International Labour Standards and the Challenges of Collective Bargaining in Nigeria

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INTERNATIONAL LABOUR STANDARDS
AND THE CHALLENGES OF
COLLECTIVE BARGAINING IN NIGERIA

OVUNDA V C. OKENE*

"Each needs the other: capital cannot do without labour, nor labour without capital."

Pope Leo XVII

Collective bargaining involves a process of consultation and negotiation of terms and conditions of employment between employers and workers, usually through their representatives. It involves a situation where the workers union or representatives meet with the employer or representatives of the employer, in an atmosphere of mutual cooperation and respect, to deliberate and reach agreement on the demands of workers concerning certain improvements in the terms and conditions of employment. Collective bargaining is thus a very important mechanism for attaining a cordial relationship between workers and their employers since it provides an effective forum for the settlement of employment issues. To achieve the laudable objectives of collective bargaining, the industrial relations system in a country must have a legal framework to encourage the parties to bargain collectively and enter into mutual agreements.

The International Labour Organisation (ILO), which undoubtedly is the pre-eminent body on international labour standards, has, by its Conventions and Recommendations, provided the legal blueprint to guide Member States to enact domestic laws and provide mechanisms to facilitate the practice of collective bargaining. Nigeria has, since 17 October, 1970, ratified the Collective Bargaining Convention and has enacted many laws such as the Trade Disputes Act 1990 and the Wages Boards and Industrial Councils Act 1990, which provide among others a mechanism for collective bargaining. But forty six years later and despite the legal framework, there are huge problems still facing the bargaining.

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facing the Nigerian workers and their trade unions in the process of collective bargaining with employers.

The purpose of this paper is to examine the challenges and difficulties affecting the practice of collective bargaining in Nigeria, including the public sector employees, in the context of international labour standards. The paper argues that the practice of collective bargaining in Nigeria does not meet the requirements of international labour standards. It is contended that the government of Nigeria infringes workers' rights to collective bargaining and this does not augur well for the nation's future as a liberal democracy nor for Nigeria's credibility internationally.

1. THE RIGHT TO COLLECTIVE BARGAINING IN INTERNATIONAL LAW

The right to collective bargaining is recognised and protected in International Law. There are several sources for this right. Two international instruments which specifically provide for the right to collective bargaining are the European Social Charter and the ILO Conventions. The right of workers to collective bargaining can also be inferred from other instruments which generally deal with freedom of association and the protection of workers and trade union rights.

The European Social Charter

The European Social Charter (ESC) clearly protects the workers right to collective bargaining. The ESC promotes joint consultation between workers and employers and encourages the setting up of machinery for voluntary negotiations between workers and employers or their representative organisations in order to regulate terms and conditions of employment by means of collective agreements.¹

The Universal Declaration of Human Rights

The right of workers to freedom of association is guaranteed and protected under the Universal Declaration of Human Rights,² the International Covenant on Civil and Political Rights,³ the International Covenant of Economic, Social

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¹ See Art.6(1)- (3) of the European Social Charter 1964.
² Article 23(4).
³ Article 22(1).
and Cultural Rights,' the European Convention on Human Rights" and the American Convention on Human Rights." These guarantees include the right of workers to join and form trade unions for the protection of their economic and social interests. One of the means by which workers can protect their economic and social interests is through collective bargaining. To deny workers the right to collective bargaining will therefore mean denying their right to freedom of association. The two essential conditions for collectively bargaining to occur include the freedom to associate and the recognition of trade unions by employers. This means that workers must be at liberty to associate and to join or form trade unions in order to be able to bargain collectively. There seems to be an established link between freedom of association and collective bargaining, since there would be no point in giving workers the right to organize if they could not bargain collectively."

The thesis that "freedom of association must include the freedom to protect the occupational interests of trade union members" and therefore by necessary implication, \textit{inter alia}, the right to bargain collectively, was confirmed in \textit{Schmidt and Dalstrom v Sweden}.  

\textbf{The African Charter of Human and Peoples Rights}

The African Charter of Human and Peoples Rights (ACHPR) 1981 does not specifically provide for the right to collective bargaining or for trade union rights for that matter. However, it is submitted that a conjoint reading of Articles 10, 5, and 15 of the Charter provides support and basis for collective bargaining. Article 10 provides that "Every individual shall have the right to associate provided he abides by the law", whereas Article 5 states that "every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." And by Article 15, "Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work."

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\item Article 8(1).
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\item Eu. C. HR, Series A. No. 21 (976).
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Article 5 of the Charter recognises the right to freedom of association which enables workers to organise, and one of the aims of organising is to be able to have a common forum to pursue one of the most outstanding purposes of trade unions, that is, improvement of terms and conditions of employment. Thus it may be argued that trade union rights are covered under freedom of association provisions of the Charter. This will then guarantee the right to form and join unions and allow trade unions perform their legitimate activities which include representing their members in collective bargaining. In this way, freedom of association and the right to organise also imply the right to collective bargaining. This argument seems fortified by the fact that similar regional instruments on freedom of association have accepted this trend in line with International Law.

Articles 5 and 15 seem to give further impetus to this by assuring respect for dignity, non-exploitation, and equitable and satisfactory conditions of work for workers.

However, notwithstanding the absence of direct provision on trade union rights in the African Charter of Human and Peoples’ Rights, the Commission has provided detailed guidance on trade union rights in its Guidelines for the Submission of State Reports. Under the Guidelines, States are obliged to provide information on laws, regulations and court decisions that are designated to promote, regulate or safeguard trade union rights, which include the right of trade unions to function freely, collective bargaining and the right to strike.

The ILO and Collective Bargaining

The International Labour Organisation is the pre-eminent authority on international labour standards. The ILO provides the major human rights’ instruments that guarantee and advance the right to collective bargaining throughout the whole world. In the 1944 Declaration of Philadelphia, which is now part of the ILO Constitution, the role of the ILO in the promotion of collective bargaining was acknowledged. The Declaration affirmed "the solemn obligation of the International Labour Organisation to further among the
nations of the world programmes which will achieve the effective recognition of the right of collective bargaining."

The ILO Convention 98 on the Right to Organise and Collective Bargaining which was adopted in 1949 is the main source of workers' rights to collective bargaining. Apart from Convention 98, there are numerous other Conventions and Recommendations which promote collective bargaining between workers and their employers such as Convention No.154 Collective Bargaining Convention 1981, Convention No. 135 Workers' Representative Convention 1971, and Convention No.151 on the right of public employees to organise.

The ILO has consistently considered freedom of association and the right to collective bargaining to be among the core rights that are at the heart of its mission. Outside these Conventions and Recommendations, the significance of the right to collective bargaining has been acknowledged by the ILO Committee on Freedom of Association. Several years ago the Committee declared that:

The right to bargain freely with employees with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent and public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof.

In June 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work. The Declaration embodies the principles of eight fundamental Conventions and all Member States are required to observe these principles regardless of ratification, as a condition of membership. As stated in the Declaration: "all Members, even if they have not ratified the [fundamental] Convention _, the Organise - accordance rights whizc _ - principles the effective rem of forced an equal employment.

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12 As already mentioned, Nigeria ratified this Convention on 17 October 1960.
The ILO is indeed the most relevant 'specialised agency' dealing with international labour standards.

2. THE PURPOSE AND RELEVANCE OF COLLECTIVE BARGAINING

Collective bargaining enables workers representatives (usually trade unions) to negotiate with employers groups to establish terms and conditions of employment and conclude collective agreements on those terms. Under Conventions, have an obligation, arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those [fundamental] Conventions. The principles referred to in the Declaration include freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced and compulsory labour, the effective abolition of child labour and equal remuneration and elimination of discrimination in occupation and employment.

There can be little doubt that the ILO has demonstrated its support for collective bargaining as a human right through which the protection of the economic and social interests of workers can be achieved. Fully cognisant of the ILO's action affirming collective bargaining as a fundamental human right, the World Trade Organisation in 1996 issued the following Ministerial Declaration on core labour rights:

We renew our commitment to the observance of internationally recognised core labour rights. The International Labour Organisation (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them.

The ILO is indeed the most relevant 'specialised agency' dealing with international labour standards.

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Nigerian law, section 91 of the Labour Act\textsuperscript{17} defines collective bargaining as the process of arriving or attempting to arrive at a collective agreement.\textsuperscript{18}

Clearly the principal purpose of collective bargaining is to settle and determine terms and conditions of employment. Improvements in the terms and conditions of workers employment is the chief task of trade unions and collective bargaining is the major means whereby trade unions can ensure that the terms and conditions of employment given to their members are adequate.\textsuperscript{19} The primary aim of workers engaging in collective bargaining has been expressed thus:

By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the

\textsuperscript{17} Chapter 198, Laws of the Federation of Nigeria 1990. In the same Act, a collective agreement is defined as an agreement in writing regarding working conditions and terms of employment concluded between (a) an organisation of workers or an organisation representing workers or an association of such organisations of the one part; and (b) an organisation representing employers or an organisation of such organization of the other part.


\textsuperscript{19} As Lord Donovan put it for the Privy Council “it is of course true that the main purpose of trade unions of employers is the improvement of wages and conditions”: see Collymore v Attorney-General of Trinidad and Tobago [1970] AC 538, 547. It is true that trade unions may have other purposes, powers and functions but the main purpose for their existence is workers welfare based primarily on terms and conditions of employment. Other purposes and powers are merely ancillary or complementary to the main purpose. See also Udoh v Orthopaedic Hospitals Management Board (1993) 7 NWLR 139.
physical integrity and moral dignity of the individual, and also
that jobs should be reasonably secure. P

It is the apparent imbalance of power between the employees and employer
that has necessitated the desire of workers to come together. Workers appreciate
that bargaining will give them near equal relationship with their employer.
They realise that against the power of employers, the individual worker has
almost no bargaining power and the chances of improving conditions of work
are slim. Workers can best strengthen their negotiating position by uniting
and bargaining collectively with employers. Workers have resorted to collective
action to enable them to consolidate their strength more effectively than they
could as Individuals.” As the Donovan Commission noted:

Properly conducted, collective bargaining is the most effective
means of giving workers the right to representation in decisions
affecting their working lives, a right which is or should be the
prerogative of every worker in a democratic society. F

One of the most involved explanations of the function of collective
bargaining ever to come out of Nigeria was formulated by Adeogun, who
stated that:

Collective bargaining is essentially a rule-making process and
a system of countervailing power, that is, a power relationship
between organisations. Thus it lays down the rules to be observed
when labour is bought and sold, in the same way that the State, by
legislation, may regulate jobs. Therefore, collective bargaining is
itself a form of job regulation with the representatives of employees

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20 See P. Davies and M. Freedland, *Kohn-Freud's Labour and the Law* (London: Sweet and Maxwell, 1983), 69. Thompson also writes that the primary aim is “To serve as a means of institutionalising the inevitable
dashes of interests that arise between capital and labour”: see C. Thompson, *Industrial Law* (Jura & Co Ltd, 1989), 281. According to Arthurs, “the world of work was historically characterised by domination
and exploitation. The practice of collective bargaining was therefore introduced to correct these defects”:

“‘Their fundamental existence, their very purpose expressed in the phrase ‘Unity is strength’ depends on
the right to act collectively- in the ultimate the right to strike”: see Wood, “The Collective Will and The

22 Royal Commission on Trade Union and Employers' Associations, *Cmd. 3623*, 1968.
and employers jointly sharing the responsibility for the content of the rules and their observance thereof. What is more, collective bargaining does not stop at job regulation, that is the regulation of the employment relationships of their individual members. The parties to the collective bargaining conclude procedural agreements which regulate their own relationship such as their behaviour in settling disputes.

Clearly the main actors in the process of collective bargaining are labour and capital. It is expected that the parties will bargain voluntarily and abide by their agreement with mutual respect. To this end, the State is not expected to be directly involved or to resort to measures of compulsion. The role of the State, if at all, should be minimal. As Kahn-Freund once noted, "the law should not be used directly to compel either side to bargain collectively, but rather it should promote collective bargaining indirectly by creating inducements."

Kahn-Freund’s view concerning the extent of the role that law can play in collective bargaining seems largely to coincide with the ILO’s position. The ILO has clearly endorsed the fact that collective bargaining should indeed be a voluntary activity between workers and their employers through which issues of employment conditions are resolved. This is explicitly laid down in Article 4 of Convention 98 as follows:

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.

Despite its acclaimed functions, the institution of collective bargaining has been criticised for various reasons. Critical labour law theorists regard collective bargaining as a tool by which capital continues to dominate labour. The lion, as it were, continues to take the lion’s share. According to one writer:

23 A.A. Adeogun, 'The Legal Framework of Collective Bargaining in Nigeria' in D. Orobo, and M. Omole (eds.), Readings ill Industrial Relations ill Nigeria (Lagos and Oxford: Marlhouse Press Ltd, 1987), 90-91. Fashoyin also explains that the aims of collective bargaining are “to accommodate, reconcile and oftentimes compromise the conActing interests of the parties. Collective bargaining is therefore a cushion to this conAct of interests and while it does not remove conflict, it facilitates its accommodation, to enable the two sides to work together harmoniously.” See T. Fashoyin, Industrial Relations ill Nigeria (Nigeria: Longman Nigeria Limited, 1992), 103.

Collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace... [and] has evolved an institutional architecture, a set of managerial and legal arrangements that reinforces this hierarchy and domination."

Another criticism against collective bargaining often advocated by developing countries is that freedom of association for trade union purposes is a hindrance to economic development. Such argument is usually put forward to justify restrictions on the right to organize and the right to collective bargaining." However, this view may not be entirely correct. In fact, an ILO sponsored study on the issue reveals that there is no contradiction between the demands of economic development on the one hand, and freedom of association for trade union purposes on the other. As was noted in the study "there can be no justification for sacrificing either economic development or freedom of association." 27

Notwithstanding these misgivings, collective bargaining seems to be the best mechanism for attaining peace in the relationship between employers and employees and is particularly an effective forum for adjustments and agreement on terms and conditions of employment. Collective bargaining provides a measure to check the concentrated power of capital and thus helps to ensure equilibrium of forces in labour management relationship to avoid exploitation. Collective bargaining is the most consolidated and powerful institution contributing to bringing some equilibrium to unbalanced economic situations." The world of work was historically characterised by domination and exploitation. The practice of collective bargaining was therefore introduced to correct these defects." Collective bargaining does matter in a very practical way. It makes a real difference to the experience of work for employees and has rightly been recognised as a necessary condition for social justice. There is ample evidence from scores of countries over many decades that employees do better collectively than individually. 30

3. BARGAINING AND BARGAINING LEVELS

Collective bargaining takes place at several organisational levels. The three basic levels at which collective bargaining is conducted are the enterprise level, the industry level and the plant or individual workplace level. At the enterprise level, collective bargaining involves an employer on the one hand and the trade union that caters for the interest of his employees on the other. By comparison, collective bargaining at the industry level normally takes place between an individual union and an industry-based employers' association. This type of bargaining seems to be very common in England and Germany. The lowest level at which collective bargaining may take place is at the workplace itself. The parties to such collective bargaining are normally the local workers' organisation and the management of the workplace. Workplace bargaining normally occurs where industry-wide bargaining predominates and the collective agreements do not address local issues.

It has been argued that the level at which collective bargaining is conducted in a given country affects the function of that country's labour market in particular, and the management of its economy in general. Batrercherjee, for example, asserts that from an industrial relations perspective the key variables that determine a country's economic performance are, first, the level at which collective bargaining takes place and, second, the nature of trade union structure.

As he further noted:

Until at least the mid-1980s, the literature suggested that the economies with a decentralised bargaining structure (enterprise-based unions negotiating at plant and firm level, as in East Asian countries, Japan and Switzerland) and economies with centralised bargaining structures (national agreements with centralised trade federations, as in Austria, Norway, and Sweden) "performed" better than economies having industry-wide agreements with industry-wide unions, as in the US and the UK.

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or otherwise of the use of legislative means to bring about an economically effective bargaining structure. In terms of ILO law, the level at which collective bargaining between the employer and employees, or their respective representatives, is to be effected is generally a matter to be decided upon by the parties themselves. The ILO Committee on Freedom of Association endorsed the issue of voluntarism by noting specifically that

According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention 98, 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. 34

In UK, for instance, the emergence of single-employer bargaining in an environment that was predominantly characterised by industry-wide collective agreements took place without any legislative intervention. It has been reported that despite its hostility toward industry-wide bargaining, the Margaret Thatcher administration did not see it fit to use legislation in order to change the bargaining structure to its liking. As Brown has noted:

Bargaining structures are essentially private arrangements between collective bargainers. Government can offer advice as to what might be the best. They can even add their weight to favour one side if the bargainers go into dispute. But they cannot directly legislate to impose the bargaining structure of which they approve. 35

The position in Nigeria, theoretically, is that collective bargainers are at liberty to bargain at any level that may suit them. This can be inferred from the provisions of section 24 of the Trade Unions Act which provides that an employer must recognise a trade union of workers in his employment for the purposes of collective bargaining. Thus bargaining can take place at the plant, enterprise or industry-wide level. In practice, however, the prevalent position seems to be that in the great majority of cases collective bargaining takes place


36 Ibid., 304.
at the industry-wide level." More importantly, contrary to ILO prescription of free and voluntary bargaining, there is State intervention concerning the level and process of collective bargaining in Nigeria particularly in public sector employment. Collective bargaining in Nigeria has become an official term of art, a facade hiding systematic State intervention in the wage bargain process."

In the public sector, while government Policy Statements piously affirm support for voluntary collective bargaining, in practice, successive governments have had to make use of *ad hoc* Commissions in the determination of wages and conditions of service of workers. Some of these Commissions include the Morgan Commission of 1963-64, the Wages and Salaries Review Commission (Adebo Commission) of 1970-71, the Public Service Review Commission (Udoji Commission) of 1972-74, and the Wages and Salaries Review Commission (Shonekan Commission) of 2005-2006. Besides these *ad hoc* Commissions, however, the institutionalised machinery through which collective bargaining takes place in the sector is the National Public Service Negotiating Council. Bargaining is done at three levels, the Federal level, the State level and the Ministerial level. Bargaining at the Federal level is further split into three categories, those representing senior staff on grade levels 10-14, junior staff on grade levels 01-06, and technical staff. In view of all this, it might be suggested that collective bargainers in Nigeria are not completely free to choose the level of collective bargaining which suits them. The subjection of workers to unilateral decisions by Government through semi-political methods

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37 What was more prevalent formerly was collective bargaining at the individual plant or company level, but this has radically changed for the industry-wide collective bargaining since Nigeria returned to full democratic governance in 1999. For more discussion, see C.K. Agomo, "Nigeria", in *International Encyclopedia of Comparative Labour Law and Industrial Relations* (The Netherlands: Kluwer Law International, 2000), 249-254.


39 O korie-Ebou, Nigeria's Minister of Labour in the First Republic, perhaps, puts the picture clearly when he stated: "We have followed in Nigeria the voluntary principle which was so important an element in industrial relations in United Kingdom. compulsory methods might occasionally produce a better economic or political result, but labour-management must. I think, find greater possibilities, mutual harmony where results have been voluntarily arrived at by free discussion between two parties. We in Nigeria, at any rate, are pinning our faith on voluntary methods." See *International Labour Office Ministerial Conference Record of Proceedings* 38th Session, Geneva (1955), 33. Prime Minister Tafawa Balewa similarly declared that: "Government re-affirms its confidence in the effectiveness of voluntary negotiation and collective bargaining for the determination of wages. The long-term interests of government, employers and trade unions alike would seem to rest on the process of consultation and discussion which is the foundation of democracy in industry. Government intervention in the general field of wages should be limited to the establishment of statutory wage-fixing machinery for any industry or occupation where wages are unreasonably low by reference to the general level of wages. Any other policy would seem likely lead to political influence and considerations entering into the determination of wages with effects that might be ruinous economically, and which would have serious adverse consequences for the development of sound trade unions." See *Nigeria: Annual Report on the Department of Labour 1954-5*, para. 20.

40 See *Labour and Industrial Relations in Nigeria* by Okorie-Ebou.

41 See *Labour in Nigeria* by D. Oyibo.

42 See *Labour in Nigeria* by Okorie-Ebou.

43 See *Labour in Nigeria* by D. Oyibo.
of ad hoc Commissions.” without the normal collective bargaining, supports this assertion. In the private sector, collective bargaining rights are restricted by the requirement for governmental approval. Every agreement on wages must be registered with the Ministry of Labour, Employment and Productivity, which decides whether the agreement becomes binding according to the Wages Board and Industrial Councils Act. It is an offence for an employer to grant a general or percentage increase in wages without the approval of the Minister of that Ministry. This is contrary to the principle of free collective bargaining.”

The Nigerian situation is clearly in violation of international labour standards. In India, for example, the position is remarkably different. Collective bargaining takes place at various levels. The choice of level appears to vary according to the category of workers. In the private sector, collective bargaining takes place at plant level between the management of the plant and an enterprise-based union. In public sector enterprises, bargaining takes place between centralised trade union federations and the State (as employer) at industry and/or national level. Central and State government employees in the service sector bargain at national and/or regional levels through affiliated unions.”

Unlike Nigeria, therefore, the bargaining structure in India does not come under legislative or administrative regulation as such. This does not mean that the Indian government may not have preferences regarding the level of bargaining. The important thing to note is that whatever the view of the government might be, collective bargainers are still allowed to decide independently the level at which they wish to conduct their collective bargaining. It might be suggested that the Indian approach is closer to the position of the ILO on the issue.

4. THE BARGAINING RIGHTS OF PUBLIC EMPLOYEES

The question may be asked whether public sector employees should be allowed to enjoy the same bargaining rights as their private sector counterparts. From the perspective of the international labour standards, the answer must, to a large extent, be in the affirmative. In the first place, Article 4 of Convention 98 dealing with the promotion of collective bargaining applies both to private

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40 Ad hoc Commissions are fundamentally different from collective bargaining structures because they are not bilateral or tripartite negotiating machinery.

41 See s. 18.


43 See D. Battercherjee, supra n. 25, 6.
sector and to nationalised undertakings and public bodies." Secondly, Article 7 of the Labour Relations (Public Service) Convention, 1978 (No. 151) also affirms that international labour standards make no significant distinction between the private and the public sector employees in this regard. As Article 7 unambiguously provides:

Measures appropriate to national conditions shall be taken, where necessary, to encourage, and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment the public authorities concerned and public employees' organisations...

Under international labour standards, the only exception to the rule that all public service workers should enjoy collective bargaining rights relates to those public servants who, by their functions, are directly engaged in the administration of the State; that is to say, civil servants employed in government ministries and other comparable bodies. Public employees of this category are excluded from the scope of Convention 98. Therefore, in the case of such employees, the ILO Member States are not required, as they are for all other classes of public employees, to create under their national legislation specific provisions recognising their right to conclude collective agreements.

However, contrary to the principles explained above, there is unilateral determination of the salary and other employment conditions of public sector employees in many developing and several industrialised countries. Government may sometimes consult the public sector unions before taking a decision, but it is ultimately the will of government that prevails in the event of any disagreement. This unitary policy in public sector labour relations finds support in the so-called doctrine of sovereignty. The doctrine is that:

...as the representative of the popular will (or general interest), the State has an unassailable right to act unilaterally in matters coming within its legislative power, a right that cannot be challenged by groups representing particular interests, such as public servants organisation.

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45 See ILO 243'd Report, Case No. 1348, para. 289.
46 See ILO 240th Report, Case No. 1348, para. 289.
48 Ibid., 286.
The sovereignty doctrine, as applied to labour relations, relates to the base of authority in government. In theory, sovereignty means that collective bargaining and its associated features such as the right to strike are inconsistent with the responsibility of the State to provide essential services which otherwise could not be provided by private sector employers. It is argued that the sovereignty of the State precludes it from negotiating with its subjects on conditions of service. In any event, it is said that ultimate sovereignty rests with the citizens and their duly elected representatives. This reasoning makes no difference whether a State has an elected representative or a military dictatorship.1

But many trade unionists and industrial relations' experts do not agree with the view that the collective bargaining rights of public employees should be abrogated or severely curtailed by the State. Professor Weiler, for example, argues that government employees, including those that are employed in ministries, should have the right to bargain collectively with their government because employers, whether public or private, are in reality the same as far as their attitudes to employees are concerned. Recounting his personal experience as a government employee, he noted:

I worked directly for a provincial government for nearly five years. I was the head of a public agency employing nearly fifty people. I can testify from that personal experience on either pole of the employment relation that the fact that the employer is a government, that it is not directly actuated by the profit motive, does not make it inherently benevolent. Sometimes a public employer maintains rates of compensation which can only be described as exploitative... Sometimes public managers or supervisors may abuse their authority and mete out arbitrary treatment to individual employees... Of course, that portrait can be drawn. On the average... public employers are no worse, and are probably a little better, than the average private employer. A more charitable description is to say that governmental personnel policies tend to be erratic.50

In a similar vein, during the preparatory meetings to Convention 87, when certain governments strongly expressed their reservations concerning the recognition of the trade union rights of public service employees, it was


observed that it would be "inequitable to draw any distinction, as regards freedom of association, between wage earners in private industry and officials in the public services, since persons in either category should be permitted to defend their interests by becoming organised, even if those interests are not always of the same kind."51

Perhaps in apparent deference to this view, some countries now determine salary and other conditions of their public sector employees through collective bargaining. Canada and the United States of America52 are examples of such countries. The position in the United States of America is that:

Both federal and State legislation mandates in many instances, collective bargaining for public employees, but normally prohibiting them from striking, instituting instead various kinds of dispute settlement mechanisms.54

In Nigeria, public employees are denied the right to collective bargaining since wages and salaries of public employees are determined unilaterally by the Government on the basis of recommendations made by independent salary Commissions set up from time to time.55 This is a clear infringement of the principles of Article 4 of the Collective Bargaining Convention. What is more, under the Trade Disputes (Essential Services) Act 1990,56 the entire public sector, that is the civil service of the Federal, State and local governments, public parastatals and agencies, as well as certain private sector establishments, such as banks and oil establishments are covered by the no-strike law?57

It may be pertinent to recall that, contrary to what obtains now, Nigerian public sector employees used to exercise and enjoy the right to collective

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52 See P. Weiler, supra n. 50, 214.
53 See M. Ozaki, supra n. 47, 291.
54 See P. Herzog, 'The Legal Nature of Collective Agreements', (1986) 34 American journal of Comparative Law, 321. We have already mentioned some of these Commissions in Nigeria. See also M. Ozaki, supra n. 47, 387.
56 Ibid.
57 The Law provides penalty by way of a fine of N10,000 for employers and a fine of N200 and/or six months' imprisonment for members and officials of trade unions who violate the law. The complete prohibition of strikes in essential services is reinforced by s. 6 (6) (a) of the Trade Union (Amendment) Act 2005 which provides for a fine of N10,000 or six months' imprisonment for any contravention. The only remarkable difference here is that whereas the former law provides for N2, 000 or six months' imprisonment against members and officials of trade unions, the new law penalty is applicable across the board to any person, trade union or employer who may violate the law.
bargaining and even to strike. The fact they no longer exercise such rights is an indication of how freedom of association by trade unions has suffered serious setbacks in Nigeria.

5. THE SUBJECT MATTER OF COLLECTIVE BARGAINING

The principle of free collective bargaining also implies that collective bargainers should have the right to determine the scope of negotiable issues. There is a world-wide trend that the content of collective agreements is to cover as many issues as possible. The scope of collective bargaining in Japan, for example, covers "all the issues over which the employer has control."?

It is trite that all ILO Member countries that have ratified Convention 98 are under the obligation to take appropriate legislative measures in order to promote collective bargaining. Such measures should, inter alia, ensure that collective bargaining is extended to all matters included in the definition of collective bargaining as contained in the Collective Bargaining Convention 151 of 1981. Article 2 of the Convention defines collective bargaining as: "all negotiations which take place between an employer, a group of employers or one or more employers' organisations on the one hand, and one or more workers' organisations on the other, for-

(1) determining working conditions and terms of employment and/or
(2) regulating relations between employers and workers and lor
(3) regulating relations between employers or their organisations and workers or workers organisations."

In Nigeria, the position is that the scope of negotiable issues in collective bargaining is subject to certain restrictions. In the public sector, negotiable issues are spelt out in the National Public Service Negotiating Council (NPSNC). The issues are threefold: namely, negotiation on all matters affecting the conditions of service of all civil servants; advising government, when necessary, on how to harness ideas and experience of civil servants for


improved productivity; and reviewing the general conditions of civil servants."

In practice, however, whereas the government has declared its unequivocal support for collective bargaining, many items of conditions of service such as salary, leave entitlements, minimum wage, pensions, car loan etc. are often subjected to unilateral decisions by government without the normal collective negotiations with the unions. In addition to this, collective bargaining is also subject to the government’s incomes policy and to civil service rules which often affect the scope of negotiable issues.

In the private sector, negotiable issues are usually contained in the procedural agreement which is the manual of standards, methods and levels to be followed by the negotiating parties. Procedural agreements are in common use. These accord recognition to the unions and usually affirm the principle of co-operation and peaceful relations between employees and their union on the one hand, and the employers on the other. A typical procedural agreement spells out the subjects for negotiation or discussion at each level and also defines issues of management prerogatives which are usually removed from the bargaining table. It must be noted that the removal of the so-called management prerogatives from the bargaining table affects the scope of negotiable issues. Although there is no specific law which sanctions management prerogatives, in Nigeria, as in other countries the actual practice of it is to be condemned as an impediment to free bargaining on all issues of employment in the workplace. In fact, the argument of the management prerogatives has rarely been accepted except by management ideologues."

It should be noted that union security clauses are clearly prohibited from inclusion in collective agreements. The decision in Bashorun Industrial Arbitration Panel has affirmed the fundamental right to dissociate from union membership, thereby making any closed shop arrangement unconstitutional."

In our view, it is more important that parties to collective bargaining should be trusted to negotiate voluntarily and freely on all pertinent issues in the workplace and conclude mutual agreements rather than for the government

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61 See C. K. Agomo, supra n, 37, 252.
62 Ibid.
63 In Malaysia, for example, s.13 (3) of the Industrial Relations Act 1976 clearly provides for the removal of issues of management prerogative from the bargaining table. See Wu Min Aun, The Industrial Relations Law of Malaysia 2nd ed. (Malaysia: Longman, 1995), 124.
66 See also s.40 of the Constitution of the Federal Republic of Nigeria 1999.
persistently to intervene by imposing legislative or administrative constraints on them.

6. THE CONDUCT OF COLLECTIVE BARGAINING

Collective bargaining implies the right of trade unions to negotiate wages and other conditions of service with the employers or their organisations. Naturally, the first step towards realising this aim is the recognition of the appropriate trade union for collective bargaining purposes. Recognition of a trade union or workers group is a sine qua non in the procedure for collective bargaining.

The issue of recognition is crucial to the whole process of collective bargaining. Before bargaining can take place, the employer must have to recognise the trade union or workers' representatives as the sole bargaining agent for the employees within the bargaining unit, in relation to terms and conditions of employment. The ILO Committee on Freedom of Association has clearly declared that recognition by an employer of the main unions represented in his undertaking, or the most representative of these unions, is the very basis for any procedure for collective bargaining on conditions of employment in the undertaking. Where there is no union organisation in an industry, the representatives of the unorganised workers, duly elected and authorised by the workers, will conduct bargaining on their behalf. Under Nigerian law, union recognition is a legal obligation on employers, so long as a trade union has more than one of its members in the employment of an employer. The employer or association of employers is therefore bound to recognise the trade union or workers group as the sole bargaining agent for the employees within the bargaining unit in relation to the terms and conditions of employment.

Having been duly recognised, a trade union would eagerly expect the employer to be prepared to enter into genuine negotiations with it. But unfortunately most employers are not willing to negotiate voluntarily and faithfully. This has necessitated the need to impose on employers not only an obligation to bargain collectively, but also the duty to do so faithfully.

In terms of ILO law, the Committee on Freedom of Association considers the issue of bargaining in good faith an obligation that is applicable to the bargaining parties. The Committee has therefore enjoined both parties to

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68 Ibid., paras. 785 and 786.
69 Section 24(1) of the Trade Unions Act, Chapter 437, Laws of the Federation of Nigeria 1990.
make very effort to reach an agreement, conducting genuine and constructive negotiations, avoiding unjustified delays, complying with agreements which are concluded and applying them in good faith. The principle of mutual respect for commitments entered into in collective agreements is expressly affirmed in Recommendation No 91, which provides that "collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded." The need for the parties to negotiate in good faith has also been reiterated by the Committee of Experts. As the Committee noted:

In several countries legislation makes the employer liable to sanctions if he refuses to recognise the representative union, an attitude which is sometimes considered as an unfair labour practice. The Committee recalls in this connection the importance which it attaches to the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement, the more so in the public sector or essential services where trade unions are not allowed strike action.

In South Africa, for example, where a constitutional right to collective bargaining exists, there is a duty to bargain and reach an agreement in good faith." In Japan, where a constitutional right to bargain also exists, the bargaining obligation of an employer is said to involve listening and responding to unions' demands and contentions, but even then it is said that the obligation to bargain in good faith does not involve a duty to reach an agreement."

However, in Nigeria, the term 'obligation to bargain in good faith' is not explicitly contained in any of the laws dealing with employment matters and

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73 See s. 23(5) of the South African Constitution Act 108 of 1996.

74 See East Rand Gold and Uranium Co v National Union of Metal Workers of South Africa (899) 10 ILJ 683 (LAC), at 697F, where the Court interpreted "bona fide negotiations" as follows: "In our view, it is clear that an important element of the obligation to bargain in good faith, is to meet and negotiate with an honest intention of reaching an agreement, if this is possible." See also A. Sreenkamp, S. Stelzner and N. Badenhorst, 'The Right to Bargain Collectively', (2004) 25 Industrial Law Journal (South Africa), 951.

75 See T.A. Hanami, supra n. 64, II.1. See also K. Sugeno, Japan's Labour Law (Searle: University of Washington Press, 1992), 488.
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Collective bargaining, such as the Trade Disputes Act 1990, Labour Act 1990, and the Trade Act 1990. Nevertheless, one may argue that the obligation to bargain in good faith is implied under section 90 of the Labour Act 1990 wherein collective bargaining is defined as "the process of arriving or attempting to arrive at a collective agreement." This must be so considering the hurdles that a trade union in Nigeria must cross before it secures for itself recognition for collective bargaining purposes. There is no reason not to expect the employer to be prepared to bargain and conclude agreements with the trade union in good faith and in an atmosphere of mutual trust and respect."

In any event, it is suggested that it is necessary for the law to impose clearly a duty on the employer to bargain in good faith with appropriate recognised trade unions. This will conform to the acceptable practice in other countries. In the United States, for example, once the appropriate bargaining unit has been determined and the exclusive bargaining agent has been chosen, the employer is duty bound to bargain in good faith with the trade union concerned. An employer's refusal to bargain at that stage is regarded as an unfair labour practice, and an aggrieved party may seek a remedy against such employer before the National Labour Relations Board.

Finally, trade unions and employers are enjoined to try and settle through collective bargaining all pertinent issues affecting the employment of workers in the workplace. Where the attempt to settle fails, the substantive trade dispute is henceforth subjected to the compulsory arbitration process provided under the Trade Disputes Act. It is submitted that this provision runs counter to the principle of free and voluntary collective bargaining and it is indeed one of the major challenges confronting free and voluntary collective bargaining in Nigeria.

7. CONCLUSION

Collective bargaining is undoubtedly an instrument of social justice which allows workers to negotiate on a more equal footing with their employer. The ILO has established international standards which enshrine workers' rights to free and voluntary collective bargaining. In fact, the ILO regards the right to collective bargaining as a human right. Most countries of the world comply with this accepted international practice. Unfortunately, this is not so in Nigeria.

76 This view is also supported by another commentator; see V. Anantarman, Malaysian Industrial Relations: Law and Practice (Sendang, Malaysia: UPM, 1997), 95.

77 See 55.3-18 of the Trade Disputes Act 1990.
Although Nigeria has ratified the Collective Bargaining Convention, many practices concerning collective bargaining do not meet the ILO standards. For example, we have seen that the ILO prescribes that collective bargainers must be free to choose the level at which they wish to conduct their negotiations. But in Nigeria the level of collective bargaining is not completely free from administrative interference. Concerning the categories of workers that should enjoy collective bargaining, the position in Nigeria is that public sector workers are hardly allowed to bargain.

In summary, the government has not allowed the practice of collective bargaining to flourish. One measure of the health of any society is the extent to which its legal system and administration are in tune with contemporary realities and contemporary public opinion. If collective bargaining is to be entrenched in Nigeria, government intervention must be severely limited to one of laying broad policy guidelines. The parties must be permitted to continue to negotiate freely. Besides, government in its capacity as an employer has a duty to set a good example by being seen in practice to Utilize effectively its own collective bargaining machinery in its dealings with its own employees." Any disrespect for the right to collective bargaining clearly weakens the bedrock principles on which our democratic institutions are built. Like other liberal democracies, the government of Nigeria must respect the right of workers to free and voluntary collective bargaining in conformity with global labour standards. Nigeria's leadership of the African Union and its membership of the ILO demand no less.

78 See A. A. Adeogun, supra n. 23, 102.