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An Examination of the Corporate Criminal Liability of a Trade Union in Nigeria

Brown E. Umukoro

Faculty of Law, Delta State University, Oleh Campus, Nigeria
Email: beumukoro@delsu.edu.ng

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Abstract

Apart from the controversy surrounding the legal status of trade unions in Nigeria, there exist a further area of contention—i.e. the nature of criminal liability of trade unions. Though, the relevant statutes on the control of trade unions in Nigeria place several duties on trade unions, breaches of which attract criminal punishment, there is hardly prosecution in this direction in spite of gross violations of the laws. This apparently stems from the dilemma of the law on corporate criminal responsibility. The paper therefore seeks to examine the issue which is always associated with attaching criminal liability to a legal entity with particular reference to trade unions. It also discusses the basis and extent of corporate criminal punishment for actual crimes and regulatory offences and the effectiveness of criminal sanctions on a registered body like trade union as against natural person. The research finds that though trade unions are incorporated bodies, they are legal entities at least for the purpose of the Trade Union Act in Nigeria and enjoys some benefits which elevate trade unions above other unincorporated bodies enabling trade unions to enter into contract, sue and be sued in their own name. It recommends that since trade unions are suable entities and can answer to criminal charges, especially regulatory offences, more efforts should be made to bring trade unions to comply with their responsibilities under the law.

Keywords

Trade Union, Criminal Liability, Corporate, Legal Status, Regulatory Offences, Nigeria

1. Introduction

Traditionally, trade unions are usually constituted for the purpose of regulating the terms and conditions of employment of workers Midland Cool Storage Ltd v Turner (1972). This is very glaring from the definition of trade union in some

statutes. For instance, section 1 of the Trade Union Act (TUA) (2004a) defines trade union to mean "any combination of workers or employers, whether temporary 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 purposes being in restraint of trade, and whether its purposes do or do not include the provision of benefits for its members".

The British Trade Union Labour Relations Act (1992) in section 1(a) similarly defines trade union as "an organisation (whether temporary or permanent) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers." It has also been said that the main purpose of trade unions is to maintain or improve the employment conditions of the members (Nchimbi, 2018). From the foregoing, it can be concluded that once the object of the body is not to regulate the terms and condition of employment, then it cannot be safely classified as a trade union under these statutes.

While the issue of whether a body is a trade union or not hardly generates serious legal controversy in some places (Bowers and Honeyball, 1998), this may not be so in some jurisdictions. In most developing countries, trade unions have pushed the frontiers of their assignment beyond mere regulation of terms and conditions of employment of workers. For instance, in Nigeria it was held that the Union of Ifelodun Timber Dealers was not a trade union because its main object was the protection and expansion of the timber trade and members' welfare and not the regulation of terms and condition of employment Union of Ifelodun Timber Dealers, Re (1964). Trade unions in Nigeria have been involved in myriads of activities which do not have the remotest connection with the terms and condition of employment of workers, thereby constituting themselves as potential instruments of social activism. The Nigeria Labour Congress (NLC), for instance, is known for challenging government policies once such policies have the slightest connection with the well-being of Nigerians even if they do not relate to the conditions and terms of employment of workers. More often than not, the NLC has been accused of being besmeared in the moldy waters of Nigerian politics. The result is that trade unions have hardly been allowed by the government in Nigeria to operate without any form of constraints. These constraints or control measures range from registrations TUA (2004k) and duty to render financial accounts TUA (2004l), to prohibitions and prosecution for certain activities declared to be offences by TUA and TDA (2004). It is worthy of note that several trade unions in Nigeria have continued to breach several of these prohibitions without being prosecuted.

This paper therefore seeks to examine the central issue which arises in attaching criminal liability to a legal entity with particular reference to trade unions in Nigeria. It also discusses the basis and extent of corporate criminal punishment for actual crimes and regulatory offences with reference to trade unions.

2. Brief History of Trade Union Movement in Nigeria

The evolution of trade union appears to have a common background all over. In England, it evolved from the fraternity of journey men which came into existence on the decay of the guild system. In Nigeria, before the advent of the British Colonialists, there had been in existence certain trade organisations. There was the association of craftsmen such as the iron mongers, bronze workers, blacksmith, wood carvers, etc. (Olatunbosun, 2004). However, modern trade unionism started in Nigeria about 1912 following the formation of the Nigeria Civil Service Union. This was followed by the Railway Workers Union and the Nigeria Union of Teachers in 1931. In 1938, the Nigerian Government passed the first legislation on labour. It was titled Trade Union Ordinance. The Ordinance marked a significant beginning in the legal history of the evolution of trade unionism in Nigeria. Other subsequent enactments in this regard were founded on the Trade Union Ordinance.

The Trade Union Ordinance facilitated the rapid growth and expansion of trade unions throughout Nigeria. The 1973 Act is considered to be the first most important piece of legislation on Trade Union in Nigeria. In 1973, the Trade Unions Ordinance was replaced with the Trade Union Act. Trade Unions began to proliferate with some trade unions so weak and small and other polarised along Socialist (Kautsky, 1901), Capitalist and Marxist theories. Labour union movement became divided. Subsequently, the Trade Unions (Amendment) Decree (TUAD) (Trade Dispute Decree, 1978) and Trade Union Amendment Act (TUAA) (1979) were passed. As at this time, about 800 unions existed before the 1978 amendment Udoh v. O.H.M.B (1990).

The TUAA of 1979 disallowed all existing trade unions and substituted a new list of 70 trade unions. This arrangement was to re-organise, check proliferation of trade unions and phase out those trade unions which were too small and weak. Unfortunately, this dream was not completely achieved as most unions became polarised the more and seriously submerged in politics. Subsequent efforts of labour have reinstated trade unionism and trade unions are still vigorously involved in pressuring the government against anti-labour policies. The Academic Staff Union of Universities in Nigeria has since 14 February, 2022 embarked on strike pressurising the Federal Government to fund the Universities and provide better condition of service. Other unions have pressed on the government at different times to accept conditions some of which are not connected with the terms and conditions of employment. While the legal definition of a trade union is premised on the terms and condition of service, their operations are defined by several other factors which include the behaviour of the government (Okechuku, 2021).

3. Corporate Criminal Liability and the Legal Status of Trade Unions

3.1. Legal Status of Trade Unions under Common Law

At common law a trade union is an unincorporated association. The implication

is that it is not a separate legal entity from its members (Simpson, 1979), (Seager, 1907). Its property is vested in the hands of trustees (Bowers and Honeyball, 1998). Trade unions at common law are more or less of the same legal status with clubs or associations. The best that was ascribed to trade union at common law was as in the decision of the court which held that unions could sue in tort Taff Vale Railway Company v Amalgamated Society of Railway Servants (1901).

The courts in Nigeria appear to be more definite on the issue of the legal status of a trade union. The Supreme Court, per Aniagolu, JSC stated the point as follows: "A registered trade union is a legal person and the birth and death of legal persons are determined not by nature but by law. They came into existence at the will of the law and they endure during its pleasure. Their extinction is called dissolution and that is what section 2(1) of Decree No. 22 of 1978 did to the 1st Appellant" Nigeria Nurses Association v AGF (1981). In this case, the Nigeria Nurses Association went to court to institute proceedings at a time when the Association had already been dissolved by Decree No. 22 of 1978. The Supreme Court held further that "corporations are undoubtedly legal persons and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations." The Supreme Court has also held that: "The principal and jural units to which the law ascribes legal personality are: 1) Human beings 2) Companies incorporated under the various companies Act 3) Corporate sole with perpetual succession, 4) Trade Unions 5) Partnership and 6) Friendly societies Fawehinmin v N.B.A (No. 2) (1989). The courts have distinguished business name from registered bodies. It has been held that mere registration under the Registration of Business Names Act does not confer the attribute of suing and being sued co-nomine on the registered body. This decision is equally in line with the above holdings that businesses are required to sue and be sued in a particular way by the rules of court in Nigeria. However, a trade union is not a business organisation Abakaliki L.G.A. v Abakaliki R.M.O. (1990).

3.2. Legal Status of Trade Union under TUA

Although, the TUA makes copious provisions for the registration of trade unions, it is not statutorily settled whether a trade union by virtue of registration, is a legal person. The term "Registered" in section 27(1) of the TUA came under heavy scrutiny by the Supreme Court in which the Court per Nnaemeka-Agu JSC held that the use of the word as it relates to registration of trade unions is more or less "(entering) on record in some official register or record of list" Nigeria Civil Service Union v Essien (1985). No provision of the TUA deals directly with the legal personality of a trade union. It does appear however that a community reading of some sections of the TUA discloses that the draftsmen intended that trade unions be treated as one clothed with a garb of legal personality TUA (2004j). This is because where the question is whether in the absence of express statutory provision, a particular unincorporated association has the status of a suable entity which can be inferred from a statute or a series of statutes,

the court must go through the task of leafing meticulously through the statutes in order to determine the point. Section 24 (1) of the TUA for instance provides: "an action against a trade union (whether of workers or employers) in respect of any tortious act alleged to have been committed by or on behalf of the trade union in contemplation of or in furtherance of a trade dispute shall not be entertained by any court in Nigeria." Section 24(2) of the TUA states that subsection 1 above applies to both an action against a trade union in its registered name and to an action against one or more persons as representatives of a trade union. This presupposes, first of all, that a trade union can be sued in its registered name under the Act except for torts committed in the course of or in furtherance of trade dispute. It also appears that a trade union is capable of being convicted separately from its members for offences against the Act. For instance, by section 21(4) of the TUA, if a trade union continues for more than 30 days without a registered office, the trade union is guilty of an offence. Furthermore, by the provisions of section 23 of TUA, trade unions derive certain benefits upon registration. These benefits include: ability to enter into contract and capacity to sue and be sued in its registered name. These tend to support the argument in favour of legal personality of a trade union.

From the provisions of TUA trade unions may be prosecuted for offences in their own name and can have judgment, order or award made in any proceedings enforced against their property as if they were bodies incorporated. It can be sufficiently inferred from the TUA that a trade union is a legal entity at least for the purposes listed in section 23 of the TUA though not a corporate legal entity. Despite the fact that a trade union is not an incorporated body, the TUA has conferred a status somewhat by way of benefits on the unions. This status elevates trade unions above other unincorporated bodies to the extent that trade unions can sue in their own name. It is recommended that any subsequent amendment to the TUA should make provision for a clear and distinct legal status of a trade union. In England for instance, in order to achieve the aim of making unions pay for the consequences of their industrial action, the Industrial Relation Act of 1971 imposed corporate status on all unions. The provision of the Industrial Relation Act 1971 conferring corporate status on trade unions in England was subsequently reversed by the Trade Unions and Labour Relation Act 1974 which forbade unions from registering under the English Companies Act 1985 (Bowers and Honeyball, 1998). What is more, a situation may even arise where a trade union may be regarded as the agent of its members Edward v Skyways Ltd (1964) in which case the trade union will have to answer as a legal entity.

4. Corporate Criminal Liability of Trade Unions

For a long time, the common law of England did not generally permit a corporation to be convicted of crime (Ferguson). The problem which common law was faced with was the task of imposing criminal liability on corporation because of the difficulty of attributing *mens rea* (i.e. a blame worthy state of mind) to an

abstract, a non-human entity called a corporation (Mrabure and Abhulimhen-Iyoh, 2020). Thus, while the common law recognises the appropriateness of vicarious liability for tort compensation, it rejected vicarious liability for crimes since crimes required *mens rea* or personal fault R v. Huggins (1730) except for crime of public nuisance R. v. Holbrook (1878), criminal libel R. v. Stephen (1866) and contempt of court R. v. Evening Standard Co. Ltd. (1954) which do not require *mens rea*.

Under the doctrine of vicarious liability, the master whether an individual or a corporate body, is made liable for the conduct of his servant in the course of the servant's employment. This doctrine was justified on the ground that since the master acquired the benefits of the servant's work, he should also carry the burdens. More often than not servants were impecunious and therefore if compensation was to be forthcoming, it would have to be obtained from the master (Ferguson). This was not the case with the commission of crime by corporation at common law. Common law gave to legal entities corporate immunity from criminal punishment. Majorly, apart from who to impute or attribute with criminal intention, the issue of who to put in the duck and how to punish a body which only exists in law (especially where law prescribes only corporal punishment) was a very discouraging factor to criminal corporate liability until the early twentieth century.

In 1915, Lord Viscount Haldane laid down the principle now known today in company law as the "Directing Mind Theory" Lennard's Carrying Co. Ltd. V. Asiatic Petroleum Co. (1915). According to Lord Viscount Haldane: "[A] Corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation… for if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself…".

The directing mind theory was subsequently applied without restriction in finding a legal entity liable for the commission of crime. A Canadian court following this theory held that: "The two corporate officers were the acting and directing will of Fane Robinson Ltd., generally and in particular in respect of the subject-matter of the offences with which it is charged." The Court held that their culpable intention (*mens rea*) and their illegal act (*actus reus*) were the intention and the act of the company and that conspiracy to defraud and obtain money by false pretences were offences which a corporation was capable of committing. R v. Fane Robinson Ltd (1941). In determining the directing mind, the court looks at which of the employees is or are in sufficient *de facto* control of a sphere of corporate operations so as to make him or them directing minds of the corporation (Hanna, 1988-1999). The factor which distinguishes a directing mind from normal employees is the capacity to exercise decision-making

authority on matter of corporate policy, rather than merely to give effect to such policy on an operational basis whether at head office or across the sea Rhones v. The Peter A.B. Widener (1993).

How then do trade unions come in? In Nigeria particularly, the Supreme Court has accepted that trade unions are legal entities Nigeria Nurses Association v AGF (1981). Accordingly, they can sue and be sued in their name whether for the enforcement of a civil right or in respect of the commission of crime. The TUA creates a number of regulatory offences as opposed to actual crimes. These offences impose criminal responsibility either on the officials of the trade union, the trade union itself or both. Some of the offences for which a trade union is criminally liable range from offences relating to failure to pay up 10 percent of total sum received by trade unions TUA (2004c) to failure to sell copies of the union rules on request TUA (2004e) and continuing as a trade union without registration TUA (2004d).

5. Criminal Liability for Regulatory offences by Trade Union

While there are real challenges in attaching criminal liability to trade union in actual crimes, there is no serious debate about the criminal liability of trade unions for regulatory offences. Almost all the offences created under the TUA are merely regulatory in that they are majorly targeted at regulating the activities and management of trade unions. Accordingly, the penalties are usually in terms of fines or at most, cancellation of registration of trade union TUA (2004i). This kind of offences has never created the burden of how to attach criminal liability to trade unions because all that is needed to be proved is the *actus reus*. Most regulatory offences are strict liability offences and as such all that is needed for conviction is that the act was actually committed or the omission was made. The offence of continuing as a trade union without registration or of failure to send audited account to the Registrar of trade unions within one month of such audit (TUA, 2004f) are all regulatory offences and require no *mens rea*. This accounts for why the offences created by the TUA are without provisos requiring an inquiry into the state of mind of the offender. Such terms as "knowingly", "intentionally", etc. are obviously absent in all the offences.

Another offence created to regulate trade unions is the offence of embarking on strike in contravention of section 17(1) of the Trade Dispute Act (TDA) (2004). The section prevents workers from going on strike, and employers from imposing a lock-out while negotiations or arbitral proceedings are in progress. The section also prevents the initiation of any industrial action after the National Industrial Court (NIC) has given its award. A worker who goes on strike is liable on conviction to a fine of N 100.00 or six months imprisonment while a corporate body is liable to a fine of N 1000.00.

It must be noted that the right to strike still remains a controversy in Nigeria even though the NIC Act still maintains that the NIC is the final arbiter on the matter in respect of which jurisdiction is vested on it and that no appeal lies to

the Court of Appeal or any other court except as may be prescribed by the NIC Act or any other Act of the National Assembly NIC Act (2006). The effect of this is that a union which decides to embark on strike after an unfavourable decision from the Court could be cited for contempt which is a criminal offence. Understandably, Nigerian courts have hardly trodden this part in recent time.

The form of industrial action most susceptible to criminal liability is picketing. Picketing ordinarily involves the act of peacefully hanging around the premises of the employer with a view to preventing other worker from working or the employer from going on with his business until the reason for the action is resolved (Adewusi, 2007). Picketing is usually carried out on behalf of a trade union and where members of a trade union commit a crime in the process nothing prevents a criminal action against the union especially where the actual culprit is mixed up in the crowd and not identifiable. It is worthy of note that acts arising out of picketing are not actionable in tort under certain conditions TUA (2004g). From the volume of offences created by TUA (which are merely regulatory) and the inability of the courts to punish the unions themselves for contempt when no-strike orders are made, it is settled that trade unions cannot be punished for all offences. They can only be safely attached with criminal liability for strict liability or regulatory offences.

6. Trade Union as a "Person"

The Criminal Code and the Penal Code which are the major statutes regulating criminal behaviour in Nigeria prohibit criminal acts and omissions adopting the term "person" or other terms referring to human actors. The law is that legal entities may also be subject to these prohibitions primarily through the construction of other statutes e.g. the Interpretation Act. The Interpretation Act defines person to include "anybody of persons corporate or unincorporated" Interpretation Act (2004). According to Gruner, "corporations and other organizations are included in statutory references to human actor unless the surrounding context suggests otherwise (Gruner, 2004)." The theoretical implications are that even a trade union can be punished for real offences as well as regulatory offences. According to Okonkwo and Naish, "there is no reason why in principle a corporation should not be convicted under the Criminal Code" (Okonkwo and Naish, 1990). An offence which can be committed by a natural person acting as an individual can also be committed by a legal entity acting through its agent. The understanding is that even if a criminal standard does not prohibit corporate conduct, the presumption is that corporate activities must conform to criminal laws to the same extent as similar activities by individuals. Flowing from this, a trade union can be convicted for fraud under a regular criminal statute book like the Criminal Code and Penal Code. The question which may now arise is: whether a trade union or any other legal entity can be punished for all offences. This appears to be a challenge to the advancement of punishment of legal entities for real offences. For instance, punishment for assault, etc is a term

of imprisonment Criminal Code Act (2004). It has often been asked how would a corporate body be sent to prison. It was for this reason that it was held in Nigeria that a corporation cannot be charged with an offence for which imprisonment is the only punishment AG Eastern Region v Amalgamated Press (1956-1957). It has been held that section 100 of the Nigerian Criminal Code which creates an offence known as "public officers receiving property to show favour) was such that it was repugnant to define a 'person' so as to include a corporation R v. Opara (1943)".

In the United States, a notable case was decided on the issue of whether interpretation statute should be read as allowing an association to be treated as a person within the *informa pauperis* statute. The Supreme Court of USA held that it would be allowed unless the surrounding circumstances indicated otherwise (Gruner, 2004). The Court here provided insight into how courts will evaluate interpretation or definition statute in applying penal and regulatory statutes to organisations. The Court described a two-step process. They are as follow: the courts should not deem an artificial entity like an association, trade union or corporation to be within the statutory reference to a "person" where: such a construction would raise logical inconsistencies and practical application problems under the statute at issue or under related statute, and where the exclusion of the artificial entity from term of the statute would not substantially frustrate the purpose or intendment of the statute.

It may appear that some of these practical application problems include inability to punish within the confine of the penal statute. It does also appear that exempting an entity like trade union from criminal offence like homicide would not frustrate the purpose of the penal statute especially where the human actor can be identified. The purpose of the Criminal Code or the Penal Code would still be realised without subjecting offending trade unions or other artificial entities to punishment for offences for which only a human offender can practically be punished. It is worthy of note that prosecution of artificial bodies for criminal offences (except in some cases of fraud by multinational companies and sedition) is not too common in Nigeria even though our statute books are replete with provisions prohibiting both regulatory and actual offences by legal entities.

7. Effectiveness of Criminal Sanctions on Trade Unions in Nigeria

Several penalties exist for punishing violations of the provisions of the TUA. For instance, the TUA prohibits the application of the fund of trade unions to legal proceedings relating to the election or appointment into any office of a trade union (TUA, 2004b). The punishment for this offence is N 5000 upon conviction. Where a trade union fails to remit 10% of contribution received from members as required by the Act, the trade union is guilty of an offence and liable on conviction to a fine of two times the said sum TUA (2004c). Furthermore, where no punishment is specified for any offence under the Act, the punishment

generally is a fine of N 50 upon conviction TUA (2004h). Under the TUAA participation in a strike or lock-out contrary to the Act attracts the fine of N 10,000 or six months imprisonment or to both the fine and imprisonment TUAA (2005).

From the foregoing, one may be tempted to think that the increase of fine under the TUAA would bring deterrence through the criminal sanctions on trade unions. The contrary appears to be the case. According to Emiola "attaching criminal sanctions to a lawful withdrawal of labour…does not help the development of healthy industrial relations, on the contrary, it will embitter workers the more" (Emiola, 1982).

While trade unions may comply somewhat with certain regulatory provisions of labour statutes, experience has shown that strike and lock – out will continue to exist. It is also of interest to note that if the government must impose fines, then most of the fines imposed by the TUA are inadequate having regards to present day economic realities in Nigeria. When we say criminal sanction does not necessarily prevent industrial actions, it is worst when the fines are ridiculously too low. A fine of a thousand naira in Nigeria for the violation of any offence in the 21st century, to say the least, is ridiculous.

8. Conclusion

The law is now very clear that legal entities are as much criminally responsible as human being except where it is logically impracticable to so attach a responsibility having regard to the nature of the offence or where a statute provides otherwise. While trade unions have not been subjected to criminal prosecution as it ought, given the fragrant violations in Nigeria, some of the penal provisions in the TUA (especially those having to do with remission of fund to the government's account) should be enforced with same zest with which the authorities prosecute individuals for tax violation. It is admitted that some other provisions of the TUA such as section 22 (failure to sell copies of the union rules to members on demand) section 39 (failure of the trade union to send audited account to the Registrar) etc., may not give way to prosecution most of the time as such offence are likely to end up in mediation and negotiation. Aside these, there is a number of criminal sanctions for which prosecution is zero.

If the authorities cannot achieve deterrence through criminal sanction, they should be able to achieve economic benefits from award of fines against offenders. The number of registered trade unions in Nigeria has continued to grow with a large number of them still in gross violations of relevant trade dispute laws. If these unions are genuinely committed to their financial duties as provided by the statutes, the government would generate a considerable sum of income from the unions and it is hoped that prosecution would drive this process more effectively.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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