



The Legal Framework for Collective Bargaining in Nigeria

Nnadozie Chile Nwabuko

PhD Student, Business and Industrial Relations Law of the Rivers State University, Port Harcourt, Nigeria

* Corresponding Author: **Nnadozie Chile Nwabuko**

Article Info

ISSN (online): 2582-7138

Impact Factor: 5.307 (SJIF)

Volume: 04

Issue: 06

November-December 2023

Received: 26-08-2023;

Accepted: 28-09-2023

Page No: 251-259

Abstract

The International Labour Organization (ILO) in its Right to Organize and Collective Bargaining Convention No. 98 of 1949 recognized the right to collective bargaining as a core trade union right. Although Nigeria has practised democratic governance for more than two decades, violation of this right persists. This paper examined the legal framework for collective bargaining in Nigeria and found that the right to collective bargaining is not provided for in the Nigerian Constitution. It was also found that one of the issues militating against the right to collective bargaining in Nigeria is the lack of good faith in the bargaining process, which manifests in delays and lack of commitment to conclude collective agreements. The paper recommends legislative intervention, especially, the amendment of the Constitution of the Federal Republic of Nigeria to provide for the right to collective bargaining. The National Assembly should amend the Trade Disputes Act to make collective agreement generally enforceable by expressly stipulating that a collective agreement is binding on any trade union and employer that has entered into it and who is included in or affected by the agreement.

DOI: <https://doi.org/10.54660/IJMRGE.2023.4.6.251-259>

Keywords: Freedom of Association, Trade Unions, Trade Union Rights, Right to Collective Bargaining, Employer, Employee

Introduction

The Constitution of the Federal Republic of Nigeria 1999 (as amended) ^[1] gives employees the right to belong to trade union of their choice for the protection of their interest at the workplace. The right to organize is a basic requirement, the right to collective bargaining is the core and the right to strike guarantees the right to collective bargaining ^[2]. These rights make up the basic labour rights and the foundation of effective labour relations system ^[3]. Thus, the right to collective bargaining is related to and dependent on the right to freedom of association and the right to strike ^[4].

The term collective bargaining describes the process by which the representatives of employers and workers meet to discuss and reach an agreement on the needs of the workers as it relates to their terms and conditions of employment. It involves negotiations by the workers, represented by the union and the representatives of the employer with a view to improving the working conditions of the employees or resolve other issues arising from their employment relationship.

Collective bargaining makes the right of association meaningful and real to workers and employers. It assumes freedom for workers to organize in independent trade unions to bargain independently and effectively with the employer, which is essential to alleviate the subordination of individual workers ^[5].

¹ CFRN 1999, s40.

² R Ben-Israel, 'Introduction to Strikes and Lockouts: A Comparative Perspective' in R Blanpain (ed), *Comparative Labour Law* (Deventer: Kluwer 1994) 6.

³ W Min and X Jifeng, *Labour Relations and Disputes* (Taiwan: Taiwan National Open University Publishing House 1999) 286; Freedom of Association and Collective Bargaining: A Primer on Freedom of Association
<<http://www.cleanclothes.org/codes/freedomofassociation.htm>> Accessed 26 March 2023.

⁴ R Ben-Israel, *International Labour Standards: The Case of the Freedom to Strike* (Deventer: Kluwer 1988) 27.

⁵ K W Wedderburn, *The Worker and the Law* (London: Penguin Books 1965) 222.

Without collective bargaining, the employer would have to bargain individually with each employee⁶. As an individual, the worker will accept the terms which the employer offers, resulting to a relationship between a bearer of power and one who is not. Therefore, it is through workers acting in solidarity that there could be a semblance of parity of power at work, which underscores the need for collective bargaining⁷. In industrial relations, collective bargaining is therefore regarded as a process of enhancing industrial peace. The right to collective bargaining has been internationally recognized as a fundamental human right⁸. Several human right instruments acknowledge and protect the right because it flows from freedom of association⁹, which in itself refers to the right of workers and employers to organize for the defence of their occupational interests. The International Labour Organization (ILO) in its Freedom of Association and Protection of the Right to Organize Convention No. 87 of 1948¹⁰ and the Right to Organize and Collective Bargaining Convention No. 98 of 1949¹¹ identified the right to collective bargaining as one of the core trade union rights. Although it has been argued that there is no generally acceptable definition of collective bargaining¹², various scholars have defined the concept due to its importance as a key trade union right. Collective bargaining is a process of negotiation and conclusion of collective agreements on terms and conditions of employment between employers and workers¹³.

Leibowitz¹⁴ defines collective bargaining as a process by which unions and employers determine the terms and conditions of employment that govern their workplace and attempt to negotiate the resolution of the disputes that may arise. For Bernadine, collective bargaining occurs when the representatives of a labour union meet with management representatives in order to determine such issues as employees' wages and benefits create or revise work rules, and resolve disputes or violations of the labour contract¹⁵. Simply put, the process represents the primary act of determining employees' wages, benefits and working conditions.

While Aturu asserts that collective bargaining is a process whereby workers and employers enter into discussion and consultation with a view to reaching a collective agreement aimed at regulating working conditions¹⁶, Ogunkorode opines that it is an instrument for promoting industrial peace, which enshrines industrial democracy at the workplace¹⁷.

Thus, collective bargaining from the perspective of workplace democracy is essentially a system in which employers share their administrative or management decision process with the trade unions.

The benefit of collective bargaining hinges on the assumption that workers have the right to contract with their employers on wages and working conditions and the employers recognize that right¹⁸. The alternative to collective bargaining is undemocratic in the sense that if the employers alone undertake bargaining, the result will be terms imposed by them, which the workers must accept. Another alternative is for the state as the chief regulator of the economy to fix all terms and conditions of employment¹⁹.

Collective bargaining is therefore the most common form of workers participation in the workplace because it provides the workers, through their trade unions, with greater advantage and equality of negotiating power in the bargaining process with employers. In addition, collective bargaining is the means by which the right of association becomes meaningful and real to workers and employers.

Legal Framework for Collective Bargaining

The legal framework for collective bargaining in Nigeria are the Constitution of the Federal Republic of Nigeria, 1999²⁰, the Labour Act 1974²¹, the Trade Unions Act 1973²², the Trade Disputes (Emergency Provisions) Act 1968, the Trade Disputes Act 1976²³, the Trade Union (Amendment) Act 2005, and the Wages Board and Industrial Councils Act 2004²⁴. It is pertinent to mention straightaway that there is no express constitutional provision on the right to collective bargaining in Nigeria. The Labour Act defines collective bargaining as the process of arriving or attempting to arrive at a collective agreement²⁵.

The Trade Disputes Act 1976 sets out the procedure for settling trade disputes. It recognizes two ways by which trade disputes could be resolved: the voluntary grievance procedure and the statutory procedure. Section 4 of the Act requires disputing parties to first attempt to settle their disagreement by the existing negotiation machinery in a meeting between both parties²⁶. It is only when this grievance procedure, also known as the internal machinery procedure, fails that the statutory procedure could be resorted to or where no such internal mechanism exists²⁷. According to Idubor²⁸, the grievance procedure is like a voluntary treaty between the union and management by which the

⁶ F Burchill, *Labour Relations* (London: Macmillan Press Ltd, 2nd edn, 1997) 35-36.

⁷ O Kahn-Freund, *Labour and the Law* (London: Stevens and Sons 1977) 6; B Gernigon and Others, 'ILO Principles Concerning Collective Bargaining' (2000) 139 (1) *International Labour Review*; 33-55.

⁸ R J Adams, 'The Human Right to Bargain Collectively: A Review of Documents Supporting the International Consensus', Working Paper No 1, *Society for the Promotion of Human Rights in Employment* (Canada: McMaster University 1998)

<<http://www.sphre.org/workingpapers/HumanRightToBargain.htm>> Accessed 26 March 2023.

⁹ (n 1).

¹⁰ FAPROC, arts 2-7.

¹¹ ROCBC, arts 1-6.

¹² F Anyim, *Industrial Relations in Nigeria in the 21st Century* (Lagos: Daily Labour Publishers 2014) 96.

¹³ OVC Okene, *Labour Law in Nigeria (Selected Essays)* (Owerri: Zubic Infinity Concept 2019) 116.

¹⁴ M Leibowitz, *Collective Bargaining and Labour Disputes Resolutions*, 2004, p. 42.

¹⁵ H J Bernadine, *Human Resources Management: An Experimental Approach* (6th edn, Boston: McGraw-Hill/Irwin 2012) 55.

¹⁶ B Aturu, *Nigerian Labour Laws: Principles, Cases, Commentaries and Materials* (Friedrich Elbert Shifting) 15.

¹⁷ O Ogunkorode, 'The Collective Bargaining Process' in L Omole (ed), *Contemporary Issues in Collective Bargaining in Nigeria* (CAIF Nig. Co. 1983).

¹⁸ G A Okogwu, 'An Overview of Collective Bargaining in both Sectors of the Nigerian Economy', Paper presented at National Workshop on Collective Bargaining Process in the Public and Private Sectors under Conditions of Deregulated Nigerian Economy, Lagos.

¹⁹ Okogwu (n 18).

²⁰ (n 1).

²¹ LA 1974, s9(6).

²² TUA 1973, s12.

²³ TDA 1976, s3.

²⁴ WBICA 2004, s8(1) and s9(1).

²⁵ (n 21) s91.

²⁶ (n 23) s4(1).

²⁷ *Ibid*, s4(2).

²⁸ R Idubor, 'Trade Disputes Settlement Machinery in Nigeria: The Need for Review' (2000 – 2001) 6(2) *University of Benin Law Journal*, 129; I N E Worudji, 'Settlement of Trade Disputes under the Nigerian Labour Law: The Missing Links' (2003) 6 *University of Maiduguri Law Journal*, 14.

parties commit to resolve all their grievances through the stated procedure.

Collective agreements usually establish internal dispute procedures, however, there are cases where they are unilaterally prescribed by the management as part of the work rules. It should be noted that when a dispute is being resolved or negotiations are ongoing, the parties are not allowed to resort to industrial action^[29], doing so would be contrary to the law^[30].

The right to collective bargaining, like other trade union rights, is accepted as a human right. Several international and regional instruments both acknowledge this and they constitute sources of the right to collective bargaining. The instruments include ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize 1948^[31], Convention No. 98 on the Right to Organize and Collective Bargaining 1949^[32] and the Collective Bargaining Convention No. 154 of 1981. Others are the Universal Declaration on Human Rights, 1948^[33], the International Covenant on Civil and Political Rights, 1966^[34], the International Covenant on Economic, Social and Cultural Rights, 1966^[35] and the African Charter on Human and Peoples' Rights 1981^[36]. Convention No. 135 on Workers' Representative Convention 1971, Recommendation 91: Collective Agreements Recommendation and Recommendation 92: Voluntary Conciliation and Arbitration Recommendation both of 1951.

The Objectives of Collective Bargaining

From the foregoing, it is evident that collective bargaining aims at improving the terms and conditions of workers through negotiation and conclusion of collective agreement. It has severally been observed that improvements in the terms and conditions of employment of workers is the main function of trade unions and collective bargaining is the process by which unions can ensure that the terms and conditions of employment given to their members are acceptable^[37].

Davies and Freedland expressed the primary objective of workers engaging in collective bargaining as a means 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, be compatible with the physical integrity and moral dignity of the individual, and that jobs should be reasonably secure^[38]. Therefore, the imbalance of power between the employees and the employer made the workers realize that bargaining collectively will

give them an equal bargaining power with their employer. Thus, through collective action by banding together, workers are able to strengthen their positions more than they could as individuals^[39].

According to Sir John Wood, the basic reason for the existence of the union and their main purpose expressed in the phrase 'Unity is strength' depends on the right to act collectively and finally, the right to strike^[40]. Put in another way, it is like where power confronts power^[41]. The workers only achieve a form of parity of power with the employer by acting together in solidarity^[42].

Reiterating the importance of collective bargaining, the Donovan Commission stated that it is the most effective means of giving workers the right to representation in decisions affecting their working lives, a right which should be the prerogative of every worker in a democratic society^[43].

The process of collective bargaining regulates industrial relations and if followed brings about industrial peace and the following benefits:

1. Workplace democracy: According to Adeogun^[44], workplace democracy appears to be the most important reason for collective bargaining. The employment relationship creates a manifest inequality of bargaining power against the individual employee^[45]. However, by joining forces and working in concert with other workers, they acquire the power to change the situation to their benefit because the employer will be concerned about the likelihood of losing all his workers, even if temporarily^[46]. Thus, in the words of Galbraith^[47], collective bargaining enables workers to acquire a "countervailing power" to that of their employer thereby reducing the imbalance of power at the workplace^[48].

It should be noted that the democratic nature of collective bargaining flows from its "civilizing impact upon the working life and environment of employees" and the fact that it subjects an employer to the "rule of law"^[49]. Collective agreements, which are the outcome of collective bargaining, specify the rules on how workers' issues like salary increases, promotion and discipline, for instance, should be handled. Without workplace rules made through collective bargaining and enforced through arbitration procedures, management decisions concerning the workers may not meet the requirements of fairness and justice^[50]. Collective bargaining therefore subjects employers to the rule of law and not to act as dictators, which makes the employment relationship more democratic.

²⁹ *Michelin (Nigeria) Limited v Footware, Leather and Rubber Products Senior Staff Association* (1980, 81) NICLR 153.

³⁰ *Ibid.*

³¹ Arts 3,5,8,9 and 11.

³² Arts 1-6.

³³ Art 23.

³⁴ Art 22.

³⁵ Art 8.

³⁶ Arts 10, 5, 15, 25 and 26.

³⁷ *Collymore v Attorney General of Trinidad and Tobago* (1970) AC 538, 547 Per Lord Donovan; *Udoh v Orthopaedic Hospitals Management Board* (1990) 4 NWLR (Pt 142) 53.

³⁸ P Davies and M Freedland, *Kahn-Freund's Labour and the Law* (London: Sweet and Maxwell 1983) 69.

³⁹ M Oslon, *The Logic of Collective Action* (Harvard: Harvard Press 1905) 20.

⁴⁰ J Wood, "The Collective Will and the Law", (1988) 17 *Industrial Law Journal* 6.

⁴¹ O Kahn-Freund, *Labour and the Law* (London: Stevens & Sons 1972) 51.

⁴² *Ibid.*, 6.

⁴³ Royal Commission on Trade Unions and Employers' Associations, Cmnd 3623, 1968.

⁴⁴ A A Adeogun, 'The Legal Framework of Collective Bargaining in Nigeria' in D Ootobo and M Omole (eds), *Readings in Industrial Relations in Nigeria* (Lagos: Malthouse Press Limited 1987) 91.

⁴⁵ Davies and Freedland (n 34) 18.

⁴⁶ *Ibid.*

⁴⁷ J K Galbraith, *American Capitalism: The Concept of Countervailing Power* (Boston: Houghton Mifflin 1956) 9.

⁴⁸ K Klare, 'Countervailing Workers Power as a Regulatory Strategy' in H Collins (ed.), *Legal Regulation of the Employment Relation* (London: Kluwer 2000) 63-70.

⁴⁹ A Flanders, *Management and Unions: The Theory and Reform of Industrial Relations* (London: Faber and Faber 1970) 41-42.

⁵⁰ (n 49).

In addition, collective bargaining offers the employees the opportunity to express their opinions and worries, and be involved in the governance of their workplace. By this, they are able to express their discontent and worries without fear of victimization, unlike the case where a worker is acting alone.

2. Redistribution of Power: As noted above, the imbalance of bargaining power against the employees necessitates their collective action to strengthen their position^[51]. The superior bargaining power of the employer results to unfair and unjust terms and conditions of employment for the employee^[52]. However, through collective bargaining workers improve their conditions through redistribution from the employer's profits to the employees' higher wages^[53]. Collective bargaining is therefore a process for reducing inequality by redistributing power and resources.

3. Settlement of Trade Disputes: According to Nwoke, settlement of trade disputes is the main function of collective bargaining^[54]. Parties to collective bargaining make procedural rules that regulate their behaviour during dispute settlement^[55]. It is therefore a rule-making process. In case of conflict, collective bargaining provides the mechanism for the resolution of the dispute by negotiation of terms and conditions of employment, which is the underlying basis for industrial peace^[56].

4. Promotion of Efficiency: Collective bargaining, according to Freeman and Medoff, promotes economic efficiency through minimizing industrial conflict in the workplace^[57]. Most of the laws that advocate collective bargaining were aimed at limiting industrial conflict, which is detrimental to efficiency at work. Collective bargaining improves productivity through free flow of communication, job security, higher morale, increase in investment, better cooperation between workers and management, and so on^[58]. It is argued that trade union ability to enforce collective agreements has resulted to improved labour contracts and higher economic efficiency^[59].

International Labour Organisation and Collective Bargaining

The main source of workers right to collective bargaining is the ILO Convention No. 98 (1949) on the Right to Organize and Collective Bargaining. The Convention provides, among others, for the obligation to establish machinery appropriate to national conditions, to ensure respect for the right to organize and encourage the full development and utilization of the machinery for collective bargaining^[60]. Apart from Convention No. 98, there are other ILO conventions and recommendations that promote collective bargaining between employers and workers. They include Collective

Bargaining Convention No. 154 of 1981, Workers' Representative Convention No. 135 of 1971 and Right of Public Employees to Organize Convention No. 151.

Other instruments include Recommendation 91, Collective Agreements Recommendation 1951, Recommendation 92, Voluntary Conciliation and Arbitration Recommendation 1951.

The ILO considers freedom of association and the right to collective bargaining as the core rights at the heart of its mission. The Declaration on Fundamental Principles and Rights at Work, adopted by the ILO in June 1998, embodies the principles of eight fundamental Conventions, which all member states are required to observe as a condition for membership, irrespective of ratification^[61]. The Declaration includes the effective recognition of the right to collective bargaining^[62]. One of the principles referred to in the Declaration is freedom of association and effective recognition of the right to collective bargaining. ILO supervisory bodies, especially the Governing Body Committee on Freedom of Association (CFA), have developed the following principles on collective bargaining:

1. The principle of free and voluntary negotiations: According to the CFA, the voluntary nature of collective bargaining is shown in Article 4 of Convention 98, and it is a fundamental aspect of the principles of freedom of association^[63]. This means that the use of compulsion in an effort to promote collective bargaining is completely excluded. In addition, ILO supervisory bodies have reiterated that the machineries that support collective bargaining, which includes the provision of information, consultation, mediation and arbitration, should be voluntary in nature.

2. The principle of good faith: During the preparatory work for the adoption of Convention No. 154, it was further recognized that collective bargaining could only function effectively if both parties conduct it in good faith. Good faith cannot be imposed by law, however, it can only be achieved through voluntary and persistent efforts of the parties to the bargain^[64]. The Committee on Freedom of Association in a bid to reiterate the importance it attaches to the obligation to negotiate in good faith stated what the principle of good faith implies. According to the committee, good faith entails making every effort to reach an agreement, conducting genuine and constructive negotiations, avoiding unjustifiable delays, complying with the agreements reached and applying them in good faith, which includes recognition of representative trade union organizations^[65].

Recommendation No. 91 emphasizes the principle of mutual respect for commitments entered into in collective agreements. The Recommendation states that collective

⁵¹ Oslon (n 39).

⁵² K G Dau-Schmidt, 'A Bargaining Analysis of American Labour Law and the Search for Bargaining Equity and Industrial Peace' (1992) 91 *Michigan Law Review*, 419.

⁵³ *Ibid*; D Belman, 'Unions, The Quality of Labour Relations and Firm Performance' in L Mishel and P B Voos (eds), *Unions and Economic Competitiveness* (Armonk M E Sharp 1992) 41.

⁵⁴ F C Nwoke, 'Rethinking the Enforceability of Collective Agreements in Nigeria' (2002) 4(4) *Modern Practice Journal of Finance and Investment Law*, 372.

⁵⁵ Adeogun (n 44) 90.

⁵⁶ Nwoke (n 54).

⁵⁷ R B Freeman and J L Medoff, *What Do Unions Do?* (New York: Basic Books 1984) 5.

⁵⁸ Nwoke (n 54).

⁵⁹ Freeman and Medoff (n 57) 11.

⁶⁰ ROCBC, arts 3 and 4.

⁶¹ ILO 1999a Freedom of Association: An Annotated Bibliography (Geneva 1999) 51.

⁶² ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998

<<http://www.ilo.org/public/english/standards/re/m/ilc/ilc86/com-dtxt.htm>> Accessed 26 March 2023; H Kellerson, 'The ILO Declaration on Fundamental Principles and Rights: A Challenge for the Future', (1998) 137(2) *International Labour Review*, 223; B Gernigon and Others, 'ILO Principles Governing Collective Bargaining', (2000) 139(1) *International Labour Review*; 33-55.

⁶³ ILO 1996, para 844.

⁶⁴ ILO 1981, 22/11.

⁶⁵ (n 63) para 814-818.

agreements should bind the signatories thereto and those on whose behalf the agreement is made ^[66]. To this end, the Committee of Experts states that in several countries, legislation makes employers liable to sanctions if they refuse to recognize a representative trade union, which may be considered as an unfair labour practice. The Committee further emphasized the importance it attaches to the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement, especially in the public sector or essential services where trade unions are not allowed strike action ^[67].

Free choice of bargaining level: ILO Recommendation ^[68] provides that measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, undertaking, branch of activity, industry or regional or national levels ^[69]. The Committee of Experts has noted that the right to bargain collectively should be granted to federations and confederations. Rejecting any prohibitions on the exercise of the right, the committee states that legislations, which make it compulsory for collective bargaining to take place at a higher level (that is sector, branch and so on) also raises the question of compatibility with Convention No. 98. The choice should therefore be made by the partners themselves because they are in the best position to decide the most appropriate bargaining level, including adopting a mixed system of framework agreements supplemented by local or enterprise-level agreements, if they so desire ^[70].

3. Categories of workers covered by collective bargaining: ILO Convention No. 98 establishes the relationship between collective bargaining and the conclusion of collective agreements for the regulation of terms and conditions of employment. The convention provides in its Articles 4–6 that the extent to which the guarantees provided for in the convention shall apply to the armed forces and the police shall be determined by national laws or regulations. The convention further states that it does not cover public servants engaged in the administration of the state, nor be construed as prejudicing their rights or status in any way ^[71].

Convention No. 98 therefore excludes from the right to collective bargaining only the armed forces, the police and the category of public servants engaged in the administration of the state. On this category of public servants, the Committee of Experts states that it could not allow the exclusion from the terms of the convention large categories of workers employed by the state merely on the grounds that they are formally placed on the same footing as public officials engaged in the administration of the state.

According to the committee, the distinction must be drawn between public servants who by their functions are directly employed in the administration of the state. For example, in some countries, civil servants employed in government ministries and other comparable bodies, as well as ancillary staff may be excluded from the scope of the convention, and all other persons employed by the government, by public enterprises or by autonomous public institutions, should benefit from the guarantees provided by the convention ^[72]. The Committee on Freedom of Association agrees with this view ^[73].

4. Subjects covered by collective bargaining: Several conventions and recommendations ^[74] indicate the subjects covered by collective bargaining as terms and conditions of work and the regulation of the relations between employers and workers and between organization of employers and that of employees. ILO supervisory bodies nevertheless, do not limit the content of collective bargaining to conventional working conditions like working hours, overtime, salaries and wages, and so on but they are extended to matters that are necessarily included in the conditions at work ^[75]. These conditions include promotions, dismissals, transfers and so on ^[76].

It is pertinent to mention that certain issues are left to the management to decide as part of their discretion or freedom to manage the enterprise. These include assignment of duties, appointment and others ^[77]. Some issues that are evidently contrary to the minimum standards may be allowed, depending on what the law provides ^[78].

There are however, certain matters that can reasonably be regarded as outside the scope of negotiations according to the Committee on Freedom of Association. These include matters that border on the operation and management of government business ^[79]. For example, in a case against the Government of Canada, the Committee on Freedom of Association stated that determining the broad lines of educational policy has been given as an example of a matter that can be excluded from collective bargaining. However, the committee indicated that policy decisions might have important consequences on conditions of employment, which should be subject of free collective bargaining ^[80].

Framework of Collective Bargaining Under Nigerian Law

Nigeria inherited the British industrial relations system as one of its colonial heritage. The main feature of this system is the voluntary machinery, which according to Clegg, developed over a wide area of employment from industry-wide collective bargaining and discussion between employers' associations and trade unions on terms and conditions of

⁶⁶ Recommendation No. 91.

⁶⁷ *Ibid.*

⁶⁸ Recommendation No. 163.

⁶⁹ (n 73).

⁷⁰ ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998

<<http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm>> Accessed 26 March 2023; H Kellerson, 'The ILO Declaration on Fundamental Principles and Rights: A Challenge for the Future', (1998) 137(2) *International Labour Review*, 223; B Gernigon and Others, 'ILO Principles Governing Collective Bargaining', (2000) 139(1) *International Labour Review*; 33-55.

⁷¹ ROCBC, arts 4-6.

⁷² (n 71).

⁷³ (n 63) paras 793-795 and 798.

⁷⁴ Right to Organize and Collective Bargaining Convention 1949 (No. 98); Labour Relations (Public Service) Convention 1978 (No. 151); Collective Bargaining Convention 1981 (No. 154); Collective Agreement Recommendation 1951 (No. 91).

⁷⁵ B Gernigon and Others, 'ILO Principles Concerning Collective Bargaining' (2000) 139(1) *International Labour Review*; 33-55.

⁷⁶ *Ibid.*

⁷⁷ ILO 1988, 259.

⁷⁸ B Gernigon and Others, 'ILO Principles Concerning Collective Bargaining' (2000) 139(1) *International Labour Review*; 33-55.

⁷⁹ ILO 1989, Case No. 1951, para 220.

⁸⁰ *Ibid.*

employment^[81]. The colonial government instituted voluntary collective bargaining machinery in both the public and private sectors in 1948 through the Whitely Councils and the Joint Industrial Councils^[82]. In 1955, Okotie-Eboh, Nigeria's Minister of Labour in the First Republic stated that the government's official policy on collective bargaining is the voluntary method^[83]. According to Uvieghara, all the stakeholders in the employment relationship in Nigeria have accepted this policy^[84].

From the foregoing, non-interventionism and voluntary collective bargaining continued largely as the primary method of regulating labour relations in Nigeria until statutory interventions designed to strengthen the process or serve as substitutes for non-existent or non-functioning collective bargaining processes were introduced^[85].

It is pertinent to mention that there is no express constitutional provision in Nigeria on the right to collective bargaining. However, the Constitution^[86] provides that one of the economic objectives of the State is to direct its policy towards ensuring that conditions of work are just and humane and that there are adequate facilities for leisure, social, religious and cultural life, and that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused. It has been argued^[87] that this provision seem to permit the enactment of collective bargaining legislations or allow for the achievement of those objectives through collective bargaining.

For collective bargaining to take place, two conditions must exist. Firstly, recognition of the trade union by the employer as the representative of the workers for the purpose of collective bargaining and secondly, both parties must bargain in good faith^[88]. Okpaluba, in agreement, asserts that recognition of a trade union, as a bargaining agent of employees in any given undertaking is a prelude to collective bargaining^[89]. The Trade Disputes Act 1976 provides the framework for voluntary collective bargaining in Nigeria^[90]. In addition, the Wages Board and Industrial Councils Act 2004 complement the use of collective bargaining to improve the condition of service of workers, especially in the private sector, by establishing industrial wages boards with a tripartite composition made up of independent members, employers and workers' representatives. The Act empowers the Minister of Labour to establish a National Wages Board for the Federation and Area Minimum Wages Committee for a state, after consultation with the state governor. The main role of these bodies is to regulate the wages of workers where there is no adequate machinery for the effective regulation of wages and other conditions of employment^[91].

The Trade Unions Act^[92] provides that all registered unions in the employment of an employer shall constitute an electoral college for the purposes of collective bargaining, to

elect members who will represent them in negotiations with the employer. For the purpose of electing members for representation at tripartite bodies, the registered Federations of Trade Unions shall constitute an Electoral College taking into consideration the size of each registered federation^[93]. The next step after recognition is to draw up a recognition agreement between the parties specifying how the negotiations will be conducted, the composition of the machinery and other procedural issues. By recognizing a trade union as a representative of employees and bargaining with it, management loses some of its authority because a set of rules and procedures jointly adopted by the union and management replaces unilateral action by management. Once the agreement is completed, the bargaining can commence as provided by the law.

Collective bargaining takes place at different levels in an organisation. Bargaining levels depend on several factors, which include interests, strength, objectives and priorities of the parties concerned. Other determining factors include structure of the trade union, employers' organisation and traditional patterns of industrial relations^[94]. Traditionally, collective bargaining is conducted at three basic levels namely, the enterprise level, industry level and the plant level^[95]. At the enterprise level, collective bargaining comprises of an employer on one hand and the union that serves the interests of the employees in the organisation on the other. At industry level, it is between an industrial union and an industry-based employers' association while at the plant level it is the bargaining at the workplace itself.

The Wages Board and Industrial Councils Act 2004^[96] recognizes three bargaining fora in Nigeria, they are Industrial Wages Board, National Wages Board and Area Minimum Wages Committee or Joint Industrial Councils^[97]. Collective bargaining in Nigeria is done at different levels, which are national, industry and enterprise or plant levels. In practice, where the subject of negotiation affects all the workers in the industry, the negotiation will take place at the national level. However, if the subject affects only workers at the plant or branch, the negotiation will be at the branch or plant.

According to Fashoyin^[98], collective bargaining in the public sector was initially implemented in Nigeria through the use of councils, known as Whitney Councils inherited from the former colonial government. These councils are now known as the National Public Service Negotiating Councils (NPSNC). At the NPSNC, collective bargaining is done at three levels: Federal, State and Ministerial. At the federal level, bargaining is sub-categorized into senior, junior and technical staff categories. However, in practice these councils are seldom used because various governments seem to prefer the use of ad hoc wage review commissions to the councils.

⁸¹ H Clegg, *The System of Industrial Relations in Great Britain* (Oxford: Basil Blackwell 1976) 20.

⁸² T M Yesufu, *The Dynamics of Industrial Relations: The Nigerian Experience* (Ibadan: University Press Ltd 1982)138.

⁸³ International Labour Office Ministerial Conference Record of Proceedings, 38th Session, Geneva (1955) 33.

⁸⁴ E E Uvieghara, *Nigerian Labour Law* (Lagos and Oxford: Malthouse Press Ltd 2001) 388.

⁸⁵ O Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (Lagos: Folio Publishers 1991) 277.

⁸⁶ CFRN 1999, s17(3)(b)(c).

⁸⁷ Okene (n 13) 125.

⁸⁸ Promotion of Collective Bargaining, International Labour Conference, 66th Session, 1980, p. 15.

⁸⁹ C Okpaluba, 'Recognition as Collective Employee Representative in Swazi Labour Law' (1998) 19 *ILJ* 1329 at1331.

⁹⁰ TDA 1976, s3.

⁹¹ WBICA 2004, ss8(1) and 9(1).

⁹² TUA 1973, s25.

⁹³ Trade Union (Amendment) Act, 2005, s5.

⁹⁴ G Bamber, 'Collective Bargaining' in R Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (The Hague: Kluwer 1998) 414.

⁹⁵ *Ibid.*

⁹⁶ Cap 466, LFN, 2004.

⁹⁷ WBICA 2004, ss16, 18 and 27.

⁹⁸ T Fashoyin, *Industrial Relations in Nigeria* (Longman 1980) 74.

Some of the commissions that were used in the past include the Mbanefo Wages Commission of 1959-62, the Morgan Wage Review Commission of 1963-64 and several others. Based on the commissions' reports, the salaries of public servants were fixed. Inputs made by civil servants themselves at the hearing of the commissions were taken into consideration in the determination of the wages and other conditions of service for the public servants. Civil servants were therefore made to serve in the commission to enable the participation of workers in the determination of matters concerning their welfare^[99].

Comparing collective bargaining in the public and private sectors in Nigeria, it is argued that while parties to collective bargaining in the private sector are at liberty to choose their bargaining level, those in the public sector cannot do so as they are subjected to unilateral decisions by *ad hoc* commissions set up by successive governments^[100]. This is contrary to the CFA ruling that determination of bargaining level is at the discretion of the parties and not to be imposed by law or by decision of an administrative authority. It is further argued, and this work agrees, that Nigeria is in breach of ILO standards for not allowing workers in the public sector to freely bargain at the appropriate level^[101].

The second condition necessary for the conduct of collective bargaining is that the bargaining must be done in good faith. According to the ILO Committee on Freedom of Association, good faith connotes genuine and constructive negotiations, which is a necessary component to establish and maintain the confidence of parties. This means that unjustifiable delay in reaching agreement should be avoided while parties make effort to reach agreement, which should be binding on the parties^[102].

According to Oji and Amucheazi, collective bargaining requires that the parties deal with each other with open and fair minds and honestly endeavour to surmount obstacles that may come between them to the end that employment relations may be stabilized^[103]. However, the question that comes to mind is whether there is evidence of good faith in bargaining in Nigeria. It is the opinion of this article that one of the problems of collective bargaining in Nigeria is lack of express provision on good faith in the laws. This is in contrast to what obtains in some jurisdictions like South Africa where the constitution imposes a duty on parties to bargain in good faith^[104].

In the Nigerian public sector, for instance, government officials lack the authority to firmly and in good faith commit the state during negotiations with the workers or their union. This is evidenced in the long process it takes to give final approvals to decisions reached at negotiations, which is against the ILO standard and the principle of good faith. Nigeria should follow the South African practice and make

an express provision for the duty to bargain in good faith.

A successful completion of a collective bargaining will result to a collective agreement. ILO Recommendation No. 91 defines collective agreement^[105]. The Labour Act defines a collective agreement 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 association of such organisation of the other part^[106].

The Court of Appeal in *Kwara State Polytechnic v Adetilo*^[107], defined a collective agreement as any agreement in writing for settlement of disputes relating to terms of employment and physical conditions of work concluded between an employer, group of employers, representatives of employers on one hand and one or more trade unions representing workers or their duly appointed representatives on the other hand^[108].

The legal status of collective agreement is affected by both common law principles regulating the formation of contracts enforceable at law and statutory provisions^[109]. The general rule under the common law is that collective agreements are non-justiciable and therefore generally unenforceable^[110]. The reason for this is that the parties do not intend to create legal relationship while entering into such agreement. For a contract to be enforceable, the parties must have an intention to create legal relationship. In *Arab Bank Ltd v Shuaibu*^[111], the court stated that collective agreement is at best a gentleman's agreement, an extra legal document devoid of sanctions because it is a product of trade union pressure. On appeal, the Supreme Court affirmed the position of the lower court^[112].

The issue of status and enforceability of collective agreements came up first^[113] in *Ford Motors Company v Amalgamated Union of Engineering and Foundry Workers*^[114] where Justice Geoffrey Lane held that collective agreement could not be enforced on contract as the court found no contractual intent by the parties. According to the judge, without such intention to create legal relations, there is no contract but only an enforceable gentleman's agreement. Collective agreements are usually between trade unions or a trade union and an employer, and completely distinct from the individual contracts of employment of the workers for whose benefits the agreements are made^[115]. Workers are not individual parties to the contract in this type of agreement. Therefore, any attempt to enforce the terms of the agreement by any worker as a member of the union will be caught up by the common law principle of privity of contract^[116].

Collective agreements will however acquire legal

⁹⁹ (n 98).

¹⁰⁰ Okene (n 13) 144.

¹⁰¹ (n 100).

¹⁰² R M Olulu and S Udeorah, 'The Principle of Collective Bargaining in Nigeria and the International Labour Organization (ILO) Standard' [2018] (1) (IV) *International Journal of Research and Innovation in Social Sciences*.65.

¹⁰³ E A Oji and O D Amucheazi, *Employment and Labour Law in Nigeria* (Lagos: Mbeyi Associates Ltd 2015) 213.

¹⁰⁴ South African Constitution Act 108 of 1996, s23(5).

¹⁰⁵ ILO 1996, para 650.

¹⁰⁶ LA 1974, s91.

¹⁰⁷ (2007) 15 NWLR (Pt 1056) 42.

¹⁰⁸ *Ibid*, 48-50.

¹⁰⁹ Oji and Amucheazi (n 103) 222.

¹¹⁰ *Ford Motors Co. v Amalgamated Union of Engineering and Foundry Workers* (1969) 2 QB 303; *Union Bank of Nigeria Ltd v Edet* [1993] 4 NWLR (Pt 287) 288; *Agbo v Central Bank of Nigeria* [1996] 10 NWLR (Pt 511) 373; FC Nwoke, 'Rethinking the Enforceability of Collective Agreements in Nigeria' (2000) 4(4) *Modern Practice Journal of Finance and Investments Law*; 353-374.

¹¹¹ (1991) 4 NWLR (Pt 186) 450.

¹¹² *Shuaibu v Nigeria Arab Bank Ltd* (1998) 4 SCNJ 109, 129.

¹¹³ Oji and Amucheazi (n 103).

¹¹⁴ (n 110).

¹¹⁵ *Nwajagu v BALCO (Nig) Ltd* (2000) 15 NWLR (Pt 687) 356, 358.

¹¹⁶ *ACB Nig Ltd v Nwodike* (1996) 4 NWLR (Pt 443) 470, 483; *Union Bank of Nigeria Ltd v Edet* (n 110).

significance if their terms are translated into a contractual relationship between the employer and employee. This is achieved by incorporating the terms of the collective agreement into the individual contracts of employment of each employee-member of the union, so that in the event of dispute between the employer and the employee, the agreement will be cited as binding on the parties^[117]. Such incorporation may be express or implied^[118]. In *Rector, Kwara State Polytechnic v Adetilo*^[119] the Court of Appeal held, among others, that for collective agreement to be enforceable the employer must have adopted it either expressly or by implication, otherwise the employer would not be bound by the agreement^[120].

Similarly, the Court of Appeal held in *Texaco Nigeria Ltd v Kehinde*^[121] that where a collective agreement is incorporated by reference or embedded into the conditions of contract of service, it will be binding on the parties. The court defined incorporation by reference as a method of making a secondary document part of a primary document by including in the primary document statement that the secondary document should be treated as if it were contained within the primary one.

Recently, it is being advocated that instead of demanding express incorporation of collective agreement into an individual employee's contract of employment, judges should have recourse to how its provisions were treated by the parties in practical terms after the execution of the collective agreement. In such cases, where there is evidence that management had acted on the agreement, thereby benefiting from it, the court should deduce an intention on the part of management as considering the agreement as binding^[122].

Apart from common law principles, statutory provisions also regulate the legal status of collective agreement. The Trade Disputes Act 1976 provides that where there is a collective agreement for the settlement of a trade dispute, the parties are required to deposit three copies of the agreement with the Minister of Labour. Thereafter, the Minister has a discretion to make an order specifying that the agreement or portions thereof shall be binding on the employers and workers to whom they relate^[123]. It appears that this provision makes enforceable only collective agreements reached for the settlement of trade disputes. What therefore happens to collective agreements made in the course of normal collective bargaining?

It has been argued^[124] that the discretion granted to the Minister by the Trade Disputes Act is subject to abuse. The Minister in exercise of his discretionary powers may refuse to make an order to confirm a collective agreement, especially where the interest of the government which he represents will be affected by the order. In such cases, it appears that the collective agreement cannot be binding on the parties, which renders collective bargaining ineffective. Against the foregoing scenario, the Committee on Freedom

of Association rules that all collective agreements should be binding on the parties *prima facie*^[125]. The committee further states that making the validity of such agreements subject to the approval of the authorities, as in the case of Ministerial confirmation in Nigeria which has been queried by the ILO^[126], is contrary to the principles of collective bargaining and of Convention No. 98^[127]. It is therefore submitted that Nigerian law should align with the provisions of Convention No. 98 in that once collective agreements are concluded by the parties, they become binding and enforceable without further confirmation or approval. It has been opined that without collective agreements being justiciable, voluntary collective bargaining will be reduced to the "rejected stone rather than the cornerstone" of industrial relations^[128].

It is pertinent to mention that the amendment to the Nigerian Constitution now seem to have altered the legal status and enforceability of collective agreement in Nigeria. The Third Alteration to the 1999 Constitution of the Federal Republic of Nigeria, 2010^[129], confers exclusive jurisdiction on labour matters to the National Industrial Court in civil causes and matters relating to the determination of any question as to the interpretation and application of a collective agreement. Therefore, the National Industrial Court now sees collective agreements as binding and enforceable by the parties to it, whether incorporated into employee's individual contract of employment or not, provided the claimant can show that he is a member of the union that signed the collective agreement^[130]. The position of the NIC on collective bargaining now aligns with Convention no. 98.

Conclusion

The International Labour Organisation (ILO) recognizes freedom of association as a basic principle in labour relations and identifies the right to collective bargaining as one of the core trade union rights. Although the Nigerian Constitution recognizes the right to freedom of association, it does not expressly mention the right to collective bargaining unlike in South Africa where the constitution expressly provides for the right. In Canada, the Supreme Court has given a constitutional backing to the right to collective bargaining and the right to strike on the ground that they are integral parts of freedom of association.

The paper reviewed lack of good faith in the bargaining process as one of the factors that militate against the right to collective bargaining in Nigeria. Good faith requires making effort to reach an agreement, conducting genuine and constructive negotiations, avoiding unjustifiable delays and complying with the collective agreements when reached. Most of these factors are lacking in collective bargaining in Nigeria, especially in the public sector. For example, it takes the Federal Government several months to conclude negotiations with ASUU and when they are eventually concluded, they are seldom implemented. For instance, non-implementation of a 2009 agreement was the main reason for

¹¹⁷ *Registered Trustees of the Planned Parenthood Federation of Nig and Anor v Dr. Jimmy Shogbola* (2005) 1WRN 15, 167.

¹¹⁸ Oji and Amucheazi (n 103).

¹¹⁹ (2007) 15 NWLR (Pt 1056) 42 CA.

¹²⁰ *Ibid*; *Anaja v United Bank for Africa Plc* (2013) 30 NWLR (Pt 87) 338, 368.

¹²¹ (2002) NWLR (Pt 94) 143.

¹²² *Nwobosi v ACB Nig. Ltd* (1995) 6 NWLR (Pt 404) 658.

¹²³ TDA 1976, s2(3).

¹²⁴ Okene (n 13) 149.

¹²⁵ ILO: Digest of Decisions and Principles of the Freedom of Association Committee, (5th revised edn, Geneva:International Labour Office 2006) para 939.

¹²⁶ ILO: CEACR, 2007, 96th Session: Individual Observation concerning Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), Nigeria.

¹²⁷ (n 125) para 1012.

¹²⁸ Nwoke (n 54), 374.

¹²⁹ S254C(j)(i).

¹³⁰ *Gbadegesun v Wema Bank Plc* (2009) 15 NLLR (Pt 40) 1; *PENGASSAN v Schlumberger* (2008) 11 NLLR (Pt 29) 164.

a strike action by ASUU that lasted from February to October 2022, when it was suspended following a court order.

In addition, the vexed issue of the enforceability of a collective agreement was reviewed. The controversy generated by this matter in the judiciary still rages as the regular courts continue to hold that collective agreements are not enforceable except where it has been adopted as part of the terms of employment ^[131]. There is therefore no uniformity in the enforceability of a collective agreement in Nigeria. While the regular courts and the National Industrial Court vary on their enforceability, the Trade Disputes Act makes the enforceability of collective agreements on the settlement of trade disputes subject to the approval of the Minister, contrary to ILO regulations and the provisions of Convention No. 98. The ministerial discretion is subject to abuse and seems to ignore collective agreements reached through voluntary collective bargaining as envisaged by ILO Convention No. 98. The Nigerian position is different from the case in South Africa and Canada where statutes make collective agreements enforceable *per se*.

recommendations and suggestions proffered in this paper are accepted and implemented.

Recommendations

1. The National Assembly should amend the Constitution of the Federal Republic of Nigeria 1999, using the Constitution of South Africa as a guide, to provide expressly for the right to collective bargaining.
2. The National Assembly should amend the Trade Disputes Act to make a collective agreement generally enforceable by expressly stipulating that a collective agreement is binding on any trade union and employer that has entered into it and who is included in or affected by the agreement. In addition, a collective agreement once it comes into effect, replaces all common law rules applicable to individual employment contracts. This will settle the disagreement between the regular courts and the National Industrial Court on the enforceability of collective agreements and comply with the regulation of the ILO Committee on Freedom of Association.
3. The National Assembly should amend the procedure for the settlement of trade disputes stipulated in the Trade Disputes Act to make settlement of trade disputes less cumbersome.
4. The National Assembly should establish an institutional framework in the form of an independent body composed of equal representatives from the government, employers' association and the organized labour, using the model of NEDLAC (South Africa), ACAS (United Kingdom) and CIRB (Canada). The chairman of the body should be appointed by the employers' association and the union and shall not be answerable to the government in the discharge of its functions. The functions, tenure and operations of the body shall be determined by it without interference by the Government, as is the case in South Africa, the United Kingdom and Canada. The body shall have power to receive complaints from workers, trade unions, employers or employers' organisations on industrial disagreements and take necessary steps to settle the disputes.

It is expected that there will be remarkable improvements in industrial relations practice in Nigeria if the few

¹³¹ *BPE v Dangote Cement Plc* [2020] 5 NWLR (Pt 1717) 322.