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ENFORCEABILITY OF COLLECTIVE AGREEMENTS IN THE PUBLIC SECTOR: A CASE STUDY OF ACADEMIC STAFF UNION OF UNIVERSITIES (ASUU) AND FEDERAL GOVERNMENT OF NIGERIA COLLECTIVE AGREEMENT OF SEPTEMBER 1992

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> *"Aside from the relation of slave to his owner, there is probably, in the modern world no other social or economic relationship that is fraught with so much actual or economic relationship that is fraught with so much actual or potential injustice than that between the worker and his employer. It is the modern equivalent of the relation of a serf to his lord under the feudal system of the medieval world, shorn of the latter's more primitive incident".*
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> *Nwabueze 1993.*

INTRODUCTION

Nwabueze's (1993) treaties on military rule and social justice in Nigeria, while considering the importance of social protection of workers, recognizes acutely the unequal relationship that exists between the "master" and the "servant". He correctly points out that the relationship, which gives

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enormous power to the employer over the worker, makes the latter "thoroughly exploited and manipulated by the former." "Employers", according to him, "do exploit their workers to an almost incredible extent, more, perhaps, than the feudal lord did his serfs". Nwabueze (1993) warns us that the exploitation of the "majority working population" of any country by the "employing minority" is "dangerous to industrial peace and consequently to the wellbeing and economic development of the entire community".

Nwabueze (1993) went on to remind us of how the mindless exploitation of workers has produced one of the most decisive revolutions of workers in history. This singular event has continued to remind humankind that extreme exploitation of workers is a constant threat to world peace. This realization led to global concerns about the welfare of workers, and concretized by the establishment in 1919 barely two years, after the 1917 Bolshevik Revolution in Russia of the International Labour Organisation (ILO). The Preamble statement of ILO vividly captures the mood of the world on the exploitation of workers at that time:

> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required…
>
> The High contracting parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, agree to the following constitution of the International Labour Organisation.

Many countries of the advanced industrialized West have since heeded this warning by ensuring that workers and indeed all citizens are provided basic minimum welfare that protects their dignity as human beings, and sustains their lives at least above the "breadline". However, in many countries of the developing world, corrupt and inept leaders have continued to appeal to the sense of patriotism and sacrifice of their citizens, allegedly in the national interest while they loot the economy to enrich themselves.

These leaders have ignored the plight of the workers and have deployed repressive laws and brute force whenever workers have tried to express their displeasure against their depressing and inhuman material conditions.

Nigerian workers under succeeding administrations (especially the military) have had their own fair share of the social and economic deprivation because of gross neglect. During the military era, the rulers, realizing the potentials of the exploited and oppressed workers to explode, employed various techniques to demobilize them. Frequent and direct interference with the organization of unions, cooptation, harassment, detention without trial, arbitrary proscription and the use of draconian legislation the provisions of which cannot be questioned by the courts of the land.

Many Nigerians, and probably even international scholars, who hold Professor Ben Nwabueze in high esteem must have been both piqued and stunned over his views on the ASUU - FGN collective agreement of 1992. Given the prolonged neglect of our education sector and the abject conditions under which academics work and live, many Nigerians were not surprised about the doggedness and tenacity of ASUU. Thus, they have continued to encourage its struggles to wrest a reasonable concession out of a military regime that had become more notorious for an endless transition programme rather than provide for the basic needs and education of its citizens. Many have asked, if Nwabueze was correct in declaring the ASUU – FGN collective agreement unenforceable when the Federal Government signed it with its eyes wide open.

It is against this backdrop that this paper seeks to examine the ASUU-FGN collective agreement in order to ascertain its nature. However, before we discuss its legal status, it will be necessary to examine the concept of collective bargaining in labour relations and its status in law generally. Therefore, this paper will encompass five parts. Part 1 will narrate a brief background of the events that gave rise to the ASUU-FGN collective agreement. The arguments offered by ASUU in support of the enforceability of the collective agreement will be summarized. Part II will discuss the implementation of the collective agreement in question. It will also examine the pronouncements of Nwabueze in relation to the legal status of the agreement and the actions taken by him following the purported

justification of his declaration of teaching as an essential service. This declaration sought to limit drastically the rights of teachers to strike, at the pains of losing their jobs if they infringe its draconian provisions. Part III will examine the status of collective agreements generally in the light of existing theories and judicial decisions, and try to establish whether the justification or otherwise of collective bargaining is the same in the private and the public sector. This will lead to an examination of the role of strikes as a tool for collective bargaining. In part IV, we shall critically examine the handling, interpretation of the ASUU-FGN collective agreement in the light of existing theories, practices, and international labour law standards, which will form the basis of our discussion in Part V. We shall then draw our conclusion and make appropriate recommendations.

BACKGROUND TO THE ASUU-FEDERAL GOVERNMENT 1992 COLLECTIVE AGREEMENT

THE NIGERIAN UNIVERSITY SYSTEM

The first Nigerian University was established at Ibadan in 1948. Today the system has expanded to 147 universities (42 federal and 36 state owned, 69 privately owned), with about 1,727,782 students in 2017. (Nigerian University System Statistical Digest).

Since 1976, there has been rapid deterioration and decline in the provision of facilities in the Nigerian public universities. This is the result of declining funding and mismanagement of the meager funds made available to the university system. This has led to many lecturers leaving the University system for better jobs within the country and abroad, in what has been tagged "brain drain". The brain drain became so alarming that the Federal Government was compelled to set up a committee to examine its causes and proffer a solution. It has been suggested that the gradual collapse of the University system over the years has been due to misplaced priorities by the military, whose prolonged interference with the political system has nurtured an authoritarian and oppressive political culture. The result has been a subversion of the spirit and tradition of democratic accountability in all our institutions.

THE ESTABLISHMENT OF ASUU AND ITS QUEST FOR RELEVANCE

The first industrial union for university academics, the Nigerian Association of University Teachers (NAUT) was established in 1965. Hitherto, only social clubs existed for recreational purposes. The NAUT provided the first platform for promoting the collective interests of academics in the Nigerian universities, but lacked the capacity to forcefully push its demands. It made only half-hearted attempts to secure a review of salaries for its members in 1967 and 1970 (salaries had not been reviewed since 1959). The weakness of NAUT was exposed when it attempted its first major industrial action in 1973. The Gowon regime smashed the strike by merely threatening the teachers with dismissal and eviction from the universities quarters.

The Academic Staff Union of Universities (ASUU) was established in 1978 as a reaction to the deterioration of the academic environment in our universities. The reigning dependency theories and neo-Marxist scholarship emboldened the resolve of staff and students to seek to change their society to fit their new vision. ASUU perceiving its role in society in broader and dynamic terms quickly assumed the position of leadership in mobilizing and channeling the energies of progressive forces towards the reconstruction of the Nigerian society. It boldly challenged the excesses of the military, which reacted by suppressing and harassing ASUU and other articulate segments of society as the National Association of Nigerian Students (NANS), Nigeria Medical Association and the Nigerian Labour Congress (NLC). Given this disposition, ASUU adopted a broad vision of its role in society transcending mere occupational objectives.

In its quest for social relevance, ASUU got itself affiliated to the Nigerian Labour Congress (NLC) to sharpen and broaden its vision. Together with ASUU, the NLC fought and secured a minimum wage and substantial increase in wages. ASUU raised the issues of poor funding of universities, interference with academic freedom and university autonomy under the Shehu Shagari regime but did not pursue them to their logical conclusion. The failure of ASUU to pursue more fruitfully the realization of these demands under a democratic regime may be attributed to the political

fault lines in the society that might have crept into the Union as members pursued divergent political interests.

Under Muhammadu Buhari, January (1984 – 20th August 1985) ASUU opposed the poor handling by that regime of the protest by Nigerian Doctors over the poor state of our health institutions and the Military's repressive style. Its leaders were arrested and detained. Based on this and other issues, Gen. Babangida seized power from Buhari on August 20, 1985. ASUU openly opposed the World Bank Structural Adjustment Programme (SAP) of the Babangida administration as well as the whole idea of a military government, and called for a return to democratic rule. The radical posture of ASUU under the leadership of Dr. Biodun Jeyifo and later Dr. Mahmud Tukur (both radicals) towards the military resulted in the growing divergence of views among academics on what the objectives of ASUU should encompass. These views were between those who wanted ASUU to concentrate on welfare issues and those who wanted ASUU in addition to this role "to take on the increasingly repressive military regimes." ASUU became split along these lines into "reformists", "moderates", and "radicals" or "confrontationists"

Thus, by 1986 when ASUU met to elect new leaders at the Awolowo University, Ife, this division had crystallized into open antagonism. However, owing to the dominance of the radicals in ASUU, it led to the emergence of Dr. Festus Iyayi, another radical, as President. ASUU under the leadership of Dr. Festus Iyayi, took on the Babangida regime head on, by first seeking to remove the Education Minister, Professor Jubril Aminu, who, apart from what ASUU described as his "high handedness and violation of due process" while he was Vice Chancellor of the University of Maiduguri, symbolized military interference with academic freedom and university autonomy. The public dissociation of a pro-Aminu lobby within the University system from ASUU's attempt to remove Jubril Aminu, again demonstrates the deepening crisis of cohesion within ASUU. This internal contradiction was to condition subsequent struggles by ASUU.

Between May 1986, and September 1987, ASUU clashed again with the Babangida regime over the killings of some students in Ahmadu Bello University (ABU) by the police sequel to a peaceful protest over the arbi-

trary expulsion of their union leaders. The union also protested the dismissal of the ASUU President and other lecturers of the University of Benin because they had protested against government's imposition of Professor Alele Williams as the Vice Chancellor of the University. Disagreements over the handling of these events further widened the gap between the radicals and opposing forces within the ASUU.

In the meantime, the first panel set up by the regime to investigate the A.B.U crisis had submitted its report, in which some ASUU members were accused of "teaching what they were not paid to teach" and recommended their dismissal. Sequel to this, a long list of lecturers was compiled for appropriate sanctions. It was a list of ASUU's representatives at the Akanbi panel; the second panel set up by the regime to investigate the crisis on other campuses, which stalled the dismissals, as this panel (whose report was never released to the public), is believed to have indicted government functionaries to deal with the extremists, the regime adopted other measures. The Babangida regime disaffiliated ASUU from NLC in 1986 and in 1987 supported the dismissal of Dr. Iyayi and other lecturers from the University of Benin, in order to weaken the strength of ASUU.

After exploiting the possibility of using dialogue to resolve the crisis at the University of Benin failed, ASUU resolved to try the strike option. However, this move was objected to by ASUU members in A.B.U and University of Lagos (UNILAG), while the University of Benin (UNIBEN) and University of Ibadan (UI) whose membership at that time represented about 25% of the membership strengthened the Union. The strike option was suspended. Dr. Atahiru Jega was elected President of ASUU in February 1988 to continue with the legacy of Dr. Iyayi. ASUU resolved in a meeting at Nsukka to continue to undertake an uncompromising critical evaluation of all the policies and programmes of the Babangida regime.

The Babangida's regime had in January the same year announced a new elongated salary structure to relieve the harsh effects of SAP, which had sparked off violent demonstrations throughout the country. The delay in the implementation of this salary package in the Universities temporarily united ASUU members as well as the Senior Staff Association of Nigerian Universities (SSANU). SSANU later abandoned ASUU when it got wind

of the fact that the regime was going to proscribe the two unions. The regime eventually proscribed ASUU. It then ordered a speedy implementation of the Elongated University Salary Structure (EUSS) in the Universities. ASUU regrouped in Lagos in May 1991, endorsed the Jega leadership team, and resolved that ASUU should get the Babangida regime to address the crisis in the University system and education sector in general.

NEGOTIATIONS LEADING TO ASUU-FGN COLLECTIVE AGREEMENT OF 1992

The most recent strike action by ASUU, February 2020 to December 2020 (10 months, which was preceded by a warning strike), led by Comrade Biodun Ogunyemi is clearly an indication that issues from the 2009 agreement, which is itself an offshoot of the 1992 agreement, is a clear sign that some aspects of the agreement are still in contention. Going back to history, in July 1991, ASUU submitted a memorandum to the new Minister of Education Professor Babs Fafunwa, calling on government to create a collective bargaining forum with ASUU to negotiate a number of issues affecting conditions of service of lecturers in the Nigerian university system in particular and the educational sector in general. The first round of negotiations did not commence until April 7, 1992, apparently, because the government wanted an earlier committee it had set up to review higher education to submit its report. After government's insistence on a 45% salary increase was rejected by ASUU, the government's Head of the negotiating team went ahead to unilaterally announce the 45% pay rise.

ASUU reacted by issuing an ultimatum to the government to reconvene the negotiation and with a better offer, or else it would go on an indefinite strike at the expiration of the ultimatum. The government rushed to the Industrial Arbitration Panel, (IAP), which ordered a stoppage of the strike and the return of ASUU to the negotiating table. But instead of going ahead with the negotiation when ASUU came back, the government maintained that the Longe Report had taken care of all the Union's demands hence there was no need for further negotiation. ASUU again ordered its members out on strike on July 20, 1992. The government wasted no time proscribing ASUU again on July 22, 1992. The union's proscription was followed by threats of dismissal and eviction. When all the threats failed to

achieve the desired effect, government finally accepted to resume negotiation with ASUU in August 1992. Within two weeks, the second and final round of negotiations ended in an agreement, which was signed by both parties on September 3, 1992. With this Agreement, ASUU immediately suspended its strike.

The major stipulations of the Agreement covered the increased funding of universities, greater autonomy for universities, and academic freedom as well as substantial improvement in the conditions of service of academic staff. For example, capital grants were to be increased by 500%; additional funding for education was to be raised from a 2% annual company tax. This gave birth to the Education Tax Fund (ETF), now Tertiary Education Trust Fund.

CONTROVERSY OVER THE IMPLEMENTATION OF THE ASUU – FGN, 1992 COLLECTIVE AGREEMENT

Professor B.O. Nwabueze took over as Education Secretary on January 8, 1992. Trouble began when on assumption of office; Professor Nwabueze announced granting parity in basic salary, which was being demanded by the non-academic unions. ASUU had deliberately asked separate negotiations for the unions allegedly because of the uncooperative conduct of those unions in the past and their nonchalance during the negotiations. ASUU's fears about the fate of the Agreement became heightened when in a meeting with the new Education Secretary, he expressly informed the Union that the collective agreement was one of imperfect obligation and was therefore not binding. He persistently maintained that government was committed to its implementation of the Agreement only as a social policy. He also expressed his aversion to the introduction of disparity in basic salary within the University system. Between January and May, 1993 ASUU explored ways to get the government to affirm the sanctity of the Agreement without success. Consequently, ASUU on May 1, 1993 decided to employ the strike option again.

On May 6, 1996, the regime wielded the big stick again against lecturers. Under the new researchers, etc, (Essential Services) Decree of 1993, academics who had been on strike for more than one week were deemed

to have resigned. The Education Secretary ordered the ASUU members that were on strike to vacate the universities' accommodation. Those who wanted their jobs back were to re-apply. There were threats that expatriates would be recruited to replace striking lecturers, and that retired lecturers would be recalled and the existing academic staff rationalized. The Education Secretary, Professor Nwabueze, also ordered the Vice-Chancellors to ignore restraining court orders obtained by ASUU members.

It was, however apparent that the regime was conscious of the harshness of the Teachers etc. (Essential Services) Decree. This must have informed its initial hesitation at enforcing it and preferring to set up mediation panels in succession, first under Hon. Kayode Eso Esq. JSC (as he then was) and Alhaji Ibrahim Dasuki (then Sultan of Sokoto).

THE QUESTION OF THE BINDINGNESS OF THE ASUU-FGN 1992 COLLECTIVE AGREEMENT

The first problem Professor Nwabueze stirred up on being appointed Education Secretary on January 8, 1993 was his support for parity in basic salary for all categories of staff within the university system. His support for parity meant a challenge to one of the stipulations of the ASUU Agreement that introduced differentials in basic salary and scale between academics and non-academics. Professor Nwabueze was averse to the issue of disparity between academic and non-academic staff because he saw its introduction as being responsible for the dichotomization of a hitherto harmonious university environment into one characterized by antagonism between classes of workers in the system. He accused young power-seeking academics who had usurped the leadership of the academic union from older academics (who, according to him, had since recoiled into their shells) for destroying this long-standing tradition.

Professor Nwabueze, therefore, saw the ASUU-FGN collective agreement of 1992, as an achievement of the "superior class ambition of these young academics". According to him, the granting of separate salary structure brought to an end the long-standing tradition of a unified salary structure and parity in basic salary and allowances for all categories of university staff. He therefore saw the resumption of strike by ASUU in May

1993 as a purely selfish struggle to win the salary differential. Besides the issues of parity of basic salary and unified salary structure between non-academic and academic staff, the most irksome issue between ASUU and the new Education Secretary in particular as well as the military regime was the question of the ASUU-FGN collective agreement of 1992.

Concerning the legal status of the collective agreement, Professor Nwabueze argued that what matters is not the seriousness of the negotiating partners, their commitment, personality, profile, and the time taken to negotiate it. The decisive factor is the nature of the "subject" matter of the stipulations of the contract. On this, he stated:

> There can be no proper and correct conception of the justiciability or the binding force of an agreement or other transaction, which does not take fully into account the subject matters dealt with in the stipulations of the agreement. This is what primarily determines whether a truncation is legally binding or judicially enforceable.

Thus, according to Nwabueze, by virtue of the subject matter dealt with, the ASUU-FGN collective agreement "cannot possibly bind the Government as a matter of legal obligation to carry them out in their precise terms" notwithstanding "the high ranking standing of those who signed or ratified the agreement… or the length of time it took to negotiate it." The Education Secretary was, however unequivocal about the commitment of government to implement the agreement as "of honour and social policy…" He then used examples of the subject matter such as the issue of salary differential, salary parity or disparity, university autonomy, academic freedom to demonstrate the non-justiciability of the stipulations. Matters of domestic and social relations, Nwabueze went on, are not subject for a binding contract. He then cited the often-quoted principle laid by Lord Atkin in **Balfour V Balfour** to support his position. The principle states:

> It is necessary to remember that there are agreements between parties, which do not result in contracts within the meaning of that term in our law. The ordinary example is where the parties agree to take a walk together or where

> there is an offer and acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife…. to any mind those arrangements, or many of them, do not result in contracts at all even though there may be what as between other parties would constitute consideration for the agreement…. they are contracts because the parties did not intend that they should be attended by legal consequences.

Other matters that are not justiciable according to Nwabueze include those that define political relations, those that do not affect the individual legal rights of the teachers or their particular universities as entities directly. The Education Secretary was also of the opinion that it is contrary to public policy for the sovereign government to legally bind itself by agreement with a group of its citizens to exercise or not to exercise any part of its law-making power in a particular way or to make a law on a particular matter. Consequently, stipulations in the agreement, which contemplated implementations by legislation such as that which required that a 2% pre-tax profit tax is levied on all companies to be registered in Nigeria to be called Higher Education Tax be, constituted to bind the sovereign legislation to realize the stipulation, which, is against public policy. He doubts whether any court of law could enforce against the Federal Government an obligation to make laws required in such stipulations. In addition, according to the jury, recommendations regarding sources of revenue that can be utilised to fund education lack the ingredient of a contract.

Nwabueze seems to have limited his arguments about the non-justiciability of collective agreements to the specific case of the stipulations of the ASUU-FGN collective agreement, suggesting that his attitude might be different in circumstances where the stipulations of collective agreement have a satisfactory criterion for judicial determination.

> He also detested strikes, especially in the education sector, which he regards, "as the country's number one en-

> terprise, as its primary industry ranking above everything else.

And asserted and underlined this point when he said

> ...without an educated citizenry we can neither develop no match along with the rest of the word in the changes taking place in science and technology any more than we can properly and meaningfully democratize our system and practice of government. The worst disease for a country is ignorance resulting from illiteracy which in turn breeds poverty and disease."

Nwabueze, therefore, decried the incessant strikes in the education sector and expressed his believe that the only remedy was to restrict strike by all categories of workers in the sector to the barest minimum. It was this disposition that informed the enactment of the Teaching, etc. (Essential Services) Decree 1993. The Decree, in his words, "is a drastic remedy for a drastic problem."

The decree sought to achieve three things:

(i) It declared teaching and service in an educational institution in the country an essential service.

(ii) It imposed restrictions and penalties provided in the Trade Disputes (Essential Services) Decree 1976.

(iii) It prohibited altogether any industrial action in the education sector whether by means of strike, work to rule etc.

The specific sanction for the prohibition is that a worker who remains on strike for more than one week shall be deemed to have resigned his appointment. Thus, the decree permitted a worker to go on strike but must be back to work after seven days or be deemed to have resigned his or her appointment.

Nwabueze believes that the decree only rested the Nigerian labour laws, which is still based on the Common Law principle that a strike, even when due notice of it is given to the employer, automatically determines the striking workers contract of employment. To him, the liberal view which regards a strike as a breach of contract and gives the employer the option to either ignore the breach or insist on performance or accept such a fundamental breach as a repudiation of the contract and treat himself as no longer bound by it, does not alter the effect of a strike in law. This is because strikes constitute a repudiation of the employment contract. Nwabueze found inadequate the more liberal approach of the Nigerian Supreme Court, which held that repudiation is not necessarily to be presumed in all cases, but would depend on the circumstances of the particular case, including the duration of the strike to warrant the employer treating a striker as having manifested an intention to repudiate. Consequently, Nwabueze dismissed the approach of Lord Denning, who held that a strike does not terminate a contract of employment, as "unduly solicitous" for the interest of workers and without due regard to the employer's wish. Nwabueze, therefore, saw the effort of ASUU to abrogate the Teaching etc. (Essential Services) Decree as a futile exercise. It is an irony that while the Decree remained in force, ASUU was on strike throughout most of the tenure of Professor Nwabueze as Education Secretary and only called off the strike when he had left office and after the Decree had been abrogated.

THE ENFORCEABILITY OF PUBLIC SECTOR COLLECTIVE AGREEMENT

What is collective bargaining? Collective bargaining has been defined as:

> A procedure looking towards making or collective agreements between employer and accredited representatives of union employees concerning wage, working hours and other conditions of employment and requires that parties deal with each other with open and fair minds and sincerely endeavour to overcome obstacles existing between them to the end that employment relations may be stabilized and obstruction of free flow of commerce presented.

Although, this definition contemplates private sector collective bargain, it captures within its remit the object of collective bargaining in the public sector as well, namely; the negotiation with respect to terms and conditions of employment between industrial unions and employers. Thus, the English Industrial Relations Act 1971 defines collective bargaining as "negotiations with respect to terms and conditions of employment or with respect to the making, variation or rescission of a procedure, agreement or with respect to any matter or which a procedure, agreement can relate." A collective bargaining agreement on the other hand, is an agreement between an employer and a labour union, which regulates terms of employment.

In Nigeria, before the advent of the military, the principle of voluntarism characterized the practice of collective bargaining. The 1941 Trade Dispute (Arbitration and Inquiry) ordinance kept the government from interfering with the settlement of disputes unless mutually invited by the parties. This era has been described as the golden era of voluntarism in the settlement of disputes. The military used compulsory and coercive procedure in collective bargaining. By the 1968 Trade Dispute (Emergency Provision Decree), the 1941 ordinance was suspended and the principle of voluntariness was seriously restricted. From the moment government intervened in the process of collective bargaining, every step in the process was compelled or backed by coercive power. Although the Decree was meant to last only 12 months, its life span was extended to 1976, when it was repealed and replaced by the Trade Disputes Act of 1976. This Act also replaced the 1941 ordinance. Some of the compulsory and coercive elements of the previous Act were eliminated and a greater measure of voluntarism was restored.

The parties to a trade dispute are required, to least try to settle it amicably by an agreed in-house method. Where it fails or where no agreed-in-house method exists, the dispute can be resolved through the mediation of an outsider appointed by mutual agreement. When either of these methods failed, the parties must report the dispute to the Minister of Labour in order to enable him or her set in motion the compulsory procedure instituted by the decree. This compulsory procedure is designed, not to over-

ride collective bargaining, but merely to support the machinery to be employed in default of amicable settlement. The object of the law is to permit the state to intervene only when the parties have failed to settle the dispute by agreement.

Under this procedure, obligatory negotiation must take place between the parties within 7(seven) days, failing which they must declare a trade dispute and notify the Minister within fourteen days. The Minister may appoint a conciliator, refer the dispute to a Board of Inquiry, or refer it to the Industrial Arbitration Panel. The report of the Arbitration Tribunal must be released within forty days of its appointment. This report is binding on the parties after it has been confirmed in an order made by the Minister of Labour.

A National Industrial Court was established under the 1976 Trade Dispute Act. The Court had exclusive jurisdiction to make awards for settling trade disputes, and to determine questions as to the interpretation of disputed collective agreements and awards made by an arbitration tribunal or terms of settlement of any trade dispute as recorded in a memorandum or report of a conciliator. However, this is without prejudice to the jurisdiction of the High Court under section 259(1) of the 1999 CFRN (As amended).

Subsection (2) of section 15 of the 1976 Act purports to make the decision of the court final. Nevertheless, the provision would appear to be ineffective in view of section 236 of 1999 CFRN (As amended).

The question of where appeals should lie from this court remains unresolved. The 1976 Act provides that where there is a written collective agreement for the settlement of trade disputes within a trade or an industry, at least three copies of that agreement must be deposited by the parties with the Federal Minister of Labour. Thereafter, the Minister may order that all or part of the agreed terms be binding on the parties. In effect, either party may take action especially where the collective agreement is with a government department. However, the action of the Labour Minister put to question, the validity of the principle that collective agreement is not enforceable.

In proffering an answer as to whether a collective agreement is enforceable in Nigeria, Prof. Emiola prefers to give a cautious response that as a general principle, it is not enforceable but that it will be unreasonable to give a firm answer either way. We should, however, be reminded that the Wages Board and Industrial Council Act 1973 and the Trade Disputes Act 1976 directly make enforceable a wages agreement once the terms of such agreement have been confirmed by an order by the Minister of Labour.

It is clear from the foregoing that the Nigerian Labour Law has not yet made collective agreements enforceable in the same way, as is the case in some continental European countries. Even in Britain, the situation Act where under sections 34 and 35 a presumption of enforceability existed, hence, the collective agreement was in writing.

> Each written collective agreement after this part of the Act comes into operation will be presumed to have been intended, by the parties making it, to be legally binding unless, it includes a provision that all or part of it is intended not bind them in law.

To the Trade Union and Labour Relations (Consolidated) Act 1990 (TULRC(C) (A) as amended by the Trade Union (Reform and Employment) Right Act 1992, Sections 178 – 179 make provision for the legal effect of collective agreements.

> "S.179". A collective agreement shall be conclusively presumed not to have been intended by the parties to be enforceable contract, unless the agreement is in writing and contains provision stating on the agreement to be legally binding.

It is possible for the parties to state expressly that only part of the agreement is intended to be legally binding, and part not, in which case, the parties' intention will be given effect to, though it is possible to look at a non-legally binding part for the purpose of interpreting a part which is legally binding. There must be an express statement to the effect that the

parties intend the collective agreement to be legally enforceable. The absence of such express statement may indicate that it is intended to be binding in honour only.

In Nigeria, as we have pointed out earlier, the nearest it has done in attaching legal enforceability to a collective agreement is the provision of section 2(3) of the Trade Disputes Act 1976. The Act stipulates expressly that the terms of a collective agreement confirmed in an order of the Minister of Labour "shall be binding on the employer and worker and workers to where they relate."

Prof. Emiola suggests that it is possible to apply the principle of the Common Law. The dearth of Nigerian cases on the matters means that we have to resort to English cases for guidance. We, however, submit, at this stage, that even this approach may not yield the desired solution, because of the serious state of discordance and uncertainty of the law in this area.

THE COMMON LAW AND THE ENFORCEABILITY OF COLLECTIVE AGREEMENTS

The English decision in Ford Motors Co. V. Amalgamated Union of Engineering and Foundry Workers was of great importance in Labour Law in England; however, successive legislation stultified its impact. Its findings are important as guide to us in Nigeria especially in discourses on the justiciability or otherwise of collective labour agreements. In the Ford's case, the enforcement of three collective labour agreements was made to turn upon the implied or fictitious intentions of the parties. Ford alleged that the defendant unions were in breach of three agreements on official strike at Ford's factories or from encouraging their spread pending the hearing of an application for interlocutory relief. The fundamental question that the court was enjoined to answer was whether those agreements where enforceable in law.

Justice Lane J. found out that there was ample 'consideration' for each of the three agreements as well as offer and acceptance (i.e. that there are bargain) but held that there were principles laid down by Lord Atkin in

Balfour V Balfour and that, therefore, there was no enforceable contract.

Based on the **Balfour** principle, Justice Geoffrey Lane came to the same conclusion on the legal status of the three collective agreements in the Ford case:

> Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability, are in my judgments not contracts dear an express provisions, making them enable to legal action they remain in the realm of undertakings building in honour.

It is important to note, that the Balfour Principle is couched in a cautious language. It should also be pointed out that Geoffrey Lane relied mainly on the "climate of opinion" or the "background of opinion adverse to enforceability" derivable from evidence from extra-judicial authorities to arrive at his decision. This suggests that the question of enforceability is subject to a changing "climate of opinion". His dictum also points to the possibility that the enforceability or collective agreements may be dependent on the express intention of the parties or the nature of the subject matter of the stipulation of each agreement. Therefore, he has not excluded entirely the possibility of some domestic arrangements being enforceable in law.

Hepple has drawn attention to the existence of considerable uncertainty about the legal status of collective agreements in Common Law. He however suggests that there are two views. The first view is that collective agreements are not contracts because the parties there do not intend them to be legally binding. The second view is that collective agreements cover so many different kinds of agreements that it is not possible to give a simple answer to the question "Are collective Agreement contracts?"

According to Hepple, some agreements are contracts but some are not because they are either so vague or uncertain that they are not capable of

taking effect as contracts. Some others are not contracts because it is clear from the express claims by the parties, or their choice of language, that they do not regard such as legally enforceable transactions. Furthermore, for Hepple, some collective agreements are not contracts because the legislative function they perform is not appropriate to the law of contract. The requirement of an intention requirement in the principle of bargain as a basis for the enforceability of contracts in Common Law has been criticized by Hepple and others. He is of the view that this requirement is not essential to the formation of a contract in English law. Criticisms have been premised on the following arguments.

The first is that the doctrine of consideration can safely be replaced by the rules of the Common Law, which establish the seriousness of a promise. English law has developed a separate set of rules about the seriousness of promises, which perform the essential function of consideration. The essence of the objections raised by the critics is that the whole basis of the Common Law of contract is the notion of bargain, of which offer, acceptance, and consideration, are indivisible facets. According to Hepple:

> Every offer may be seen as consisting of a promise and a request to the offeree to do some act (which may be the giving of a promise or the rendering of a performance) in exchange for the promise. From the offeree's side the doing of that act is an acceptance of the offer. From the offeree's angle, the response to his request is the consideration.

Hepple points out that it is merely for analytical purpose that it has become traditional to separate the element of agreement (usually reduced to an offer and acceptance) from the element of consideration. This separation of agreement from consideration, Hepple contends, has resulted in the neglect of a fundamental point. This is that the Common Law recognized at an early stage that the parties usually do not define their intention to enter legal relations. Consequently, the fact that they have cast their agreements into the form of bargain (offer, acceptance, consideration) provides an extremely practical test of that intention. This test of bargain, Hepple concludes, renders superfluous any additional proof of intention.

Hepple then, submits that the difficulty in reconciling his approach with the remarks of Atkin L.J. (as he then was) in **Balfour v Balfour** has arisen because of Lord Atkin's definition of consideration. Lord Atkin insisted, "Arrangements made between husband and wife are arrangements in which there are mutual promises, or there is consideration in the form within the definition that I have mentioned. Nevertheless, they are not contracts… because the parties do not intend that they should be attended by legal consequences." Hepple defines "consideration" as consisting of a benefit received by one party or a loss suffered by another. Hepple points out that much confusion, based on contractual enforceability has arisen from his definition in the judicial insistence on intention of consideration because Lord Atkin failed to add that the benefit or loss must be received or suffered as a price for the other. In other words, such exchanges are not gratuitous. An agreement between spouses, according to Hepple, may consist of mutual promises and yet not be a contract precisely because the promise of one is not given as the price for the other. He contends that the same reasoning can be applied to other domestic agreements. Hepple then reviewed a number of decisions based on the **Balfour** principle, in which had the courts applied the principle of bargaining as well as his extended definition of consideration, it would have found enforceable contracts in many of the cases they found none, for want of intention to create legal relations.

Our attention is drawn to the recent decision of the House of Lords to limit the Balfour principle, which the Lords described as an "extreme case" and one, which stretch the doctrine (that in ordinary day-to-day activities, spouses do not intend to contract) to its limits.

Regrettably, at that time when the House of Lords was adopting cautious approach to the Balfour principle, it seems strong that it is being extended in another direction to solve the problem of a very different type of relationship, namely collective bargaining, as was done in Ford's case. Thus, we adopt Hepples conclusions that:

(i) In ascertaining whether the parties have reached agreement, the Common Law requires how a reasonable person would have

understood the words or conduct in issue. However, the courts will prevent injustice by denying or granting equitable relief.

(ii) In ascertaining whether the agreement is enforceable, the Common Law inquiries apply the test of bargain.

These tests (i) and (ii) are sometimes couched in the language of intention. "Viewed in this way, they are conclusive evidence of an intention to create legal relations".

(iii) Atkin L.J's dictum requiring some additional proof of an intention to create legal relations must be understood in the light of the special meaning, which he attached to "consideration". It should not be extended to situations in which bargain in the usual sense of offer, acceptance and consideration is found to exist, and attempts to make such extensions, as in Ford's case inevitably result in the use of unnecessary legal fictions. This cannot be in the interest of the national development of the law of contract, particularly in such modern context as collective labour relations.

(iv) The present English rules about the seriousness of promises are inseparable from (1) and (II) so listed here.

Having highlighted the existing limitations in the Common Law rules of contract as applicable in the area of collective agreements, what remains is for our courts to develop our contract by either rejecting or modifying the requirement of additional proof of an intention to create legal relations. It is suggested that the "good faith approach" of continental Europe may offer a more visible option given the complex nature of collective agreements i.e. it is usually without prejudice.

To continue along the present path of constructive invention "which the courts have used, a cloak policy decision in the mantle of private contract is only superficially attractive. We agree with Hepple that the test of bargain will in most cases provide a satisfactory answer to the policy question as well as satisfy the requirement of contractual autonomy since it is for the parties to cast their transaction in the form of bargain.

However, other categories of agreements are cast in the form of bargain but to which, the concept of private contract law seems inappropriate. In this category are government contracts and collective agreement. The courts have shown greater preference to the denial of legal enforceability to government contracts and collective agreements, not on the grounds of absence of constructive intention rather than on explicitly policy grounds. English courts are increasingly basing their reasons for reviewing government contracts on the tenuous presence of some public law interest or element. The law regulating government contracts in this country, particularly in the areas of procurement and supply of public services, is still grossly under developed and calls for urgent examination and reform. It is, however, important to mention that the continued justification of non-justiciability of government contracts in terms of intention may be partly responsible for the slow development of a separate set of legal rules to deal with the construction and effect of government contracts and collective agreements.

The rigid classification of issues as "contract/not contract" (a derivative of the intention theory) has also prevented the development of the jurisprudence of the collective labour agreement in Common Law jurisdictions. The policy implicit in Ford's case was that the parties did not intend that their agreement should create legal relations, and was implemented by saying that no contract has been formed. An alternative approach would have been to assume that the fact of bargain was sufficient to create legal relations but then to find that the distinctive features of collective bargaining give rise to a relationship *sue generis.*

Among the special characteristics of collective agreements, which have been identified, are; collective agreements are more similar to statutes or peace treaties than commercial contracts. They therefore cannot be fitted neatly into the traditional categories of contracts. Their open-ended nature makes it sometimes difficult to find rights capable of legal enforcement. The concept of fundamental breach is rendered meaningless by the mutual interest of the parties to avoid deviations from the bargaining struck, as they emphasize the achievement of just and harmonious operations of the enterprise. Moreover, the power of performance may lie at the shop

floor level and not with union officials. In addition, the difficult problems of agency is created by the absence of clear answers by the Common Law; nor are traditional contract remedies adequate. Based on these and other reasons, concepts appropriate to private bargains cannot simply be extended to collective agreements.

However, these distinctive features of collective agreements should not constitute an absolute barrier to their legal enforceability. If it were so, then it would be difficult to account for enforceability of collective agreements statutorily, either through judicial decisions or by the express intention of the parties. The courts should remove the blinkers of the "contract or no contract" analysis, so that they can see the need to develop a separate set of rules for the construction of the good faith of collective agreements, and to create remedies. What is more? The courts should take cognizance the changing climate of opinion adverse to the enforceability of collective agreement in many countries and increasing impact of international norms of labour and law as developed by the International Labour Organization.

Given the traditional hostility of the judiciary to labour matters, these changes are unlikely to come without struggle from the workers themselves to bring about changes in the attitude of judges and get government to enact benign legislation.

THE LEGAL STATUS OF THE ASUU – FGN COLLECTIVE AGREEMENT

Is the ASUU-FGN Collective Agreement of 1992 enforceable in Law? First, since the Agreement was not submitted to the Minister of Employment, Labour and Productivity, it can be said that the (the Minister) was not given the opportunity to pronounce the enforceability of some or all the stipulations of the Agreement as provided under the Trade Disputes Act of 1976. This is notwithstanding, the representation of the Ministry on the team of Government negotiators.

Therefore, we are left with only the option of considering the position of the Common Law. In the absence of any pronouncements by the Nigerian

courts on the point, we are forced to turn to the judicial decision of other Common Law Countries. The point should be made that generally, labour unions distrust the courts because the courts historically have been hostile to them. Moreover, the unsettled state of the Common Law on the legal status of collective agreements tends to discourage unions from resorting to the courts, because they believe that their likelihood of getting a favourable decision is very slim.

The English courts have discordant notes on the justifiability of collective agreement. The Ford's case, which decision revolves around three collective agreements, concluded that collective agreements are not legally enforceable based on a "climate of opinion" unfavourable to the enforceability of collective agreements. The court in fact based its decision on the single extra-judicial authority of Kahn Freund, an expert in labour law. Such a decision in our view cannot be said to be rational and conclusive since the climate of opinion is unlikely to remain static ad infinitum.

Given the unsettled state of the law relating to the enforceability of collective agreements, was Professor Nwabueze correct in pronouncing the ASUU-FGN collective Agreement of 1992 unenforceable? Does it amount to executive adjudication that he made such pronouncement at all? Reacting against the pronouncement of the Justice Kayode Eso Committee on the binding character of the Agreement, Professor Nwabueze incidentally points out correctly in these words:

> But even if the government were to accede to the Committee's recommendation and affirm the binding character of the Agreement, such affirmation cannot alter the legal nature of the Agreement, it cannot give the agreement the character or status of a legally binding agreement if it does not in fact possess that status. Only a court of law can pronounce authoritatively on the legal nature of the agreement. Neither the Government nor ASUU (nor the Kayode Eso Committee) is competent to pronounce authoritatively nor conclusively on whether the agreement is legally binding or not."

Nwabueze concludes, "It seems to be futile therefore to ask the Government to affirm that the Agreement is binding when it has no competence to do so." With due respect to the learned Professor, we submit that for the same reason, it was futile for him to have pronounced on the enforceability of the Agreement, especially as he did not show the intention of submitting such opinion to the determination of the court.

There is no doubt that some of the stipulations of the Agreement were aspirational in nature. For example, those that cited Alumni Associations as sources of revenue for the education sector but this fact does not render all the stipulations lacking in "standards meet for judicial judgment." In our view, stipulations on new salary rates do not share the same characteristic of vagueness and are therefore enforceable.

It is, however, worth mentioning that despite the vagueness or aspirational nature of some of the stipulations of the Agreement, the fact that the government was determined to implement most of them is evidence of how serious the government took the agreement. The learned Professor himself admitted that "as at July 1993 (The Committee set up to implement the Agreement) had achieved more than 80% implementation of the ASUU Agreement." It suggested, following Happle, that the Agreement had all the ingredients of a bargain and a serious transaction thereby rendering the necessity of intention superfluous. The "high ranking" standing of those who signed or ratified the Agreement on behalf of Government (and) the length of time it took to negotiate it (elements that the Professor discounts) in our view go to show how serious the bargain was.

It is cheering that the position of the Professor on the enforceability of collective agreements is not a general one, but is confined to the ASUU Agreement. Consequently, it is a reasonable inference that he is not very disagreeable to the enforceability of all collective agreements. This, in our view, is even more reason why any question on the enforceability of the ASUU Agreement should have been referred to the court for determination. Such a step would have the Teachers etc. (Essential services) Decree of 1993 and the attendant rights of the teachers and their families grossly violated.

Nwabueze's reference to political relations, public policy and the generality of some of the rights secured by the Agreements as a justification of his position on the non-justiciability of those stipulations, in our view, exclude ASUU. This is because members of ASUU are members of the Nigerian society with stake in their occupation, the conditions of their work place, and indeed the political progress of the nation. In other words, members of ASUU are part of the democratic process.

If indeed "education ranks in important above everything else (and) it qualifies more than anything else to be declared an essential services," then we further submit that the learned Professor approached the problem from the wrong end. He should not have started with enacting a draconian legislation that got banned, harassed, and humiliated grossly underpaid teachers complaining about the abject working conditions. The proper point to start, in our opinion, was to support the just struggle by ASUU to lift education from its present state of gross neglect and depravity to a position "deserving of its high ranking in importance above everything else". On his belief that strikes should be banned in the education sector or at least should be subjected to serious restrictions under the Teachers etc. (Essential services) Decree, we recommend the counsel of Professor St Antoine:

> It is folly… (to outlaw) absolutely a form of conduct that is sure to be engaged in, under certain conditions by respectable persons in thousands.

This observation has a ring of wisdom. Indeed the "deterrent effect of a loan is not sufficient to stop strikes." This point was amply demonstrated by the failure of the Teachers etc., (Essential services) Decree to end the ASUU strike against which it was enacted.

WHAT HOPE LIES IN INTERNATIONAL LABOUR STANDARDS

Given the underdeveloped state of the law relating to the legal status of collective agreement, can we find a visible window of hope for the protection of the rights of Nigerian workers in international labour standards?

By the virtue of the theory of judicial dualism adopted by Nigeria, an international labour standard becomes part of our national law now that the international instrument has been transformed.

Trade Unions in the modern sense cannot exist in the absence of freedom of expression and freedom of association, within the municipal realm S.36 (i) and S.37 of the 1999 Constitution (As amended), of the Federal Republic of Nigeria have made ample provisions for the protection of these rights. These freedoms are not only justiciable but enjoy supremacy over the ordinary laws. The two rights have been further reinforced by the International Labour Organization (ILO) Conventions No. 87 on freedom of association and protection of the right to organize and bargain collectively. These conventions immediately became part of our national law by accession on our attainment of independence on October 1, 1960.

The ILO attaches special importance to freedom of association and collective bargaining because it considers the happiness of workers as a means of ensuring world peace and has employed its strong supervisory machinery and the pressure of public opinion to exert deterrence on employers. It has also assisted in resolving labour disputes in such a way as to promote the development of good industrial relations.

By the ILO standards, all workers and employers enjoy the basic right to organize for the promotion and defense of their interests. The only exception is members of the Armed Forces and the Police. Thus, any existing national legislation that deprives some categories of persons forming unions or embarking on strikes particularly in the public sector should be abrogated, in compliance with our international obligation. The Teachers etc. (Essential services) Decree enacted during the tenure of Professor Ben Nwabueze as Minister of Education was unnecessary. It was an infringement of such obligation. Constant government interference in the affairs of unions, bans, dismissal of union leaders, etc., all fall foul of our international obligations. Strikes are considered by the ILO as an “essential element of trade union rights” for promoting and defending the occupational interests of workers. The only exception are workers in the public sector who undertake essential service in the strict sense – namely, those whose interruption of work would or could endanger the existence of wellbeing

of the whole or part of the population. By ILO standards, only the Army and the Police fall within the category.

With respect to politics, the ILO standards state that a general prohibition of political activities of any kind is incompatible with the principles and guarantees of the Convention; it would also seem to be unrealistic as regards its application in actual practice. It is therefore, in order and in the interest of trade unions to make publicly known their position on matters of economic and social policy, which affect their members. Thus, they can support a political party that will advance their collective interest. However, this should not compromise the existence of the union, a rather difficult dilemma that faces all trade unions.

For Freedom of Association to be meaningful, it must form a part of the whole range of fundamental rights of humanity including the right to hold one's opinion and expression and, in particular, to organize meetings freely. It includes freedom and security of the person, freedom from arbitrary, and an impartial judiciary.

CONCLUSION

In this paper, we considered the main issues in the ASUU-FGN collective agreement, and the subsequent controversies that arose over its legal status. We have established that at the present state of the development of both Contract Law and Labour Law, the issue of the enforceability of collective agreements remains unsettled, especially in the Common Law countries. Some countries such as Britain have resorted to legislation to resolve the issues, without success. In Nigeria, the situation is even less satisfactory. Many instances of legislation inhibit freedom of association. The provision that gives the Minister for Employment Labour and Productivity power to decide which agreement is binding on the parties leaves much to be desired, especially with respect to public sector collective agreements, or when the Ministry of Labour is directly involved. This responsibility should be left for the National Industrial Court, whose decision should further be subject to appeal.

As regards the ASUU – FGN collective agreement, we submit that the energy wasted by Professor Nwabueze was a needless academic exer-

cise, which was to say the least, diversionary and unproductive for the implementation of an agreement to which he attracted an unprecedented implementation commitment by the Federal Government.

Finally, Unions in Nigeria should avail themselves of the supervisory activities of the ILO in order to restrain employers and government from unleashing unpopular labour legislations, regulations, and policies on workers.

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