstrated for instance in Nest *Oil Plc v National Union of Petroleum and Natural Gas Workers*,[11] was followed in *Non-Academic Staff Union of Educational and Associated*

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[6] Constitution 1999 (as amended) section 254C (2)
[7] *Attorney-General of Enugu State v National Association of Government General Medical and Dental Practitioners (NAGGMDP) and Another*, Unreported suit No: NIC/EN/16/2010, judgment delivered by Justice B.B.Kanyip (presiding judge) on 20th June 2011, http://judgment.nicn.gov.ng/ accessed 8th April 2015
[8] *Ejieke Maduka v Microsoft Nigeria Limited and Others*, unreported Suit No: NICN/LA/492/2012, judgment delivered by Justice O.A.Obaseki-Osaghae on December 19th 2013, judgment.nicn.gov.ng/ accessed 8th April 2015
[9] *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa-Ibom State University and Another*.Unreported suit No:NICN/CA/58/2013, Judgment delivered by Justice O.A.Obaseki-Osaghae on 1st April 2014, http://judgment.nicn.gov.ng/ accessed 7th April 2015
[10] Otto Kahn-Freund, *Labour and the Law*, (Paul Davies and Mark Freedland eds, Stevens and Sons Third edn 1983) 1,18
[11] *Nestoil Plc. v National Union of Petroleum and National Gas Workers*, nreported Suit No NIC/LA/08/2010, Judgment delivered 8th March 2012 by Justice B. B. Kanyip. Also http://judgment.nicn.gov.ng/ accessed 8th November, 2013.

Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta.[12] It is important to note that unlike the court (NICN) there are no no rules that guide who should get what or protect workers' rights in ADR settlements, and no consistency (that is precedents which can guide future matters in ADR settlements), so that the party who has a higher bargaining power (usually the employer) can manipulate or influence the terms of the settlement to make the weaker party (usually workers) to either abandon or compromise their rights. Thus, ADR procedures appear to be unsuitable for enforcement of workers' rights. Moreover, interpretations of laws are usually not part of ADR procedures since their sole aim is settlement.

Given the nature of my conclusions – that labour rights ought to be protected as human rights, in line with international standards, and that the NICN is the forum most suited to this task – my thesis offers a strong counter-argument to those who would do away with the NICN's exclusive jurisdiction in labour matters. It is to be hoped that the bill currently before the National Assembly will not be passed.

[12] *Non-Academic Staff Union of Education and Associated Institutions (NASU) v Akwa-Ibom State University and Another*.Unreported suit No:NICN/CA/58/2013, Judgment delivered by Justice O.A.Obaseki-Osaghae on 1st April 2014, http://judgment.nicn.gov.ng/ accessed 7th April 2015 . For the facts and judgment of this case see chapter 4 (section 4.11.3)

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