



AN ANALYSIS OF THE STATUTORY PROVISIONS ON THE FUNDAMENTAL RIGHT OF WORKERS IN SOUTH AFRICA: LESSONS FOR NIGERIA

By

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Abstract

The Constitution is the bedrock of the fundamental rights of employees in Nigeria and South Africa. The fundamental rights of an employee in the workplace derives its validity from human rights, which require every human being to live fully human lives. This paper is aimed at analysing comparatively the fundamental rights of employees in South Africa and Nigeria, while the objectives of this paper is to examine the extent South Africa have incorporated employees rights in their constitution, and the lessons Nigeria can take home. The research methodology applied is the Doctrinal Research Method. In the course of the research, it was discovered that the South African constitution is one of the best and admirable constitution in the world. It seeks to establish a society based on democratic values, social justice and fundamental human rights. The constitution enshrines labour rights as fundamental rights, and expressly provides for freedom of association, unfair labour practices, the right to collective bargaining, and the right to strike. It's one of the progressive constitution in the world. Based on the findings of this study, the paper recommends that Nigeria take a clue from the South African constitution, and amend its constitution to include workers rights as fundamental rights.

1.0 Introduction

The Constitution of South Africa¹ was adopted on 10 May, 1996 and came into effect on 4 February 1997. The constitution is the supreme law of the land,² binding on all organs of State at all levels of government. South Africa is a State founded on the principles of a constitutional democracy. Workers human rights were for the first time entrenched in the South African constitution 16 years ago:³ A new set of labour laws that give effect to ILO principles were enacted between 1996 and 1998⁴ and local labour law reforms during 2002 witnessed further strengthening of worker's rights in the statute books. The constitution contains a bill of rights in chapter two, which enshrines the rights of all South Africans. It guarantees the right of workers in the workplace.

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¹ Act No. 108 of 1966

² Constitution of South Africa 1996, s 2

³ Interim Constitution 200 of 1993, s 27

⁴ Labour Relations Act 66 of 1995; Basic Conditions of Employment Act 75 of 1997; Employment Equity Act 55 of 1998.



Under the heading, ‘Labour Relations’ in South African Constitution, it is specified that everyone has the right to fair labour practices,⁵ every worker has the right to form and join a trade union,⁶ every worker has the right to strike,⁷ every employer has the right to form and join an employer’s organization,⁸ every trade union, employer’s organisation and employer has the right to engage in collective bargaining.⁹

Undoubtedly, therein lies great potential for the protection of workers’ rights under the constitutional framework. In addition to public service employment relationships, the relationship between the private sector employer and its workers is directly covered by the application of the constitution. It is quite often in the sphere of private entities where problems with the observance of labour rights may occur and this also falls under constitutional application.¹⁰ Section 8(2) of the constitution provides that the bill of rights may be applied horizontally to private persons including juristic persons, provided it is applicable, thus bringing the conduct of private citizens under constitutional scrutiny. The protection of workers’ rights does not only lie with the horizontal application itself, but also in the fortification of labour standards due to the fact that present and future governments may find it difficult to erode workers’ rights without meeting constitutional challenge.¹¹ This paper undertakes a comparative analysis of the Constitution of South Africa and Nigeria, and draws lessons for Nigeria from the Constitution of South Africa.

2.0 Constitutional Rights of an Employee under the South African Constitution

The constitution contains a bill of rights in chapter two, which enshrines the rights of all South Africans. It guarantees the right of workers in the workplace. The following labour rights are enshrined in the constitution which shall be appraised individually:

Section 18: Freedom of Association

Section 23: Labour Relations

(1) Everyone has the right to fair labour practices

⁵ Constitution of South Africa 1996, s 23(1)

⁶ *Ibid.*, s 23(2)(a)

⁷ *Ibid.*, s 23(2)(c)

⁸ *Ibid.*, s 23(3)(a)

⁹ *Ibid.*, s 23(5)

¹⁰ S. V. Eck, ‘Constitutionalisation of South African Labour Law: An Experiment in the Making’ <<http://www.researchgate.net>> accessed 20 September 2022.

¹¹ H Cheadle, ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ [2006] (27) *Industrial Law Journal*, 663



- (2) Every worker has the right-
 - (a) right to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union;
 - (c) to strike.
- (3) Every employer has the right-
 - (a) to form and join an employer's organization; and
 - (b) to participate in the activities and programmes of an employers' organization.
- (4) Every trade union, and every employers' organization and employer has the right-
 - (a) to determine its own administration, programme and activities;
 - (b) to organize; and
 - (c) to form and join a federation.

2.1 Right to Fair Labour Practices in South Africa

The first section in the South African constitution under the heading 'Labour Relations', states that 'everyone has the right to fair labour practices'.¹² Although this fundamental right is bestowed upon everyone, it has been argued that the limitation of this right lies in the word 'labour practices'. Cheadle¹³ opines that such practices go hand in hand with the broader relationship where one person is dependent on another by virtue of being paid for work rendered. It therefore, does not apply to the genuine independent contractor working under the *locatioconducitiooperis*, for example the builder who repairs the homeowner's garden wall on an adhoc basis, nor would it apply to the lawyer or doctor who works under the common law contract of mandate. However, despite this embedded limitation alluded to by Cheadle, the word everyone holds potential for the extension of workers' rights to the atypically employed who may not fall within the limiting boundaries of the term 'employee' and the common law contract of employment.¹⁴ Thus, the right may be interpreted as embracing persons on the margins of employment relationship.

The term 'unfair labour practice' is also provided in the Labour Relations Act (LRA) of South Africa. Having codified unfair dismissal law in the LRA, the statutory definition of unfair labour practice in the LRA now covers only a specified arbitrary list of remnant employer actions, notably in connection with the unfair promotion and demotion of

¹² Constitution of South Africa 1996, s 23(1)

¹³ *Ibid.*, 18-3

¹⁴ Eck (n 15) 273



employees and other disciplinary action short of dismissal against them.¹⁵ The retention of the term unfair labour practice in both the LRA and the Constitution with their different meanings create uncertainty about what exactly is covered by the term in the different statutes. Landman¹⁶ posits that the constitutionalisation of the term will keep the torch of this open-ended concept burning brightly. In *National Education Health and Allied Workers Union v University of Cape Town*,¹⁷ the constitutional court confirmed this position by holding that:

The constitutional concept of fair labour practice is incapable of precise definition...Indeed, what is fair depends upon the circumstance of a particular case and essentially involves a value judgment...The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance from the specialist tribunals including the LAC (Labour Appeal Court) and the Labour Court...That is not to say that the constitutional court has no role in the determination of fair labour practices. Indeed, it has a crucial role in ensuring that the rights guaranteed in section 23(1) are honoured.

Blanpain¹⁸ posits that labour organisations commit unfair labour practice by: coercing or restraining employees in the exercise of collective bargaining rights; causing an employer to discriminate against non-union members; refusing to bargain collectively with an employer; engaging in or pressurizing workers to engage in certain strikes and boycotts; charging discriminatory agency fees; requiring employers to pay for services not performed; picketing where the object is to force an employer to bargain with a labour organization as the representative of his employees.

The Industrial Court fashioned an equity based jurisprudence arising from the unfair labour practice provision introduced by the Commission of Enquiry known as the Wiehahn Commission¹⁹, which provisions were broad and vague. The commission stated that an unfair labour practice was ‘any labour practice which in the opinion of the industrial court is an unfair labour practice’, this gave the court wide scope in developing its jurisprudence. Later refinements to the provision gave it greater content, and over time the court developed a body of rights-based rules in terms of which fairness was seen broadly as encompassing a balancing of employees’ and employers’ interests in order to achieve the Act’s object of

¹⁵ LRA, s 186(2)

¹⁶ A A Landman, ‘Fair Labour Practices – The Wiehahn Legacy’ [2004] (25) *Industrial Law Journal*, 805.

¹⁷ (2003) 24 ILJ 95 (CC) 33-35

¹⁸ R Blanpain, ‘International Encyclopedia of Industrial Relations and Labour Law’ [1988] (5) *USA Supplement*, 124-127

¹⁹ Commission of Enquiry into Labour Legislations (1979) pt. 5 4.127.17



labour peace.²⁰ The court developed the following as unfair practices: (a) unfair dismissals because of the absence of a fair reason and procedure; (b) the dismissal of strikers for participating in a lawful strike; (c) failure to reemploy in terms of an agreement; (d) failure to renew a contract where there was a reasonable expectation of such renewal; (e) selective dismissal; (f) racial discrimination; (g) victimization for trade union activities; (h) refusal to bargain; (i) bad faith bargaining; (j) failure to accord rights relevant to the bargaining process; (k) the use of unfair bargaining tactics; (l) resort to industrial action before deadlock had been reached in negotiations.

2.2 Freedom of Association under the South African Constitution

The South African Constitution recognizes the general principle that ‘everyone has the right to freedom of association’.²¹ The right to freedom of association constitutes the bedrock of the related rights to form and join trade unions, right to organize, bargain collectively, and in the case of workers, to strike. The right to freedom of association has long been recognized internationally both by ILO²² and other international instruments. The individual and collective right to freedom of association protects workers and employers and their organisations from control and undue interference by the State, and trade unions and their members from victimization by employers.²³

The fundamental importance of the right to freedom of association in the context of labour relations was captured by Dickson CJ in Reference re Public Service Employee Relations Act as:

Freedom of association is most essential in those circumstances where the individual freedom is liable to be prejudiced by the action of some larger and more powerful entity, like the government or an employer. Association has always been the means by which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfill their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps conflict.

The right to freedom of association is also protected in the LRA. Individual rights to freedom of association are guaranteed by granting employees the right to participate in forming a trade

²⁰ *Consolidated Frame Cotton Corporation v The President, Industrial Court* (1986) 7 ILJ 489 (A)

²¹ Constitution of South Africa 1996, s 18S

²² Freedom of Association and Protection of the Right to Organise Convention No 87 of 1948

²³ S Woolman, ‘Freedom of Association’ in S Woolman and Others (eds), *Constitutional Law of South Africa* (2nd edn, OS, 2003) chap. 44.



union²⁴ or federation,²⁵ to join a trade union, subject to its constitution,²⁶ and to participate in its lawful activities,²⁷ and by protecting employees and work seekers from victimization for exercising these and other rights under the Act.²⁸

2.2.1 The Right to Membership of Trade Union in South Africa

The constitution recognizes the general principle that ‘everyone has the right to freedom of association’,²⁹ more specifically, in the employer employee context; it guarantees that ‘every worker has the right to form and join a trade union’³⁰ and to participate in the activities and programmes of a trade union’.³¹ Also included is the right of ‘every employer to form and join an employers’ organization’,³² and to participate in the activities of an employers’ organisation’.³³

The above enumerated rights are also expressed in section 4(1) of the South African Labour Relations Act which guarantees every employee the right to join a trade union. Similarly, the right to freedom of association of employees is protected under section 5 of the LRA, while by virtue of section 5(1) of the LRA, no person may discriminate against an employee on the basis that he or she is a member of a trade union. Consequently, by the combined effect of sections 4(1) and 5(1) of the LRA, an employee is guaranteed the right to freedom of association, and the right to join a trade union, and the employee is protected against discrimination by his or her employer as a result of the exercise of this right.

Under the LRA, trade union is defined as ‘an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ organisation’.³⁴ In South Africa, trade unions operate either in the public or private sector. Public service is defined as the service referred to in section 1(1) of the Public Service Act 1994,³⁵ and includes any organizational component contemplated in section 7(4) of that Act,

²⁴ LRA 1995, s 213

²⁵ *Ibid.*, s 4 (1) (a)

²⁶ *Ibid.*, s 4 (1)(b)

²⁷ *Ibid.*, s 4 (2) (a)

²⁸ *Ibid.*, ss 5 and 187(1)

²⁹ Constitution of South Africa 1996, s 18S

³⁰ *Ibid.*, s 23(2)(a)

³¹ *Ibid.*, s 23 (2) (b)

³² *Ibid.*, s 23 (3) (a)

³³ *Ibid.*, s 23 (3) (b)

³⁴ LRA 1995, s 213

³⁵ Public Service Act 1994 promulgated by the Proclamation No. 103 of 1994



but excluding-(a) the members of the National Defence Force; (b) the National Intelligence Agency; and (c) the South African Secret Service.³⁶

Members of the South African National Defence Force are excluded from the scope of the application of the LRA, and they are consequently precluded from registering and joining trade unions in terms of the LRA. Apart from this, the provisions of the previous Defence Act³⁷ expressly prohibited soldiers from belonging to trade unions. The first in a sequence of South African National Defence Union (SANDU) cases,³⁸ serves as an excellent example of just how the inclusion of this collective labour right in the constitution has been able to protect workers' rights. In the Defence Force Union's quest to have the limiting provisions of the Defence Act declared unconstitutional, the matter proceeded through the Civil High Court to the Constitutional Court. The first question considered by the court was whether members of the armed forces are workers, for if they were, the court held, the restriction would undoubtedly be contrary to the constitutional right to form and join trade unions. The court took account of Article 2 of the ILO Freedom of Association Convention No 87 that reads, 'workers and employers, without distinction whatsoever, shall have the right to establish and ... join organisations of their own choosing'. It also considered article 9 (1) of the same convention that provides that 'the extent to which the guarantees provided for in this convention shall apply to the armed forces and the police shall be determined by national laws and regulations'.

Pointing out that the courts are constitutionally bound to consider international law,³⁹ it held that members of the South African National Defence Force are indeed 'workers' despite the fact that the relationship that they have with the defence force is unusual and not identical to an ordinary employment relationship. The second issue to be considered by the court was whether these rights may justifiably be limited under the constitution's limitation clause that provides that the 'rights in the Bill may be limited...to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁴⁰ Implementing a generous and purposive interpretation to accord individuals full protection of their rights, the Constitutional Court held that a total ban on trade unions in the SANDF was unreasonable and unjustifiable.

³⁶ LRA 1995, s 213

³⁷ Act 44 of 1957, s 126 B (1). This Act has since been replaced by the Defence Act of 2003.

³⁸ *South African National Defence Union v Minister of Defence* 1999 ILJ 659 SCA

³⁹ Constitution of South Africa 1996, s 39

⁴⁰ Constitution of South Africa 1996, s 36(1)



The Constitutional Court directed that new regulations be drafted and enacted by Parliament that would provide for the registration of trade unions in the defence force and to make provision for procedures that have to be followed should deadlock be reached in the negotiating process. In this indirect role, the Constitution played a positive role in the protection of workers' rights without undermining labour law as self-supporting discipline. Prior to 1990, bargaining in the public sector was redefined and consolidated, state employees were generally excluded from the scope of the LRA. In 1990, the police began organizing themselves and the Police and Prisons Civil Rights Union (POPCRU) was formed and later the South African Police Union (SAPU) followed.⁴¹

The biggest public sector unions in South Africa are the South African Democratic Trade Unions (SADTA), National Educational Health and Allied Workers Union (NEHAWU) and the Public Service Association (PSA),⁴² while the largest federation of trade unions in South Africa is the Congress of South Africa Trade Unions (COSATU).⁴³

The labour relationship in South Africa is essentially a relationship between the employer and the employee, as well as between employer/employee and the state, thus making it a tripartite relationship.⁴⁴ The LRA introduced an equality based industrial relations system that actively promotes the formation of trade unions and creates an environment conducive to collective bargaining. The LRA provides for both agency-shop⁴⁵ and closed-shop agreements⁴⁶ for trade unions in the workplace.

In the agency-shop agreement, the representative trade union and an employer or employers' organization may conclude a collective agreement which requires the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof. This implies that non-members of the trade union may be obliged either to pay trade union fees or become trade union members.

⁴¹ M E Manamela, 'The Social Responsibility of South African Trade Unions: A Labour Law Perspective' <https://uir.unisa.ac.za/bitstream/handle/10500/20069/thesis_manamela_me.pdf?sequence=1> accessed 5 January 2023.

⁴² L Kpapola and P Smith, 'Trade Unions' Services and Members Satisfaction in Public Sector: A South African Scenario' [2017] (53) (2) *Indian Journal of Industrial Relations*; 336

⁴³ M Budeli, 'Trade Unionism and Politics in Africa: The South African Experience' [2012] (45) (3) *The Comparative and International Law Journal of South Africa*; 451

⁴⁴ J C Visagie and Others, 'A Comparative Analysis of Current Trade Union Trends in the European Union and South Africa' [2012] (6) (44) *African Journal of Business Management*; 11101

⁴⁵ LRA 1995, s 25

⁴⁶ *Ibid.*, s 26



Under the closed shop agreement, a representative trade union and an employer or employers organisation may conclude a collective agreement which requires all employees covered by the agreement to be members of the trade union. These two species of agreement are generally referred to as ‘union security arrangement’.⁴⁷

2.2.2 Collective Bargaining in South Africa

In South Africa, collective bargaining was regulated upon promulgating the 1924 Industrial Conciliation Act of 1924 (ICA). The freedom and duty to bargain in South Africa is not just statutory but constitutionally guaranteed. The constitution confers the right to engage in collective bargaining thus: ‘Every trade union, employees’ organization and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining’.⁴⁸ The right to collective bargaining in South Africa plays host to many other rights such as right to use collective economic power in pursuit of a demand and duty to bargain. Halton Cheadle succinctly elucidated these rights thus:

Right to bargain collectively is shorthand for a range of rights and freedoms associated with the institution of collective bargaining. Each of these rights and freedoms needs to be distinguished. There is the freedom to bargain collectively. It is a right normally raised against a government passing legislation, prohibiting collective bargaining or having effect of doing so. There is the right to use collective economic power in pursuit of a demand. There is the positive right with the concomitant duty to bargain as state enforced duty to bargain...the compulsion usually takes the form of a judicially enforced duty to bargain.⁴⁹

The right to collective bargaining under the LRA is interwoven with employee and trade union rights, called ‘organisational rights’, which make organized labour’s capacity to bargain more effective.⁵⁰ These rights include the right of access to the workplace, the deduction of trade union dues, the appointment of trade union representatives and the right to relevant information.

In South Africa, apart from bargaining at several levels, it operates single-employer bargaining (branch, company or corporate level) and multi-employer bargaining (more than one employer represented by employers’ organization). The implication is that the agreements reached are extended to non-parties, in other words, to employers and employees

⁴⁷ (n 55) 11101; Constitution of the Republic of South Africa 1996, s 23

⁴⁸ Constitution of the Republic of South Africa 1966, s 23(5)

⁴⁹ H Cheadle, ‘Collective Bargaining and the Labour Relation Act; Law, Democracy and Development’ [2005] (9)(2) *Law, Democracy and Development*, 147

⁵⁰ J Grogan, *Workplace Law* (Cape Town: Juta 2005) 359



who are not members of the organisations that negotiated the agreement.⁵¹ Multi – employer bargaining takes place in the form of bargaining councils. Trade union and employers can apply to form bargaining councils under sections 27-38 of the LRA. These councils basically deal on collective agreements, solve labour disputes, set up various schemes and make general comments on labour laws and policies.⁵² In resolving labour disputes within their councils, bargaining councils can apply to the Commission for Conciliation, Mediation and Arbitration (CCMA) for their authorization to settle disputes.

The South African constitution also provides the right to form a union and the right to collective bargaining to soldiers and other uniformed security formations. This position was upheld by the south African constitutional court in the case of *National Defence Union v Minister of Defence & Anor*,⁵³ where it was held that soldiers are akin to employees and accordingly workers, for the purpose of section 23(5) of the South African Constitution. Pursuant to the above decision by the South African court, provisions in the defence act and regulations which prohibited soldiers from belonging to trade unions and from engaging in public protests were declared to be invalid.⁵⁴ In response, the Minister promulgated a set of regulations that provided for the registration and recognition of trade unions and that established a Military Bargaining Council and a Military Arbitration Board for the resolution of industrial disputes pertaining to the welfare of soldiers in South Africa.

2.2.3 The Right to Strike in South Africa

The right to strike is entrenched in Section 23 of the constitution which provides thus “every worker has the right to strike.” The right to strike is widely regarded as fundamental to the protection of workers’ interests. Without a right to strike, workers’ rights to freedom of association and to collective bargaining are compromised.

Although there are no restrictions on the right to strike in the constitution, limitations are provided in the Labour Relations Act of 1995 as to procedure, subject matter of the issue in dispute, and persons entitled to exercise the right. The Labour Relations Act (LRA)⁵⁵ defines a strike as a partial or complete concerted refusal to work or the retardation or obstruction of

⁵¹ ILO Geneva, ‘What We Do’ <<http://www.ilo.org/whatwedo/publication/WCMS632263/lang..en/index.htm>> accessed 6 January 2022.

⁵² *Ibid.*

⁵³ 1999(6) BCLR 615

⁵⁴ LRA 1995, s 18

⁵⁵ Act No. 66 of 1995 as amended by Labour Relations Act, No. 42 of 1996; as amended by Act No. 6 2014.



work by employees of the same employer for the purpose of remedying a grievance or resolving a dispute in respect of a matter of mutual interest.

In *First Certification case*,⁵⁶ the Constitutional Court stated that strike action is the primary mechanism through which workers exercised collective power and that the capacity to strike enabled them to bargain effectively with employers. In *NUMSA v Bader Bop*,⁵⁷ the court has asserted that;

The right to strike is both historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.

The LRA places other procedural and substantive limitations on the statutory right to strike that may infringe section 23 of the constitution. The Act requires that specific procedures must be followed before workers can embark on a protected strike.⁵⁸ The ILO has accepted legal procedures preceding a strike as long as they are not so complicated as to make it ‘practically impossible to declare a legal strike’.⁵⁹ The procedural limitations in the LRA requiring prior conciliation and advance warning of 48 hours (or seven days where the employer is the state), should survive constitutional scrutiny. The requirement for conciliation is in line with the notion of strike action as a weapon of last resort. The notice period is short enough so as not to undermine the effectiveness of the action, while allowing the employer time to reconsider its position or to make provision for the action.

At a substantive level, the Act limits the right to strike during the currency of a collective agreement if the issue in dispute is regulated by the agreement.⁶⁰ The rationale for this is that having bargained and settled an issue, parties should abide by the agreement until it expires. The Act meets the ILO requirements in that it provides for disputes over the interpretation or application of issues in such agreements to be referred in the first instance to conciliation, and if the dispute is not resolved, to voluntary arbitration.

Section 65 (1) (d) of the LRA prohibits strikes and lockouts in essential services and maintenance services. Instead, employers and employees are obligated to refer their disputes

⁵⁶ 1996 (10) BCLR 1253, 1405-6

⁵⁷ (2003) 2 BCLR 182 (CC)

⁵⁸ LRA 1995, s 64

⁵⁹ ILO Freedom of Association (1996)

⁶⁰ LRA 1995, s 65 (3)(a)(i)



to final and binding arbitration. The ILO recognizes that it might be necessary to prohibit strikes in essential services but that such services should be restrictively defined. Without a restrictive definition, the notion would lose all meaning. The ILO defines essential services as those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.⁶¹

The LRA basically adopts the definitional approach to essential services. It defines as essential service, ‘a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population.’⁶²

The Act further limits strikes in what it terms as maintenance services. These services are defined as those which, if interrupted, will have the effect of the ‘material physical destruction to any working area, plant or machinery’.⁶³ The difference between the provisions on maintenance and minimum services is that the former are concerned with preventing the potential damage a strike may have on the wealth creating capacity of the business and the latter the effect of a strike on the safety of the people. Maintenance services may be instituted in any plant either via collective agreement, or if there is no such agreement, on application by the employer to the essential services committee. The declaration of a service as a maintenance service has the effect of depriving the right of employees in that service to strike.⁶⁴ The Act provides that the Committee may refer disputes in maintenance services to arbitration but only if the number of employees employed in the maintenance service is greater than the number who would be entitled to strike.⁶⁵ The effect of this requirement is not to deprive the whole workforce of the right to strike if the majority are entitled to do so.

3.0 A Comparative Analysis of the Fundamental Rights of Employees in South Africa and Nigeria: Lessons for Nigeria

In South Africa, under the South Africa legal framework, there is a guaranteed right to collective bargaining⁶⁶. Hence it enjoys contractual status to which is binding on the parties to the agreements. In Nigeria, on the other hand, there is no clearly guaranteed right to collective bargaining by way of an express legal framework. All we have are at best, laws

⁶¹ ILO Freedom of Association and Collective Bargaining (1994) para 149

⁶² LRA 1995, s 213

⁶³ *Ibid.*, s 75(1)

⁶⁴ LRA 1995, s 65(1)(d)(ii)

⁶⁵ *Ibid.*, s 65(1)(ii)

⁶⁶ SAC 1995, s 23(5)



enacted such as the Trade Disputes Act, 2004 and the Wages Boards and Industrial Council Act, 2004 which provides among others, a mechanism for collective bargaining, which is why despite the legal framework, there are still problems and challenges facing workers and employers in the process of collective bargaining in Nigeria.

In South Africa, there is an express constitutional right to strike, which empowers every worker of the right to strike. It is entrenched as a fundamental constitutional right, all that is required is a notice to strike except where the issue is not a strike-able one.⁶⁷ In Nigeria, there is no right to strike cause of the mandatory, rigorous and perpetual dispute settlement procedures even though it is provided in the Trade Dispute Act as in the case of the employees in the private sector, while those in the public sector are categorized as essential service employees and subject to compulsory arbitration in lieu of exercising the right to strike.

In South Africa, there is an imposition of a positive right and structure to bargain collectively in the public sector, and reach an agreement in good faith. In Nigeria, public sector workers are considered as essential services employees hence public officers, and uniformed personnel are not allowed to form or join trade union and therefore, do not have the right to bargain collectively. In South Africa, the constitution makes provision for fair labour practices.⁶⁸ Hence a duty on the employer to bargain in good faith. In Nigeria, there are no such provisions as the agreements are considered as gentleman's agreement from its inception. All we get are issues of bargaining in bad faith without intention of redeeming same which has greatly impaired the success of collective bargaining in Nigeria. The obligation to bargain in good faith is not explicitly provided in any of the laws dealing with issues of employment.

The South African constitution provides for the right to form a union and collective bargaining for soldiers and other uniformed security personnel. All provisions and regulations which prohibit soldiers from belonging to trade unions and engage in public protests were declared invalid. Therefore, a military bargaining council and a military arbitration board was set up for the resolution of industrial disputes pertaining to the welfare of soldiers. In Nigeria, uniformed personnel and other security personnel are clearly prohibited from forming or joining a trade union and do not have the right to bargain collectively or be involved in any

⁶⁷ LRA 1995, s 64(1)(9)

⁶⁸ SAC, s 39(1)



protest of any form. In South Africa, collective agreements are enforceable by the parties provided that they are entered into and written, and are therefore binding on the parties to the agreement and their members respectively. In Nigeria, it is totally different, as an individual cannot enforce a collective agreement due to privity of contract except such agreement is stated in his contract of employment.

Courts in South Africa have had recourse to ILO Conventions on freedom of association and collective bargaining in order to consider international law when interpreting the provisions of the bill of rights. This is to ensure that they comply as closely as possible with international standards as provided by the ILO. At this stage, it is very important that Nigeria takes a clue from these improvements, though it has ratified a good number of the ILO provisions via its conventions, it is yet to domesticate same.

4.0 Conclusion

In the course of the research, it was discovered that the South African constitution is one of the best and admirable constitution in the world. It seeks to establish a society based on democratic values, social justice and fundamental human rights. The constitution enshrines labour rights as fundamental rights, and expressly provides for freedom of association, unfair labour practices, the right to collective bargaining, and the right to strike. It's one of the progressive constitution in the world.

In Nigeria, workers rights are not expressly provided in the constitution, sections 17 (3) (a) – (h) and section 40 of the constitution provides for the rights of citizens which invariably provides for the rights of employees in the workplace, however section 17(3) (a)-(h) is non justiciable by virtue of section 6 (6) (c) of the constitution. Section 40 of the constitution which provides for the freedom of association, employers and employees have the right to form or belong to any trade union for the protection of his interest. It was discovered that although Nigeria has ratified a good number of international conventions regarding freedom of association and collective bargaining, yet the country has failed to comply with international labour standards in some areas. The Nigerian situation as we have it today is clearly a violation of international labour practices and standards. Therefore, it is imperative to state that Nigeria take a clue from the South African constitution, and amend its statutes where applicable



5.0 Recommendation

Flowing from the conclusion above, the researcher makes the following recommendation, that the Constitution of the Federal Republic of Nigeria be amended to expressly provide for worker rights. Trade unions in South Africa can go on strike as of right as this is provided for in their constitution and Labour Act. This is allowed where the government or employers fail to honour agreements or make policies that have negative impact on the socio-economic well-being of the workers and the society in general. It is suggested that the position in South Africa where the right to strike and fair labour practices are expressly enshrined and guaranteed in the Constitution and Labour Act be followed by Nigeria.