IS THE PRINCIPLE OF CONSENSUS AD IDEM IN THE NEGOTIATION OF EMPLOYMENT CONTRACTS TENABLE UNDER THE 1992 CAMEROON LABOUR CODE?

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ABSTRACT

A prominent requirement for the legitimacy of a contract of employment is agreement of the parties to the contract. Since mutuality lies in the heart of any enforceable agreement, a contract of employment requires a meeting of the minds of the parties on all essential matters relating to it (consensus ad idem) for its validity. Therefore, the principle of consensus ad idem in the negotiation of contracts of employments implies that it is based on the decisions of two free and voluntary consenting minds. In this regard, even though section 23(2) of the 1992 Cameroon Labour Code guarantees the free negotiation of employment contracts, the practical implementation of the provisions of the latter remain problematic. One is mindful of the fact that true consensus ad idem can only be attained in the job place where the parties are strong enough to stand on their feet to realise their wills through free negotiations with equal bargaining power. Given the economic situation of a country like Cameroon where the bulk of people of working ages are unemployed, equality in negotiating employment terms remains a myth; thus contracts are negotiated on 'a take it or leave it basis'. Besides, the fact that a contract of employment is a contract in personam requiring subordination of the worker to the employer during the performance of the contract defeats the whole notion of consensus ad idem as envisaged in section 23(2) of the 1992 Labour Code. To this end, the paper seeks to examine the principle of consensus ad idem in the negotiation of employment contracts as is confectioned under the 1992 Cameroon Labour Code and the extent of its application in Cameroon. In this light, the researcher adopted an in-depth content analysis and critical evaluation of the primary and secondary sources of data. This research concludes that the 1992 Cameroon Labour Code guarantees the principle of consensus ad idem in the negotiation of

ISSN: 2581 4095
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employment contracts, but its effective implementation leaves much to be desired. This has necessitated the suggestion of some policy recommendations for the way forward.

Keywords: Consensus ad idem, Negotiation, Contract of Employment, Labour Code, Cameroon

INTRODUCTION

Consensus ad idem is a Latin term which means, simply, agreement. In contract law as well as employment contracts, *consensus ad idem* means there has been a meeting of the minds of all parties in the negotiation of the contract and everyone involved has accepted the offered contractual obligations of each party. This implies that there is a common understanding in the formation of the contract. This principle forms the foundation of enforceable contracts because for contracts of employment to be enforceable, 'agreement' or a meeting of the minds of all the parties involved is a *conditio sine qua non*. In this regard, section 23(2) of the 1992 Labour Code provides that contracts of employment are a product of free negotiations between the parties. This notion of freedom of contract is underpinned by the notion of *laissez faire* economics practiced in a pure market libertarianism. Through "freedom of contract", individuals possess a general freedom to choose with whom to contract, whether to contract or not, and on which terms to contract with the parties being in *consensus ad idem*.

This freedom promotes economic self-interest as the parties would bargain to obtain the maximum social wealth of the society. Therefore, the doctrine of freedom and sanctity of contracts of employments is no longer based on religion and social status of the worker but on decisions of two free and voluntarily consenting minds. To this extent, once the employer and employee have entered into such employment contracts, each must abide by it unless relieved by the other. Nevertheless, the sacredness of the individualist theory cannot longer hold in the face of changing social, political and economic circumstances. The *laissez-faire* idealism has been supplanted by social security, which suggests status rather than the contracts[i] so that there is a compulsion to protect the contractual parties against economic and social exploitation in the guise of liberty to contract. The freedom to choose as well as to leave employment is an inalienable right of the worker and so when a person is coerced to perform a contract of

ISSN: 2581 4095
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employment, it will be absurd to affirm that he has offered himself voluntarily. Nevertheless, if a worker is not physically compelled but accepted employment, he will be taken to have done so in the exercise of his own freewill, that is, in the exercise of his natural rights as envisioned in section 23(2) of the 1992 Labour Code. This theoretical and idealist position of equality clearly does not exist in Cameroon where majority of the citizens of working ages are unemployed.

AN ASSESSMENT OF THE IMPLEMENTATION OF THE PRINCIPLE OF *CONSENSUS AD IDEM* IN THE NEGOTIATION OF EMPLOYMENT CONTRACTS UNDER THE 1992 CAMEROON LABOUR CODE

The big question here is whether the principle of *consensus ad idem* in the negotiation of employment contracts pursuant to the provisions of section 23(2) of the 1992 Cameroon Labour Code is a respected practice in Cameroon. The answer to this worrisome question is in the negative because true *consensus ad idem* where the parties realise their wills because of free negotiations and laissez faire comes only from parties with equal bargaining power who are strong enough to stand on their feet in the job place.[ii] This theoretical and idealist position of equality clearly does not exist in Cameroon where an army of unemployed labour force is chasing scarce employment.[iii]

This can be gleaned from the fact that the contemporary labour scene in the country is absolutely a 'take it or leave it' situation, especially in the private sector, where the employment relationship is synonymous to that of master-servant relationship. Here, the master (employer) is capable of dictating the terms of employment to his servant (the employee). This is further compounded by the high rate of unemployment in the country.[iv] As a result, employers are aware of the numerous jobless citizens in the country and as such, will not hesitate to replace workers who do not conform to dictated employment terms or who constantly clamour on the employer to respect their rights. In this regard, the Cameroonian worker is left at the mercy of the employer and this accounts for the blatant violation of the principle of *consensus ad idem* in the negotiation of employment contracts by some unscrupulous employers. It is obvious

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from this analysis that a worker; from his inferior position cannot talk of true consensus in terms of the laissez-faire philosophy. Since the powerful employer has an inexhaustible supply of potential employees in our context (Cameroon), he could treat them with disdain and complete disregard of the contract terms.

The situation in Cameroon is similar to that vividly captured by Lord Denning's dictum in *LLOYDS BANK V. BUNDY*[v] thus:

> "...gathering all together, I would suggest that in all these instances there runs a single thread. They rest on inequality of bargaining power. By virtue of it, English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressure brought to bear on him by others."[vi]

According to Fokum,[vii] this position adopted by Common law arising from the assumption of the equality of the parties has resulted in situations where the law does not concern itself with the question of the reasonableness of the terms of employment. Today, the power differential between the employer and the employee in Cameroon is so wide that employers are looked upon as God since they are the providers of the employment the only means by which the pitiable worker can survive; they made themselves into one. In this light, Larry Yackle[viii] argues that individuals cannot be compelled to surrender their property rights in their own labour, but they may agree to place themselves in someone else's service in exchange for wages. If they do so, they must have done it freely and voluntarily. Coercing an individual to offer his service is tantamount to forced labour and a violation of the principle of *consensus ad idem* in the negotiation of employment contracts. Nevertheless, if a worker is not physically compelled but accepted employment, he will be taken to have done so in the exercise of his own freewill, that is, in the exercise of his natural right as envisioned in section 23(2) of the 1992 Labour Code.

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Although section 23(2) of the 1992 Labour Code assumes that employments are products of free negotiations, very few employments respect this sacrosanct provision in practice. The recruitment by the government of Cameroon specifically into the Ministry of Higher Education is a case in point. Once an applicant has gone through an interview and offered employment as an assistant lecturer, the terms of employment which have not been negotiated neither individually nor collectively are imposed on the 'new recruit' who must sign the standard form contract as presented by the state. The conditions of employment including those relating to promotion to higher ranks are only known after the assistant lecturer has signed the offer of employment, which contains the conditions of employment that s/he is seeing for the first time. Clearly, this mode of contracting cannot be described as a function of consensus.[ix] It must be noted, with regard to this demonstration that, although employment into the higher education for purposes of teaching is outside the contemplation of private sector employment,[x] it can vividly be used to describe the experience of potential employees in the private sector of the country.

The myth in the negotiation of employment contracts is further compounded by the fact that section 29(1)[xi] of the 1992 Labour Code allows the employer to unilaterally draw up the internal rules and regulations governing employment. The internal rules and regulations become binding as prescribed under section 29(3)[xii] after it has received the authorisation of the Labour Inspector. It is rather unfortunate that the employees to whom these internal rules and regulations are to apply are not made a party to the drafting of the rules. Moreover, the fact that the Labour Inspector has to visa the work rule is not enough guarantee that the work rule will contribute in guaranteeing workers' rights. The Labour Inspector; being a government employee for fear of losing his/her position is likely to act in the interest of an employer who is a para-public entity. In such a dispensation, abuse of employment is bound to arise.

Although it is correct to assume as Atiyah[xiii] rightly points out that employment contracts are relational and for this reason different from simple classical contracts, this does not however mean that everything about them has to be negotiated and agreed upon. Since the employer may amend some aspects of the employee's obligations without his/her agreement, this gives an ascendency to the employer who may act ultra vires to negatively amend the contract against the interest of the worker. Section 42(2) of the 1992 Cameroon Labour Code gives the employer

the potential power to do so in the following terms: The contract of employment, may, while still in force, be amended on the initiative of either party and where the amendment suggested by the employer is substantial and is rejected by the worker, the termination of the contract that may result therefrom shall be the responsibility of the employer...

This feature of Cameroon's labour law shows that it evolves out of a capitalist system[xiv] that accommodates the interest of the capitalist (employer) to retain power and ultimate control over a worker's time. This philosophy insists on allowing the employer/entrepreneur the liberty to manage the enterprise to maximise profit. In other words, those who own the means of production: - the factories, offices and machines which economists call 'capital inputs' strive to get richer at the detriment of their employees. This philosophical foundation makes the employer to develop monopolistic and clientelistic tendencies creating a situation of 'take it or leave it' contracts of employment. The freedom to negotiate (the notion of *consensus ad idem*) as contemplated in section 23(2) of the 1992 Labour Code is a figment with grave consequences on workers' rights.

More so, section 3 of the 1992 Labour Code guarantees the right to freedom of association of workers in Cameroon. This right amongst its other benefits ensures that trade unions can meet and seek to project and protect their rights and benefits as it relates to their employment conditions. In workplace relations, there exists diverse interests, with the employer on one hand driven by the quest for profits and control while the employees on the other hand are driven by the desire for an increase in wages and benefits, the inclusion and expression of which sometimes results in conflicts. Collective bargaining is the most common form of workers' participation in the workplace as it provides workers, through their trade unions, with greater leverage and equality of negotiating power in the bargaining process with employers. The freedom to combine in autonomous associations is essential to individual workers to alleviate their subordination.[xv] It is through this system of collective representation that workers can obtain influence over their employers and become involved in decisions that have a bearing on their experience of work. In the same way, it is through the negotiation and administration of written agreements with management that a union becomes an effective instrument of workers' representation in industry.

Section 18 (1) (e) of the 1992 Labour Code makes collectively bargained agreements part and parcel of the terms of the employment of a worker in Cameroon. This provision gives statutory recognition to trade unions to enter into collective agreements with the employer on the worker's behalf. Despite this sacrosanct provision, trade unions in practice are rarely involved in the collective bargaining process in companies or enterprises in Cameroon. In fact, until early 2010 when the Minister of Labour and Social Security signed two collective agreements for the private sector banking and hydrocarbons corporations, there were virtually no such agreements in the country.[xvi] Moreover, these agreements are objectionable because the Minister should not be involved with them. Government participation definitely brings pressure on trade unions as well gives the collective bargaining process a tripartite quality, distorting its original bilateral character (trade unions and employers). The intervention of the minister of Labour,[xvii] who sometimes has a firm hand in the negotiations, implies that the negotiations may not be free and this turns the collective bargaining process into a regulatory transaction and not an agreement based on negotiations. In this dispensation, the principle of *consensus ad idem* in the negotiation of employment contracts is untenable with grave consequences on workers' rights.

CONCLUSION AND THE WAY-FORWARD

It has been observed that contracts of employment are a product of free negotiations between the parties with the parties being in *consensus ad idem*. As remarked, this principle forms the foundation of enforceable contracts because for contracts of employment to be enforceable, 'agreement' or a meeting of the minds of all the parties involved is a *conditio sine qua non*. Section 23(2) of the 1992 Cameroon Labour Code unequivocally guarantees this principle as it states that contracts of employment shall be freely negotiated. Nevertheless, it has been observed that the Cameroonian labour scene is characterised by powerful employers well capable of unilaterally dictating the terms of employment without any reference to the pitiable worker. This is further compounded by the economic situation of the country where the bulk of people of working ages are unemployed. As a result of this, equality in negotiating employment terms remains a myth; thus contracts are negotiated on 'a take it or leave it basis' and not on the basis of *consensus ad idem* as demonstrated hither to. The futility in trying to

ensure the protection of this fundamental freedom has necessitated the proposition of some policy recommendations for the way forward. To this end, it is proposed that:

It is recommended that the Government of Cameroon should reinforce the capacity of the labour inspectorates which is the principal body in charge of guaranteeing the effective application of labour legislation. This measure should be accompanied by an effective guarantee of their independence as well. This measure will not only remove the lingering fear of losing his/her position in case s/he acts against the interest of his employer (government) but will go a long way to ensure that all enterprises employing workers respect, in practice, the provisions of section 23(2) of the 1992 Cameroon Labour Code on the principle of free negotiation of employment contracts (*consensus ad idem*). Moreover, enough resources (vehicles, well-equipped offices and Personnel) should be wielded to Labour Inspectorates in order to ensure the application and effective implementation of labour law at workplaces so that it will facilitate routine visits to enterprises to inspect the level of compliance with the laws. In addition, the State should establish Labour Inspectorates in each sub-division in a bid to ensure an effective follow-up on the situation of workers in work centres such as plantations and private residences which are hardly inspected for want of distance, lack of personnel and transportation means.

It is equally recommended that the enormous powers wielded to the Minister of Labour in the affairs of collective bargaining should be curtailed. The wide powers accorded to the Minister of Labour at the level of selection of members of trade unions to be represented in the National Bargaining process defeats the whole purpose of trade union independence. In practice, trade union independence is jeopardised as the prerogative to choose the members they want to represent them in the negotiations is swerved in favour of the Minister of Labour who has a firm hand. Reducing the over bearing influence of the Minister in collective bargaining affairs will greatly help in ensuring trade union independence and by extension, enhance the effective realisation of workers' freedom to negotiate the terms of their employment contracts through their trade unions based on the principle of *consensus ad idem*.

It is recommended that trade unions and their members (workers) should acquaint themselves with the rights of workers so that they can better protect them against violation. In principle,

trade unions should provide workers with information on their legal entitlements, creating awareness to the employees on how they are covered in matters relating to free negotiation of employment contracts. This is due to the fact that, an organisation accommodates employees with different academic disciplines and levels of education to the extent that not all can satisfactorily comprehend the content and implication of labour laws and regulations as well as the procedures associated with them. Likewise, edification of workers where complaints of violation of their rights could be reported without fear of vendetta or victimisation will add impetus to the protection of their rights. This is because infringement of these rights somewhat emanate from ignorance on the part of workers. On the other hand, individual employees must take personal responsibility to equip themselves with the provisions of section 23(2) of the 1992 labour code and their employment rights so that they can identify threats.

ENDNOTES

[i] Chesire *et al*., *Law of Contract*, London, Butterworths, 1986, P. 19.
[ii] *Ibid.*
[iii] Fokum, I.D., "The Security of Private Service Employment in the Post-Economic Crisis Period of Cameroon: A Common Law Perspectivel, Unpublished PhD Thesis, Department of Law, University of Buea, 2012, P. 91.
[iv] A 2010 Survey of Employment and the Informal Sector (EESI) by the National Institute of Statistics revealed an unemployment rate of 3.8% based on International Labour Organisation (ILO) Standards. The study identified underemployment as a real policy challenge for employment policy makers in Cameroon, with rates of 12.3% and 63.7%, respectively for visible and invisible underemployment. See Cameroon Investment Climate, prepared by Derrin Smith, Deputy Political /Economic Section Chief, U.S. Yaoundé, Cameroon, June 2015, P. 23.
[v] (1975) Q.B. 326. In this case, Mr Bundy was elderly farmer. He and his son were long-time customers at Lloyds Bank, the son's company also banked there. Lloyds guaranteed the company's overdraft and charged the farm as security. As the overdraft increased, Lloyds needed more security, which, as per the son, Mr Bundy could provide. Mr Bundy and his son went to Lloyds where an assistant manager, leaving the documents with Mr Bundy for consideration, had Mr Bundy sign a further guarantee and execute a further charge. Mr Bundy later sought legal advice and was told that he could support his son with approximately half the value of his assets (i.e. his home). Mr Bundy then executed the guarantee and charge. The son's business was unsuccessful so he told Lloyds that his father would give further security. Subsequently, the son went to Mr Bundy with a Lloyds assistant manager with a further guarantee and charge, for even higher sums than before. Mr Bundy, trying to help his son, signed these deeds as well. The son's company ceased to trade; Lloyds attempted to sell Mr Bundy's house. The assistant manager gave evidence that; in his view, Mr Bundy relied on him for advice about the transaction and did whatever he and the son said. He also admitted to knowing that Mr Bundy did not have any other assets except for his house. Mr Bundy claimed that the final guarantee and charge should be set aside. Nevertheless, the judge gave an order for possession. Mr Bundy appealed. The Court found for Mr Bundy. The nature of the relationship between Lloyds and Mr Bundy was such, that is, that of confidentiality, that the Court could intervene in the event of its abuse. There was conflict of interests in Mr Bundy's signing of the final guarantee and legal charge as he could lose his only asset to the bank. Furthermore, Mr Bundy received no independent legal advice by which Lloyds' fiduciary duty of care was breached. Consequently, the final guarantee and charge were set aside based on undue influence.
[vi] Ibid. at P. 339.
[vii] Fokum, I.F., "The Security of Private Service Employment in the Post-Economic Crisis Period of Cameroon: A Common Law Perspectivel, *op. cit* at P.94.

[viii] Yackle, L., *Regulatory Rights: Supreme Court Activism, the Public Interest, and the Making of Constitutional Law*, Chicago & London, University of Chicago Press, 2007, P. 65.
[ix]. *Ibid.* at P. 92.
[x] Given that employment in the public sector is governed by a different law: Decree Nº 94-199 0f 7th October 1994 to lay down the General Rules and Regulations of the Public Service.
[xi] Section 29 (1) of the Code provides that: The internal regulations shall be drawn up by the company head. They shall deal exclusively with rules relating to the technical organisation of work, disciplinary standards and procedure, safety and hygiene at work which are necessary for the proper functioning of the company.
[xii] This section provides: Before enforcing the internal regulations, the company head shall communicate them to the staff representatives (if any) for their opinion and for endorsement to the Labour Inspector of the area who may order the deletion of or amendment to any provisions which may be repugnant to the laws and regulations.
[xiii] Atiyah, P.S., *An Introduction to the Law of Contract*, Oxford, Clarendon Press, 1995, P. 51-52.
[xiv] The starting point of most analyses of industrial relations is that the employment relationship under capitalism involves a conflict of interest. Employers produce in order to make a profit, and labour power represents a major cost: the more they pay to get the necessary work accomplished, the less they keep in profit. Moreover, because the commodity employers' purchase is labour power (capacity to work), the level of workers' effort cannot be specified in advance, and employers therefore have to find means of achieving the desired level of performance. Employees, on the other hand, sell their labour power in order to secure a living. For that living to be sweet they need leisure, energy and money, all of which have to be wrested from reluctant employers with an interest in obtaining optimal performance for minimum cost. From this basic antagonism flows a whole series of conflicts over issues such as the level of effort, the level of reward, the organisation of work and so on. The tensions are unavoidable. See Ashwin, S., "The Regulation of the Employment Relationship in Russia: The Soviet Legacy" in Galligan, D., and Kurkchiyan, M., *Law and Informal Practices: The Post-Communist Experience*, Oxford, Clarendon Press, 2003, P. 224.
[xv] Wedderburn, L., The *Worker and the Law*, 3rd edition, Harmondsworth, Penguin Books Ltd, 1986, P. 7.
[xvi] Trade Union Rights and Industrial Relation in French Speaking Africa: The Impact of Structural Adjustment, Trade Union and Labour Series, Nº 1, September, 1995, P. 8.
[xvii] For example, on 30 August 2016, the CSTC (Confédération Syndicale des Travailleurs du Cameroun), affiliated to the ITUC, denounced the authorities' interference in its internal affairs following the Labour Ministry's recognition of a faction claiming to have been elected as the confederation's executive, despite a court ruling invalidating the election in question. The CSTC also criticized the Labour Ministry's unilateral appointment of workers' representatives to national collective bargaining commissions, without regard for the representativeness of the organisations in the sectors concerned. See Cameroon-ITUC Survey of violations of trade union rights, available at www.survey.ituc-csi.org/Cameroon, accessed on 14/08/2020.