

# New Frontiers on Legal Enforceability of Collective Agreements in Nigeria

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## Abstract

The objectives of this research paper are: to examine the status of collective agreements under the common law; highlight impacts of statutory intervention on common law perception of collective agreements, and discuss how the National industrial Court (NIC) and the Constitution of the Federal Republic of Nigeria 1999 (as altered) have broadened the horizon of enforceability of collective agreements in Nigeria. Reliance is placed principally on statutes, judicial decisions, textbooks written by learned authors as well as international best standard and practices championed by the International Labour Organization (ILO) and practices in some foreign jurisdictions. The findings of the research were that under the common law, collective agreements are ordinarily not binding, they are considered as a 'gentleman's agreement', a product of a trade unionist's pressure, binding only in honour or on the goodwill of the parties thereto, unless and until it is incorporated expressly or impliedly into the contract of employment. However, statutory intervention has slightly altered the common law notion of collective agreements, e.g. where the Minister of Labour and Productivity is empowered to declare, by order, that part or the whole of an agreement deposited in his office is binding on the parties. Furthermore, with the enactment of the NIC Act and the listing of the NIC in the 1999 Constitution as a superior court of record (following the alteration of the Constitution, necessitated by the *N.U.E.E. V. BPE* case), the

Court now has exclusive jurisdiction to adjudicate on a wide range of labour matters, industrial relations and application of international best practices such as the standard and principles of the International Labour Organization (ILO), and practices in foreign jurisdictions. It has been argued that the enforceability of collective agreements is in tandem with international best practices, which the NIC can readily give effect to, if it is pleaded and established/proved as a fact. This has invariably expanded the frontiers of enforceability of such agreements. Therefore, the common law position on the status of collective agreements has been rendered otiose and obsolete, giving way to the sparkling provisions of enforceability guaranteed by the NIC Act and the Constitution respectively. Notwithstanding, it is highly recommended that parties to a collective agreement should expressly state their intention whether or not to be bound; the duration of the agreement should be stated and whether, and when, it should, be reviewed; experts and other stakeholders should be properly consulted before an agreement is entered into; an arbitration clause may be included in case a party breaches its own part of the agreement. Industrial democracy ought to be promoted in all sectors. Strikes and lock outs should be used only as a last resort for enforcing compliance with a collective agreement, because these industrial actions cause devastating effects on the economy and on the lives of the citizenry generally.

## **Introduction**

There is no contract of employment that can possibly reduce all its terms in one document, or envisage all the terms that should form part of the contract in the future. Therefore, in addition to the terms of a contract being expressly stated in an appointment letter, reference may be made to other documents forming an employee's conditions of service, e.g. Handbook, Work Rules/Rules Book, Staff Regulations, Administrative Manual, Collective Agreement, etc. When it comes to collective agreement, its enforceability under common law is doubtful, because parties are presumed not to intend that it is binding on them; hence, it is regarded as a 'a gentleman's agreement', which is merely 'binding in honour', unless and until it is incorporated into the contract of service, whether expressly (by making direct reference to it as forming part of the contract) or impliedly (e.g. by the conduct of the employer implementing its terms or part thereof, or as implied by custom/usage). Statutory intervention has made the implementation of a collective agreement mandatory, if it satisfies the statutory requirements. Moreover, with the coming into effect of the National Industrial Court Act (NICA) 2006 and more importantly, the listing of the National Industrial Court (NIC) and the consequential entrenchment of its jurisdiction in the Constitution of the

Federal Republic of Nigeria (Third Alteration Act) 2010, the NIC can now assume jurisdiction over labour disputes, including disputes concerning the implementation of collective agreements. The extent of the enforceability of such agreements has not been fully explored by the NIC, bearing in mind its relatively short period of existence as a superior court of record post - N.U.E.E. V. BPE case and the alteration of the Constitution that resulted from it. Suffice it to say that the Court (NIC) has power to hear and determine labour and labour-related matters and to apply international best practices in its adjudicatory proceedings. The enforceability of collective agreements, among other things, is in tandem with international best standard, practices and principles.

This research paper is intended to analyze the legal status of collective agreements in Nigeria. The study is necessary in order to look for ways that will curb the strikes that have characterized labour unions in Nigeria, many of which have arisen on account of non-implementation or partial implementation of collective agreements.

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**Definitions**

According to the Black's Law Dictionary, collective bargaining means '[N]egotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits ...'<sup>1</sup>On the other hand, collective-bargaining agreement is '[A] contract between an employer and a labour union regulating employment conditions, wages, benefits, and grievances ... also termed labour agreement; labour contract; union contract; collective labour agreement; trade agreement...'<sup>2</sup>

The National Industrial Court Act (NICA) gives the definition of 'collective agreement' as:

*any agreement in writing regarding working conditions and terms of employment concluded between*  
*(a) an organisation of employers or an organisation representing employers (or an association of such organisations), of the one part; and*  
*(b) an organisation of employees or an organisation representing employees (or an association or such organisations) of the other part.*<sup>3</sup>

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1. Garner, B.A. et. al. eds. *Black's Law Dictionary* 9th ed. (St. Paul, M.N. West: Thomson Business, 2009) p. 299.  
2. *Ibid.* pp. 299 300.  
3. See s. 54 (1) of NICA, Cap. N155, Vol. 11, L.F.N. 2004 (as updated).

Another way of saying 'an association of such organisations' is 'a confederation of trade unions.'<sup>4</sup> Section 48 of Trade Disputes Act (interpretation of expressions) states that 'collective agreement' means:

*Any agreement in writing for the settlement of disputes and relating to terms of employment and physical conditions of work concluded between*

*(a) an employer, a group of employers or organisations representing workers, or the duly appointed representative of any body of workers, on the one hand; and*

*(b) one or more trade unions or organisations representing workers, or the duly appointed representative of any body of workers, on the other hand.*

The definition in NICA does not use some terms found in the Trade Disputes Act (TDA), e.g. 'settlement of disputes' and 'physical conditions of work'. It uses 'working conditions' instead of 'settlement of disputes'. But what is common to these provisions is the expression 'terms of employment'.

The National Industrial Court Act (NICA) uses the term 'employee' to refer to 'a person employed by another under oral or written contract of employment whether continuous, part-time, temporary or casual basis and includes a domestic servant, who is not a member of the family of the employer'.<sup>5</sup> This definition, though brief, is explicit. For instance, it includes persons doing 'casual' and 'domestic' jobs. The Act defines 'employer' as 'any individual or body corporate or un-incorporate who has entered into a contract of employment to employ any other person as an employee or apprentice'. It further defines other terms: "inter-union dispute" means dispute between trade unions and or employer's association;" intra-union dispute" means dispute within a trade union or an employer's association'.

"Trade dispute" is defined in NICA in a more expansive term than it is under the TDA. It means

*any dispute between employers and employees, including disputes between their respective organisations and federations which is connected with*

*(a) the employment or non-employment of any person;*

*(b) terms of employment and physical conditions of work of any person;*

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4. See also the interpretation of 'organization" and 'trade dispute' in section 54 , where the expressions 'employers' association' and 'federations' respectively, are also mentioned.

5. Section 54. (1) (b) of NICA, Cap. N155 vol. 11, L.F.N. 2004 (as updated).

(c) the conclusion or variation of a collective agreement; and **UNIVERSITY OF JOS LIBRARY**  
(d) an alleged dispute.<sup>6</sup>

The definitions of 'collective agreement' in Finnish, Swedish and Norwegian statutes (acts) are identical. A collective agreement is defined as an agreement in writing concluded by an employers' association or an employer, on the one hand, and a trade union, on the other hand, concerning 'the conditions of employment and otherwise the relationship between an employer and the employee'.<sup>7</sup> According to Malmberg,

*[T]he wording [of the definition] is chosen to indicate that a collective agreement can include both a contractual part and a normative part. The contractual part contains obligations of the employer and provisions that regulate the relation between the organizations and signatory parties, and the normative part contains provisions concerning rights and obligations of the employer and the employee vis-à-vis each other.*<sup>8</sup>

In Denmark, statutory definition is not given to the term 'collective agreement', rather it is based on case law, and there is no requirement for it to be in writing.<sup>9</sup> However, the legal effect of collective agreements in these Nordic countries is the same.

According to the New Book of Knowledge,

*[I]n collective bargaining, management meets with union officers representing labour to discuss hours, wages, conditions of employment, and other matters. When an agreement on these demands is reached between labour and management officials, it is put into a written labour contract signed by both parties. It then becomes a legal agreement, which can be enforced in a court of law.*<sup>10</sup>

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6. Ibid

7. Quoted in Malmberg, J. "The Collective Agreements as an Instrument for regulation of Wages and Employment conditions" Stockholm Institute for Scandinavian Law p. 197.

8. Ibid.

9. Ibid.

10. The New Book of Knowledge Vol. 11, New York. Grolier, 1979, p. 15.

It is also defined as '[A]n agreement reached through collective bargaining between an employer and one or more trade unions, or between employers' associations and trade union confederations: it may be written and formal or unwritten and informal.<sup>11</sup> Collective agreements may be divided into 'procedural agreements' and 'substantive agreements'. The former regulate the relationships between the parties and the treatment of individual workers, e.g. disciplinary procedures, while the latter cover the wages and conditions of the workers in question, e.g. wages/pay, holidays, etc.<sup>12</sup> Collective bargaining is basically aimed at settling terms and conditions of employment.<sup>13</sup>

From the various definitions of 'collective agreement' stated above, we can draw the following conclusion:

- A collective agreement is a contract, written or unwritten (but usually in writing).
- It is concluded between an employer, an employers' organization (union) or a federation of an employer's union, of the one part, and an employee's trade union or federation of trade unions, of the other part.
- It concerns terms of employment and conditions of work.
- It is ordinarily not binding on parties thereto, unless a contrary intention is shown to have existed at the time the agreement was concluded.

### **Contents of a Collective Agreement**

They include wages, workloads, classification of workers, safety and health measures, working hours/overtime payments, training sponsorship, vacation, leave pay, maternity leave, paternity leave, sick pay/sickness benefits, death benefits, canteens, dispute procedures, layoffs/redundancy, discipline, gratuity, retirement benefits, etc.<sup>14</sup>

### **Approaches to Interpretation of Collective Agreement**

Before the coming into force of the NIC Act, the attitude of Nigerian courts had been that such agreements, being extraneous documents, were generally not binding. Generally speaking, they are binding only in honour; their legal status is doubtful; they are a

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11. Eurofound, "Collective Agreement: United Kingdom" Available at [eurofound.europa.eu](http://eurofound.europa.eu), last updated on 14 Aug. 2009, accessed on 9/11/2013.

12. Ibid.

13. Uvieghara, E.E. op. cit. p. 392.

14. For instance, see Scrivastava, S.C. *Industrial Relations & Labour Laws* 4th Revised. Ed. New Delhi: Vikas Publishing House PVT Ltd. P. 117. See also pp. 116-120, for discussion on parties to, subject matter of, object of, duration of, and prerequisites for, collective bargaining.

gentleman's agreement; it is binding only when incorporated into the contract of service.<sup>15</sup> This represents the typical common law position. In the case of *Nigeria Arab Bank Ltd. V. J.E. Shuaibu*,<sup>16</sup> the Court of Appeal held (Per Ndoma-Egba, J.C.A.) that a collective agreement is 'at best, a gentleman's agreement, an extra-legal document totally devoid of sanctions... a product of a trade unionist's pressure.' Similarly, Emiola remarks that '... a gratuitous promise without a reciprocal consideration cannot be enforced in law.'<sup>17</sup>

Nevertheless, according to Fogam, the common law status of collective agreements has been modified by statute, i.e. the Wages and Industrial Council Act<sup>18</sup> and section 2 (3) [now section 3 (3)] of TDA.<sup>19</sup> By section 3 (1) (a) and (b) of TDA, parties to a collective agreement owe it an obligation to deposit at least three copies of a collective agreement to the Minister (of Labour and Productivity). But there is no reciprocal obligation on the Minister to make an order that the provisions of the agreement or any part thereof is binding on the employers and/ or the workers to whom they relate.<sup>20</sup>

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### **The National Industrial Court Act<sup>21</sup>**

The NIC Act expanded the jurisdiction of NIC. It excludes other courts from hearing and determining those causes or matters mentioned in Part II of the Act except those that were part heard before the commencement of the Act.<sup>22</sup> Section 7 (1) (a) to (c) provides for the jurisdiction of the NIC. In particular, section 7 (c) (i) relates to the determination of any question as to the interpretation of 'any collective agreement'.

A landmark aspect of this Act is its flexibility in terms of both the application of the law and rules of procedure. Accordingly, section 13 provides that in every civil cause or matter commenced in the court, law and equity shall be administered by the court concurrently.

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15. See the following cases: *Union Bank of Nigeria Ltd. V. Edet* [1993] 4 NWLR (Pt. 287) 288; *Ben Chukwuma V. Shell Petroleum Development Co.* [1993] 4 NWLR (Pt. 289) 12; *Olaniyan V. University of Lagos* [1995] 2 NWLR (Pt. 9) 665; *A.C.B. V. Nwodika* [1996] 4 NWLR (Pt. 443) 471; *Oguejiofor V. Siemens Ltd.* [2008] All FWLR (Pt. 398) 378.
  16. [1991] 4 NWLR (Pt. 186) 450 at 469, cited with approval in the case of *Nwajagu V. B.A.I. Co.* [2000] 14 NWLR (Pt. 687) 356 at 363, per Akaahs, J.C.A. (delivering the leading judgment).
  17. Emiola, A. op. cit p. 497.
  18. See the Wages Boards and Industrial Council Act, first enacted as No. 1 of 1973, L.N.55 of 1974; date of commencement: 1st October, 1974; now it is Cap. W1. Vol. 14, L.F.N. 2004 (updated to the 31st Day of December, 2010).
  19. Fogam, P.K. *Law of Contract Simplified* (Lagos: Malthouse Press Ltd. 1997), p. 49. See also Emiola, A. op. cit. pp. 497 503 and s. 31 (c) of Labour Act.
  20. See s. 3 (3) of TDA. On written particulars of terms of employment, and of hours of work and overtime, see e.g. s. 7, and s. 13 (1) (a) (b) respectively, of the Labour Act.
  21. No. 37 of 2006, Cap. N155, Vol. 11, L.F.N. 2004 (as updated).
  22. See s. 11 of the Act.

Section 7 (6) states that '[T]he Court shall in exercise of its jurisdiction or any of the powers conferred on it by the NIC Act or any other law or enactment, have due regard to good or international best practice in labour or industrial relations and what amounts to good or international best practice in labour or industrial relations shall be a question of fact. Section 15 provides:

*Subject to the express provisions of any other enactment, and in all matters not particularly mentioned in this Act in which there was formerly or there is any conflict between the rules of equity and the rules of common law with respect to the same matter; the rules of equity shall prevail in the court so far as the matters to which those rules relate are cognisable by the Court.*

As rightly observed by Adejumo:

*By the provisions of section 7 (6) of the NICA the Court is permitted and even enjoined to take into cognizance international best practices in industrial and labour relations in arriving at decisions in cases before the Court. What amounts to international best practices in a particular instance is a question of fact to be proved by the person urging the Court. This provision obviously permits the Court to borrow from foreign jurisdiction in tandem with the present global village system. The various conventions of ILO which the member states are enjoined to apply come in handy here; and the implication is that NIC will constantly have to take cognizance of these.<sup>23</sup>*

Although the status of the NIC as a superior court of record was successfully challenged in the case of *N.U.E.E. V. BPP*,<sup>24</sup> the National Assembly promptly addressed that anomaly by making an alteration to the Constitution, which vested the Court with the status of a superior

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23. Adejumo, B.A. "The National Industrial Court of Nigeria: Past, Present and Future". Being a Paper Delivered at the Refresher Course Organized for Judicial Officers of between 3 5 years Post Appointment by the National Judicial Institute, Abuja at the Otutu Obaseki Auditorium, National Judicial Institute, Abuja on the 24 March, 2011, p. 5.

24. (2010) 1 NACLR 91 at 127 8



court of record.<sup>25</sup> With this dispute over, the Court has been included in the ranks of superior courts in Nigeria with wide powers. For instance, section 254C (1) item 6 states that the Court shall have jurisdiction to the exclusion of any other court in civil causes or matters '[R]elating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters'. Item 8 provides for causes or matters '[R]elating to, connected with or pertaining to the application of international labour standard; 'Item 10 (i) provides for civil causes or matters '[R]elating to the determination of any question as to the interpretation of any - (i) collective agreement;'. Fundamentally, subsection (2) of section 254C provides that:

*Notwithstanding anything to the contrary in this Constitution, the National industrial Court shall have jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.*

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It is submitted that the combined effect of the aforementioned provisions is that the NIC will give effect to collective agreements if they are proved as a fact that they are indeed binding in line with international best practices. Secondly, where Nigeria has ratified a convention, treaty or protocol<sup>26</sup> on labour, employment, work place or industrial relations, the NIC has the jurisdiction to deal with any such matters. Since this is a constitutional matter, it overrides any statutory provision that states anything to the contrary. In fact, it applies notwithstanding anything to the contrary in the constitution itself. However, the problem that will likely arise in the application of international best labour practices is where

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25. This was effected by virtue of the Constitution (Third Alteration) Bill 2010, assented to by the President on 4th of March 2011. Now the status and jurisdiction of this court are entrenched in the Constitution, e.g. ss. 5 (cc), 84 (4), 240, 243, 254C 254D, 287, 289, 292, 294, 295, 318, and the Third and the Seventh Schedules to the 1999 Constitution respectively. See also Adejumo, B.A. *ibid.* pp. 6 7. On a broad critique of the powers of the NIC, see Alubo, A.O. "the National Industrial Court of Nigeria and Contemporary Industrial Challenges" in Oche, P.N.N. et al. eds. *Journal of Private Law* (2013) JPL, Vol. 1 No. 1. A Publication of the Department of Private Law, Faculty of Law, University of Jos, Nigeria, pp. 68 s81.

26. On ratification of treaty, see s. 12 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as altered). Only a treaty between the Federation and any other country that has been enacted into law by the National Assembly shall have the force of law.

such a practice, though of international standard, is not part of a of treaty or protocol ratified by Nigeria, and it also conflicts with an extant Nigerian statute or enactment: what will be the implication of this in view of the supremacy of the Constitution?<sup>27</sup>

By reason of the NIC Act which has been given constitutional backing, it is likely that parties to collective agreements will be more committed when they enter into collective agreements because the legal implications of their agreements will be judged by international standards and principles, particularly of the International Labour Organization (ILO) and of other jurisdictions. Equity will not allow an agreement freely and voluntarily entered into to be regarded as unenforceable in a court of law, as equity will not suffer a wrong without a remedy.

Kanyip has stated the extent of latitude available to the NIC to apply international best practice when exercising its jurisdiction over labour/employment disputes:

*There is greater latitude now for the court to apply international best practice when adjudicating labour/employment disputes. It does seem that the court can now apply without hindrance international conventions, treaties and protocols that relate to employment/labour issues which are ratified by Nigeria. In this regard, note that the jurisdiction section commences with the words, “Notwithstanding the provisions of sections 251, 257, 272 and anything contained in this Constitution...” Section 12 of the 1999 Constitution which requires domestication before a treaty or convention can become applicable in the country is certainly covered by the words “and any thing contained in this Constitution” used in the opening paragraph of section 254C of the Constitution.*<sup>28</sup>

Kanyip has also stated the relative advantages of the NIC to other courts: national geographic jurisdiction; there are nuances in labour/industrial relations shaped by the ILO standards as to best practice which only the NIC can appreciate and bring to bear in adjudicating trade disputes; adjudication at the NIC is different from that in the High Court in terms of informality, simplicity, flexibility, speed, and user friendliness; it is easier to get

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27. Section 1 (1) of the Constitution. See also the cases of *Danbaba V. State* [2000] NWLR (Pt. 687) 396 at 410, per Suleiman Galadima, J.C.A., and *Abacha V. Fawehinmi* [2000] 6 NWLR (Pt. 660) 228 at 315 316, Per Achike JSC.

28. Kanyip, B.B. “The National Industrial Court: Yesterday, Today and Tomorrow”. Available at [nic.gov.ng](http://nic.gov.ng), accessed on 4/11/2013.

reinstatement order from the NIC than from the High Court:<sup>29</sup> He continues: '... collective agreements are binding in honour only at the High Court except incorporated into the conditions of service of employees; but they are binding and held at such at the NIC'<sup>30</sup> Kanyip further espouses the interpretation jurisdiction of the NIC with respect to collective agreement:

*To activate the interpretation jurisdiction of the NIC for the purpose of interpreting collective agreement, there must be a sufficient nexus between the applicant and the collective agreement in question. It is not enough that the applicant benefits from the collective agreement without more. To be so entitled, there has to be proof that the beneficiary is a member of the signatory trade union to the collective agreement. This was one of the grounds upon which he NIC dismissed the claims of the applicants in the case of Joy Maskew & Os. V. Tidex Nigeria Limited where an application for interpretation was brought under section 15 of the TDA 1990.*<sup>31</sup>

The breach of collective agreements is one of the major causes of strikes in Nigeria. As observed by Awuzie, '[T]he major cause of ASUU Government conflicts, and hence protracted strike actions in the universities, has always been refusal of government to implement valid agreements that it entered with the union'.<sup>32</sup>

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29. Kanyip, B.B. *ibid.* p. 6.

30. *Ibid.*

31. *Ibid.* p. 12.

32. See Text of ASUU Press Conference Addressed by President of ASUU, Professor Ukachukwu Awuzie, at the End of National Executive Council (NEC) Meeting Held at ABU, Zaria from 15-16 May 2011, published in *The National Scholar* June 2011 Vol. 8, No. 1 pp. 12-16. *The National Scholar* is a publication of ASUU.

For more information on ASUU's grievances and ASUU's collective agreement, the Memorandum of Understanding (MOU) with Government on 24th January, 2012, and a Resolution on 4 November, 2013, see the following: Strike Bulletin Number 1, ASUU, University of Jos Branch, n.d. pp. 1-3, distributed on 12/12/2011, 'Letter to All ASUU Members Issued on 15/4/2013 by Dr. Nasir F. Isa, ASUU President; ASUU Strike Bulletin No. 6, National Secretariat, Issued on 03/8/2013; ASUU Strike Bulletin No. 7, National Secretariat, n.d. distributed in August 2013. ASUU Strike Bulletin No. 8 National Secretariat, n.d., distributed in Sept. 2013; ASUU Strike Bulletin No. 9, National Secretariat, n.d., distributed in Sept. 2013.

Resolutions Reached at the Meeting of the Secretary to the Government of the Federation (SGF), Honourable Minister of Labour & Productivity (HML & P), Honourable Minister of Education (HME) and the Academic Staff Union of Universities (ASUU) at the Office of the Secretary to the Government of the Federation on 9th April 2013; RESOLUTIONS REACHED AT THE MEETING BETWEEN FEDERAL GOVERNMENT AND REPRESENTATIVES OF THE ACADEMIC STAFF UNION OF UNIVERSITIES (ASUU) CHAIRED BY THE PRESIDENT AND ATTENDED BY

## Basic Contents of FGN/ASUU Agreement of 2009<sup>33</sup>

- Consolidated Peculiar Allowances (CONPUAA) exclusively for University teaching staff derived from allowances not adequately reflected or not consolidated in CONUASS (Consolidated University Academic Salary Structure).  
Progressive increase in annual budgetary allocation to education up to 26% between 2009 and 2020.  
Transfer of Federal Government landed property to universities.  
Setting up of Research and Developing Units by companies operating in Nigeria and teaching and research equipment.  
Payment of Earned Academic Allowances.  
Federal Government's Assistance to State Universities.  
Establishment of the Pension Fund Administrator (PFA) need to establish Nigerian Universities Pension Management Company (NUPEMCO).  
Inauguration of University Governing Councils.  
Transfer of Federal Government Landed Property to Universities.  
Amendment of the Pension/Retirement Age of Academics on the professional Cadre from 65 to 70 years.

Among the above-mentioned items, the ones that have been fully implemented to the full satisfaction of ASUU are the CONPUAA and the pension/retirement age of academics. The latter was actualized by legislation.<sup>34</sup> The other ones are either not implemented, or have

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THE LEADERSHIP OF THE NIGERIA LABOUR CONGRESS (NLC) TRADE UNION CONGRESS (TUC) OF NIGERIA HELD AT THE STATE HOUSE ABUJA ON 4TH NOVEMBER 2013. See also: Akor, M.I. "ASUU/FGN Agreements and Nigerian Universities" Daily Trust 9, Letter 9 Sept. 2013, p. 66; Nwagwu, E. & Kari, U.A. "Nigerians Support ASUU to Save Education in Nigeria", n.d., distributed on 11 Jan. 2012; Coalition to Save Education in Nigeria. "Things you should Know about ASUU Strike" Issued in 2013; "The Decay in Nigerian Universities" Nigerian Tribune Editorial, 3 April 2013, p. 17. ASUU "Nigeria's University System and the Menace of Underfunding" Issued on 20 Sept. 2013. On the travails of ASUU during the military regime of General Ibrahim Badamosi Babangida, see Kukah, M.H. Democracy and Civil Society in Nigeria Ibadan: Spectrum, 1999, pp. 158-62. See also, Strike Bulletin No. 11, Oct. 1, 2013, for the struggles of ASUU during the regimes of Babangida, Abacha, Obasanjo and Yar'Adua.

33. See 'Agreement between the Federal Government of Nigeria (FGN) and the Academic Staff Union of Universities (ASUU) January 2009'. 'The Agreement between the Federal Government of Nigeria (FGN) and the Academic Staff Union of Universities was signed on 22nd Oct. 2009 'after a protracted negotiation that spanned almost three years': The National Scholar, June 2011, Vol. 8, NO. 1 p. 15.
34. Adetayo, O. "Jonathan Signs Profs' retirement age into Law" The Punch 15 May 2012, at punchng.com, accessed on 10/11/2013; National Universities Commission "70 years Retirement Age: ASUU Commends FG" 21 May, 2012, Vol. 7 No. 21, at nuc.ed.ng, accessed on 10/11/2013. See also "ASUU strike: the Level of Implementation of the FGN/ASUU 2009 Agreement' The source ibid. p. 43.

been partially implemented, or are in various stages of being implemented.<sup>35</sup>

Isa has chronicled the determined efforts of ASUU to get its collective agreements implemented through decades of struggles despite antagonism by regimes forces:

1. Our strike to get government to implement the 2009 Agreement and the Memorandum of Understanding arising from it (January 24, 2012) has reached a second phase. In the first phase, we demonstrated to the Nigerian people that our struggle is for the revitalization of the Nigerian university system. Government attempted to deceive the public about our goal but failed.
2. A new phase has started. Government has chosen to use the method of deception and blackmail. Government now claims our strike is political. Remember that Babangida proscribed our union when on strike and we did not give in but went to win the 1992 Agreement.

Remember that we defended the 1992 Agreement against Abacha's attempt to kill it. We defended the 1992 Agreement against Obasanjo's effort to repudiate it and won the 2001 Agreement.

We had to go on strike to force Obasanjo regime to reach and implement the 2001 Agreement with ASUU.

It took three years of struggle to renegotiate the 2001 Agreement with the Yar'Adua regime. Therefore, the defence of the 2009 Agreement is a continuation of our struggle for education in Nigeria.

Our duty is to our country and its educational system. And we have been discharging this duty since the Shagari regime through the military rule and thereafter.

We must, therefore, not succumb to blackmail. Our unity has been tested and strengthened through our resistance to various attempts to divide us. We must not allow politicians to distort the goal of our struggles for their selfish ends.<sup>36</sup>

### **Legal Enforceability of Memorandum of Understanding (MOU)**

An MOU is defined as 'an agreement to agree' or an agreement to enter into more specific

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35. On Federal Government's position/version on the level of implementation, see, e.g. Bernard, B. "ASUU: Facts and fallacies" *The Source* Ibid. pp. 41-44. See also "ASUU Strike: The Level of Implementation of the FGN/ASUU 2009. Agreement" Being excerpts from a statement issued by Sam Nwaobasi, Special Assistant (Media) to Secretary to the Government of the Federation (SGF), in *The Source* Ibid. pp. 43-44.

36. *Strike Bulletin* No. 11, ASUU National Secretariat, October 1, 2013, p. 1.

and comprehensive contract or agreement at a later time after negotiations'.<sup>37</sup> It is defined in the Black's Law Dictionary (as 'memorandum of intent') thus: '[A] written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; non-committal writing preliminary to a contract'.<sup>38</sup>

The preponderant view about an MOU is that it is generally not a binding document; that parties intend not to be bound, and courts ordinarily do not enforce it.<sup>39</sup> But more importantly, whether or not an MOU is binding depends on the wording or terms of the document, which indicate the intention of the parties, coupled with the surrounding circumstances and the conduct of the parties.<sup>40</sup> Cumulatively, these factors largely determine whether or not the document is intended to be binding.

Furthermore, our opinion is that, depending on the intention (express or implied) of the parties and whether the MOU is entered into at a pre-contract stage or thereafter, it could be binding or not binding. The parties, subject matter, terms and purpose of the MOU as well as the stage at which it is concluded, are major determinants as to whether or not it is legally enforceable. If parties want to be bound, a clause in that regard should be expressly stated, so that in the event of a breach, the court can uphold the MOU's bindingness or inderogability. It is submitted that where an MOU is concluded in a pre-contract or pre-collective agreement stage, it is likely not binding, unless it clearly has elements to show that it is intended to be binding. If it is concluded concurrently with a contract or a collective agreement, or thereafter, it is likely that it will set out modalities of implementation or execution of the other agreement(s), including any variations or reviews that might have been mutually agreed upon. Some agreements/contracts clearly provide for periodic reviews of the terms thereof, and this may be realized by a direct review of the document itself or if need be and/or as agreed upon, by an MOU. For instance, if the terms of a collective agreement have been agreed upon by parties and for some reason, the implementation did not strictly follow the time line, parties may, by an MOU, reschedule the timing or duration of implementation. In that regard, the MOU will become part of the collective agreement, although strictly speaking, the MOU itself does not create a new agreement other than it has only modified the previous agreement as a result of supervening circumstances. Or the MOU itself may clearly be a renegotiated document agreed upon by parties to a collective agreement. If the intention

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37. "Memorandum of Understanding" Pilch Connect, at [pilch.org.au](http://pilch.org.au), accessed on 9/11/2013.

38. Garner, B.A. et.al. (eds.) op. cit. p. 988. It is also termed 'memorandum of intent'; 'term sheet'; 'commitment letter'.

39. Garner, B.A. et. al. *ibid.* See also "Memorandum of Understanding" p[/cot/

40. *Ibid.* and Lyons, M. "Letters of Intent and MOU's" VPor Lawyers, Aug. 2006, p. 1, at [vprolawyers.com.au](http://vprolawyers.com.au), accessed on 9/11/2013.

of parties is that the MOU shall not be binding, they will and should couch it as a mere guide. If, on the other hand, parties want it to be binding, Lyons has suggested some steps to follow to achieve this:<sup>41</sup>

1. Be clear and specify whether to be bound or not.
2. If you want to be bound, incorporate appropriate dead lock breaking mechanisms in case discussions break down over the details.
3. Treat the MOU with respect, and do not let the tail wag the dog.
4. At all costs, avoid the worst outcome of a dispute about the status of the MOU itself.<sup>42</sup>

Below are two examples of MOUs. Whereas the first one has a clause that clearly expresses non-bindingness, the second one is not clear as to the actual intention of the parties. Although the latter confers rights on the parties, it does not expressly confer duties that are enforceable.

Example 1:

Purpose

(1) ....

(2) ....

(3) This MOU is not intended to be legally binding'.<sup>43</sup>

Example 2 :

ICE [Immigration and Customs Enforcement] and DOL [Department of Labour] agree to keep confidential information shared pursuant to section IV (A) of this MOU.<sup>44</sup>

This MOU is an agreement between DHS [Department of Homeland Security] and DOL, and does not create or confer any right or benefit on any other person or party, public or

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41. Lyons, M. Ibid. p. 2.

42. Ibid. p. 2.

43. Memorandum of Understanding Between the Department of Labour and Employment of the Government of the Republic of Philippines and Her Majesty the Queen, in the Right of Saskatchewan as represented by the Minister Responsible for Immigration and the Minister of Advanced Education and Employment, Concerning Cooperation in the Fields of Labour, Employment and Human Resource Development, signed on 18 Dec. 2006, Available at [ac.gov.sk.ca](http://ac.gov.sk.ca), accessed on 09/11/2013.

44. Revised Memorandum of Understanding between the Department of Homeland Security and Labour Concerning the Enforcement Activities at Worksites, signed on 7 Dec. 2011. Available at [dol.gov](http://dol.gov), DHS DOL MOU. Pdf., accessed on 09/11/2013.

private. Nothing in this MOU or its implementation is intended to restrict the legal authority of ICE or the relevant DOL components in any way.<sup>45</sup>

Under what category, normally, do the MOU concluded, and the Resolutions reached respectively, between Governments and trade unions in Nigeria, stand, e.g. the ones between ASUU and the Federal Government of Nigeria?<sup>46</sup>

Omorege has argued that Nigeria, having ratified the conventions on collective agreements, is bound to implement its obligations to ASUU (he refers to ASUU as the only recognized umbrella trade union for academic staff in Nigerian universities - federal, state and private universities), and that the implementation of the collective agreements in both Federal and State universities will not offend the operation of federalism. According to him,

*Article 2 of the Right to Organise and Collective Bargaining Convention of 1948, which defines collective bargaining, is virtually replicated in the Trade Disputes Act of Nigeria... Nigeria ratified this convention on October 17 1960. It has also ratified the Collective Bargaining Convention of 1981 (and its Recommendations), the most recent international instruments on this subject.*<sup>47</sup>

He goes further to say, thus:

*Importantly, the... Trade Unions Act in section 23 emphatically recognizes collective agreement as one of the benefits which can inure to a trade union (and by necessary implication, its members) as a result of registration. The section in fact categorically prohibits any steps, which seeks to render such an agreement unlawful.*<sup>48</sup>

We submit, with due respect, that the import of section 23 of the Trade Unions Act is not on the bindingness or otherwise of collective agreements per se; instead, it refers to a situation where the purposes of a trade union is in restraint of trade: the purposes of a trade union shall not be unlawful 'so as to render void or voidable any agreement or trust related to the union....' merely on account of the purpose of that trade union being in restraint of

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45. Ibid.

46. Look up the FGN/ASUU MOU 2012 for guidance.

47. Omoregie, E. "Why ASUU's 2091 Collective Agreement with FG stands" This Day 1 Sept. 2009. xiii. Viewpoint.

48. Ibid.



trade.<sup>49</sup> The court is precluded from entertaining any legal proceedings 'instituted for the purpose of directly enforcing any agreement mentioned in subsection (2) of this section, or of recovering damages for any breach of any agreement so mentioned'. Subsection 2(a)-(e) contains the agreements referred to above. Then subsection (3) provides: 'Nothing in this section shall render unlawful any agreement mentioned in subsection (2) of this section'. On the other hand, subsection (4) (a) and (b) relate to an unregistered trade union.

Without prejudice to section 2(1) of the Act, the foregoing provisions of section 23 shall apply to an unregistered trade union, subject to the restrictions stated in section 23(4) (a) and (b).<sup>50</sup> Therefore, the agreement stated in section 23 of the Act is with reference to the limited context of whether a trade union is in restraint of trade, or whether it is an unregistered trade union: that status shall not in or of itself render void or voidable any agreement or trust relating to the union; yet a court shall not entertain any proceedings instituted (with respect to those trade unions) for the purpose of directly enforcing any agreement mentioned in subsection (2) of section 23, or for recovering damages for breach of any agreement mentioned in that subsection.

### Collective Agreement in some Foreign Jurisdictions

#### - Germany

In Germany, collective agreement is a source of law, by virtue of the Act of Collective Agreements and the Works Constitution Act. In particular, Article 9 paragraph 3 of the German Basic Law (Grundgesetz) gives legal status to collective agreements.<sup>51</sup> Moreover, 'the right to strike for employees and the right to lock-out for the employers are also derived by the constitutional rule as being part of the freedom of association'.<sup>52</sup> The German law also draws inspiration from international human rights instruments which guarantee freedom of forming associations.<sup>53</sup> Another notable aspect of German labour law is that collective agreement has a contractual status, creating rights and duties as

49. Look up s. 23(1) of Trade Unions Act, Cap. T14, Vol. 14, L.F.N. 2004 (updated to 31st Dec. 2010). See also s. 1 (1).

50. Subsection 2(1) provides: 'A trade union shall not perform an act in furtherance of the purpose for which it has been formed unless it has been registered'. However, there is a proviso that such prohibition shall not prevent a trade union from taking any steps (including the collection of subscriptions or dues) pursuant to getting the union registered.

51. Richter, A.M. "Collective Agreements" National Reporter's Judge Annelie Marquardt Richter in Bundesarbe. Tsggericht Bundesarbeitsgericht Erfurt XIVth Meeting of European Labour Court Judges 4 Sept. 2006 Cour de Cassation Paris, p. 2. See also p. 3.

52. Ibid. p. 2.

53. Ibid.

between the trade unions and the employers association or a single association. Furthermore, collective agreements are not subject to approval by ministerial order.<sup>54</sup> Customary Law may abridge a collective agreement, but this is allowed only if the customary law is a reasonable'.<sup>55</sup>

- **Nordic Countries**

The Nordic countries are European nations of Finland, Norway, Sweden and Denmark. Collective agreements are binding in these countries. Statutory provisions give mandatory effect to collective agreements in Finland, Norway and Sweden, whereas in Denmark, the legal basis is case law.<sup>56</sup> The mandatory or binding effect of collective agreements in the Nordic countries means that employers and employees may not reach individual agreements that conflict with the collective agreement they have entered into. 'However, the agreement can be framed in such a way as to permit variations,<sup>57</sup> in which case divergent individual agreements would not conflict with it.<sup>58</sup> Of course, an individual agreement may also confer a benefit higher than the minimum requirement specified in a collective agreement, provided it does not offend an existing law.

The implication of the normative effect of collective agreements under 'Nordic Laws are like German Law, based on the principle that collective agreements are, within the areas of their application, not only binding on the signatory parties, but also on members of their organizations'.<sup>59</sup> Remedies for breach of collective agreements in the Nordic countries include collective action at the trade union level, and punitive damages.<sup>60</sup>

In contrast to the Nordic countries and some other jurisdictions, 'British collective agreements are not contracts enforceable at law; they are 'binding in honour only', depending for their ultimate enforcement on the sanctions available to the parties'.<sup>61</sup> This is not surprising because Britain is regarded as the cradle of the common law, and we have seen that the common law system treats collective agreements as generally non-binding. An attempt to make such agreements binding in Britain by the Industrial Relations Act 1971,

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54. Ibid.

55. Ibid. p. 4.

56. Ibid.

57. Malmberg, J.. op. cit. p. 198.

58. Ibid. p. 199.

59. Ibid. p. 198.

60. Ibid. p. 201.

61. Ibid.

failed because both unions and employers ignored it, until the Act was repealed.<sup>62</sup> The basis for non-enforceability of a collective agreement is that it is conclusively presumed that parties to it did not intend it to be a legally enforceable contract, 'unless it is in writing and specifies that the parties intend all or part of it to be legally enforceable'.<sup>63</sup> The legal effect of such an agreement not being enforceable is that a breach of it does not become actionable in contract for an injunction or damages.<sup>64</sup> With particular reference to the United Kingdom, the 'characteristic informality' of collective bargaining in that country is partly attributable to the lack of contractual status and vice versa.<sup>65</sup> However, a common ground of compromise is that terms of a collective agreement may have a legal effect if they are incorporated (as implied terms) into the individual contracts of employment.<sup>66</sup>

### **Collective Agreements in Relation to Express and Implied Terms of Contract of Employment**

Examples of incorporated terms of agreement into a contract of employment are:

#### **(a) Express Terms**

'Other terms or conditions of service are as contained in [mention the document(s)] and as may be amended/reviewed from time to time'.

#### **(b) Implied Terms**

##### **(i) Terms implied by conduct:**

This is where the conduct of the employer suggests that the agreement is binding on him, e.g. where the employer starts implementing a new salary structure or a special allowance to his employees. However, if there is more than one term in an agreement and the employer has implemented only one, there is no direct obligation/duty on the employer to implement the other term(s), but he may feel morally impelled to do so. Notwithstanding, in a legal regime where a collective agreement is automatically binding, parties (whether an employer or an employee) are bound to comply with its terms whether or not steps have been taken to comply with or implement, the terms therein.

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62. Ibid.

63. Ibid

64. Ibid.

65. Ibid.

66. Ibid.

### (li) Terms implied by custom

A term may be implied by custom. If the usage in an industry has been on for such a long time as to settle as a custom, that custom becomes an implied term of contract of any person who is employed in that industry.

An express term supersedes an implied term. An oral term and an implied term cannot be used to override or alter an express term.<sup>67</sup> An implied term, to be applicable, must not conflict with or contradict an express term.<sup>68</sup> But of course, an express term can be used to alter another express term.

'Terms of employment' are usually as agreed upon by parties to a contract of employment. However, 'conditions of service' are largely if not solely determined by the employer.

### Strikes and Lock Outs on Account of Breach of Collective Agreements

One of the conditions to fulfill for a strike or lock out to be declared is that the strike or lock out concerns a dispute arising from a collective and fundamental breach of contract of employment or collective agreement on the part of the employee, trade union or employer.<sup>69</sup> But there are several other conditions that must be complied with, e.g. the strike or lock out must have arisen from a 'dispute of right' (not 'dispute of interest').<sup>70</sup> The provision for arbitration in the Trade Dispute Act must have been first complied with;<sup>71</sup> a ballot has been conducted where the simple majority of all its registered members have voted to go on strike. There are penalties for violations of these procedures.

From the above provisions, it is crystal clear that there is no automatic right for workers to go on strike or for employers to declare a lock out. In fact, employees, employers or trade unions engaged in the provision of 'essential services' are prohibited totally from embarking on strike or lock out for whatever reason.<sup>72</sup> Certainly, workers in essential services have the

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67. UBA V. Edet (supra).

68. Look up, e.g. Abdullahi Baba V Nigerian Civil Aviation Training Centre, Zaria [1991] 5 NWLR (Pt. 192) 388.

69. Section 31 (6) (d) of Trade Unions Act (TUA).

70. Section 31 (6) (b) of Trade Unions Act (TUA).

71. See ss. 17, 18, 41, 42 and 43 of the TDA.

72. See s. 31(6) (a) of TUA. These 'essential services' (as contained in the First Schedule, item 3(a) of the TDA) include electricity, power, water, fuel, broadcasting, telecommunications, ports, docks, aerodromes, transportation, hospitals and public health matters, outbreaks of fire, banks, and (arguably) education: see s. 7(1) (vi) of Trade Disputes Essential Services Act, Cap. T9, Vol. 14, L.F.N. 2004 (as updated/reviewed to 2010). On another note, it appears that the Trade Unions (Essential Services) Act has a life of its own, as it were, because: (a) it has a wider list of 'essential services' and penalties for trade unions or associations engaged in 'industrial unrest or acts calculated to disrupt the smooth running of any essential service' (see the long title of the Act), and (b) whereas reference is

right to terminate their employment if they give the requisite statutory notices. Therefore, the restrictive right to embark on industrial action is available only to those who provide services other than 'essential services'. For those engaged in the provision of essential services, the provisions of the TDA shall apply to all disputes affecting the provision of those services and that the determination of the NIC in such disputes shall be final.

Considering the stringent procedures that have to be in place before a strike or lock out is embarked upon or declared, it is doubtful to say whether any right to stage whether to stage a strike or lock out exists in Nigeria. When it comes to 'essential services', it is a different case entirely. That being the case, if collective agreements are breached, the extant statutory procedures will make it very difficult if ever possible to go on even lawful strikes. Furthermore, those who go on lawful strikes are not entitled to any work and employment benefits while the strike lasts.<sup>73</sup> On the other hand, if an employer 'locks out' his employees, the employees will not be denied their employment entitlements, the reason being that the

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not made to this Act by other statutes/Acts, it makes reference to some other statutes particularly the TUA and the TDA. Concerning the right to unionize, noteworthy is the provision in the TUA prohibiting members of some organizations from unionizing let alone embarking on any kind of industrial action, e.g. the Nigerian Army, Navy, or Air Force; the Nigeria Police Force; the Nigeria Customs Services, the Immigrations Services and the Prisons Services; the Customs Preventive Service; etc. The provisions of the TDA do not apply to these organizations/establishments. For details, see s. 11 of TUA. For further insights, read: Zechariah, M. "An Appraisal of the Right to Unionize under Nigeria's Trade Unions Act (as updated)" *Journal of Private Law*, (2013) JPL VOL. NO.1, pp. 278-97. Well, it is one thing to prohibit something and quite another to comply with such prohibition. Thus, strikes have been embarked upon frequently by those engaged in the provision of 'essential services', e.g. doctors, nurses, teachers/lecturers and a host of others: Akanfe, G. "Resident Doctors Call Off Strike" *The Nigerian Telegraph*, 6 Nov. 2013, at telegraphing.com, accessed on 6/11/2013; Ofikhenua, J. "NUT Calls Off Strike in States" *The Nation*, 29 Sept. 2012, at thenationonline.net, accessed on 6/11/2013; Ahiuma-Young, V. "NUPENG Calls Off Strike" *Vanguard*, 29 July, 2012, at vanguardngr.com, accessed on 6/11/2013; "PHCN Workers Call Off Strike, Give FG 1 Week Ultimatum" *PM News*, 16 Aug. 2012, at pmnewsnigeria.com, accessed on 6/11/2013; "Fuel Subsidy: Strike Grinds Nigeria to a Halt" *The Street Journal*, 9 Jan. 2012, at thestreetjournal.org, accessed on 6/11/2013; etc. More ironically, some persons that are prohibited even from unionizing have engaged in strike! For instance, some police men/women embarked on a nationwide strike in 2002, and there are more threats of such actions being carried out: "The Police Strike" *Editorial Newswatch Magazine*, Vol. 37, No. 7, 18 Feb. 2002, at newswatchngr.com, accessed on 6/11/2013; "Nigeria Police Threaten Strike Over Unpaid Salaries" *PM News*, 6 Feb. 2013, at pmnewsnigeria.com, accessed on 7/11/2013; Godwin, A.C. "Boko Haram: Policemen Threaten Strike Over Transfer to Northern States" *Daily Post*, 17 Oct. 2013, at dailypost.com.ng, accessed on 7/11/2013. Here, we see a kind of 'practical contest' between 'legality' and 'legitimacy', or interplay of law, morality and legitimacy. Obviously, some things are better allowed to be tested by practical realities even though at the risk of some people's jobs.

73. See the case of *Oshiomhole V. F.G.N.* [2005] 1 NWLR (Pt. 907) 414, esp. pp. 416-437, per I.T. Mohammed (who delivered the Ruling). In that case, the court stated that strikes and lock outs were not legalized in Nigeria, and that in the event of any of these two (strike and lock out) happening, and a worker participates in a strike or he is locked out by his employer, his entitlements are as provided by section 42(1) of the TDA.

are presumed not to be responsible for their being locked out. However, workers/employees, employers and trade unions who go on lawful strikes, or lawful lock outs, enjoy immunities in common law of tort, and immunity from criminal conspiracy.

Because of the difficulty involved in complying with and enforcing strike laws, and the attendant social, moral and political implications or consequences of such enforcements, parties usually resort to 'political approach' in resolving their disputes. This means, the employers and the employees engage in positive dialogues and compromise, or 'give-and-take' measures. Accordingly, the implementation of collective agreements sometimes goes through such a hard process too. A political settlement (if you like, call it 'diplomacy') has something of the nature stated below:

- Parties in a dispute shift grounds; they come, or return, to the 'negotiating table'; or in some instances, the terms of the agreement are renegotiated.
- Workers will undertake to call off, or suspend, their strike and resume work.
- Promise that striking workers will not be 'victimized' or meted with disciplinary measures, on account of the strike.
- Salaries and allowances of employees withheld during the strike will be paid.
- Room is open for further negotiations so as to iron out any grey areas; and the line of dialogue may remain accessible as new issues come up that affect the interests of the parties.
- There is a give-and-take posture between/amongst the parties. Thus, parties declare that there is no victor, no vanquished; no winner, no loser. This way, parties are consciously or unconsciously expanding the frontiers of alternative dispute resolution (ADR).

As parties negotiate, the contours and sustainability of their negotiation is guided by each party's abilities and relative strengths and weaknesses as well as their shrewd negotiating power.

### **International Best Practices**

Is the ban on strikes whether for any, some, or all categories of workers consistent with international best labour practices or any conventions which Nigeria has ratified? Are collective agreements voluntarily entered into in good faith, reduced into writing, automatically enforceable in Nigerian courts?

For strikes, the International Labour Organization (ILO) has considered that ban of strikes for those engaged 'essential services' as done in Nigeria is inappropriate. According to the Committee, essential services are only those the interruption of which would endanger

the life, personal safety or health of the whole or part of the population... requests the Government ... to amend the Trade Disputes Act's definition of "essential services", without prejudice to the possibility of establishing a system of minimum service in services which are of public utility'.<sup>74</sup>

On the statutory restrictions relating to the objectives of strike (i.e. issues that have to do with 'dispute of rights' and those that have to do with 'dispute of interest'), the Committee remarked:

*Therefore, the Committee requests the Government to take the necessary measures to align section 6 (d) of the Trade Union (Amendment) Act with national practice, so as to ensure that workers enjoy the full right to strike and, in particular, that workers' organizations may have recourse to protest strikes aimed at securing collective bargaining agreements or criticizing the Government's economic and social policies without sanctions.*<sup>75</sup>

When these facts on best labour practices are pleaded before the NIC, the Court will certainly give effect to them provided the issues squarely come within the ambit of the NIC Act and, above all, of constitutional provisions. In the case of *Oyo State Government V. Alhaji Bashir Apapa and Ors.*,<sup>76</sup> the respondents had argued that it was not good international best practice to classify all public servants, and teachers in particular, as being on essential services and so cannot embark on strike. However, the Court rejected that argument, stating that the provisions of s. 7(6) of the NIC Act cannot be applied in this general and sweeping form: a litigant relying on best international practice in industrial relations has to establish or prove the same because it is a question of fact. In other words, the Court does not or cannot take judicial notice of such matters.

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74. Observation (ILCCR) Adopted 2011 Published 100th ILC Session (2011) Available at ilo.org, accessed 16/11/2012, p. 6. In 1960, Nigeria acceded to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). See also s. 31 (6) (b) of TUA.

75. Ibid. Emphasis added. Also, see generally, Observation (CEACR) Adopted 2011, Published 101st ILC Session (2012) Available at ilo.org, accessed on 16/11/2012, and "Freedom of Association and the Right to collective Bargaining" Available at ilo.org, accessed on 16/11/2012. See also Uvieghara, E.E. op. cit. pp. 388-93, and Observation by Nigeria of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98): Report on Direct Contacts Mission to Nigeria (17 to 21 August 1998) GB 273/15/1, 23rd Session, Geneva, November 1998. Available at ilo.org, accessed on 16/11/2013.

76. Unreported Suit No. NIC/36/2007 delivered on 23 rd May, 2007, as cited by Adejumo, B.A. op. cit. pp. 5 & 9.

But what is missing in the principle and practice of the ILO is whether the 'no-work-no-pay(ment)' clause as contained in section 43 (1) (a) of the TDA is in tandem with international labour practices. Is the converse: 'no-pay-no-work' also consistent with international practice, especially if it is in consequence of no-work-no-payment? As labour unions put into practice this principle of 'no-pay-no-work', it may eventually go to the NIC for determination. Meanwhile, two facts are obvious: 'If a man/woman will not work he/she shall not eat';<sup>77</sup> and 'the labourer deserves his/her own wages'.<sup>78</sup>

Coming back to the issue that a collective agreement is a 'gentleman's agreement': a consequential question is whether a person who breaches an agreement is a 'gentleman'. If the person is not one, then he/she does not deserve the treatment befitting of a gentle person. Period! Therefore, granted, as argued, that strike is outdated or obsolete, this 'obsolete' weapon is still being used against employers who do 'obsolete' things of denying workers their entitlements and dishonouring agreements that have been consciously and voluntarily entered into.

In essence, when an employer, or an employee/worker dishonours or reneges on his own part of an agreement duly entered into, in writing, voluntarily, in good faith, that person is no longer 'gentlemanly' or honourable', and the person is treated as such. That explains why many collective agreements in Nigeria have been enforced by strikes or political pressure. Where a party to a collective agreement breaches its own part of the agreement, a strike or lock out may be used to compel compliance. Another reason why parties to collective agreements, especially Government employers, are compelled to implement collective agreements is the fear of the political consequences on them (as politicians); they give in to the demands of workers as expressed in collective agreements so as not to lose popularity with the people or suffer the political consequences. Therefore, it is not in all cases that when Governments succumb to union pressure it is because they feel morally and/or legally bound to do so. Perhaps this also holds true when legal actions are not proceeded against workers who take part in illegal strikes, or where such legal actions have already been instituted, they may be withdrawn; and even a court decision is given against strikers, some settlement or compromise may still be brokered outside the court setting.

It should be noted that employees/workers also breach terms of collective agreements too; but in Nigeria, it is commoner with employers, based on the current experience in the country so far. Notwithstanding, employees ought to be cautious whenever they are

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77. Holy Bible: 2 Thessalonians 3:10.

78. Luke 10:7. Also, look up 1 Timothy 5:18.



contemplating embarking on strike. They should count the cost on the general society and not only on their employer(s). This is necessary because strikes can have very devastating effects on the economy and on social life generally. It should be used only as a last resort. In fact, if it is exercised discriminately, or is unnecessarily prolonged, it will lose its essence and its legitimacy, and therefore, become counter-productive.

## **Conclusion**

Our study has revealed that at common law, a collective agreement is generally not binding, except it is incorporated into the contract of service as such. Although initial statutory intervention had watered down the harsh effects of the common law position in Nigeria, it was not until the enactment of the NIC Act and consequential alteration of the 1999 Constitution (the grundnorm), that the binding effect of collective agreements became apparent in the tradition of international best practice particularly in the standard and principles of the ILO. Accordingly, at present, a collective agreement is binding on parties to it if it is voluntarily entered into, in good faith and not in contravention of any extant law in the country. The intention of parties to be bound by the agreement may be expressly stated or implied by their conducts. A failure to implement, apply or observe the terms or conditions of the agreement shall attract appropriate sanctions. Strike has been used as a sort of pressure mechanism to enforce compliance with collective agreements.

## **Recommendations**

- A collective agreement should be in writing in all cases; the terms should be clearly spelt out including times line for implementation. It should contain the basic elements of a contract offer, acceptance, consideration and intention to enter into legal relations. Experts and other major stakeholders (including where necessary, ILO representatives) should be properly consulted for their inputs and advice on the holistic implications of the terms of the agreement especially those that relate to financial or economic matters. Those matters should be treated with caution because they are subject to unpredictable economic realities, e.g. inflation, budget deficit and so on.
- The agreement needs to state expressly that ll or part of is binding on the parties.
- A memorandum of Understanding (MOU) signed by mutual agreement of parties to a collective agreement pursuant to that collective agreement, should be interpreted conjunctively to give effect to the overriding intention of the parties. Again, the MOU should be couched in clear and precise terms.

A provision in the agreement may include an arbitration clause where parties will submit any issue with respect to interpretation of any clause to an arbiter freely appointed by the parties and on terms specified in the agreement.

The parties should indicate whether the agreement is for a fixed period/term or it is for an open-ended/indefinite period, and there should be review or modification clause, etc. Moreover, alternative dispute resolution (ADR) should be prioritized in deciding contending issues.

Strikes or lock-outs used to enforce compliance with a collective agreement should be used as a last resort and not as a user-friendly weapon. The crippling effects of strikes and lock-outs are inestimable and therefore should not be taken for granted.

Defaulting parties to a collective agreement should take responsibility for their actions rather than plead ignorance of the consequences of the agreement, or claim that the terms are no longer implementable, even when there are no real frustrating events or force majeure to justify such claims.

Employers and employees will do well to strengthen industrial harmony by engaging in industrial harmony by way of brokering strategically viable consultation and entrenchment of participatory culture in line with prevailing 'industrial democracy'.