LEGISLATIVE CONTROL OF FREEDOM OF CONTRACT IN NIGERIA

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INTRODUCTION

Nigerian law has adopted, along with the general reception of the common law, the individualistic common law notion of freedom of contract evolved in England and America in the late eighteenth and nineteenth centuries. This evolution was in an age whose intellectual climate stressed individual freedom and autonomy of will. One would have thought that this idea should have received a stern adaptation in the Nigerian context to fit the less individualistic local culture. Both the colonial judges and even the post-independence Nigerian judges have followed the non-interventionist policies of the English judges.

Without any doubt, a consequence of the process of economic change in Nigeria over several years has been the considerable increase in the proportion of people who now depend upon others in order to obtain their consumer requirements. In traditional society, most families produced for themselves the majority of goods they consumed. But now more and more people have come to depend on others to produce the goods and services they need. In other words, the market dependence of consumers has increased. A problem that has developed from this situation has been that consumers have come to stand in need of legal protection in connection with the contracts through which their consumption requirements are satisfied. The need has therefore arisen for freedom of contract to be controlled in the interests of the consumers of the various goods and services available in the modern Nigerian economy.

It is believed that the socialisation of the law of contract is necessary to enable it solve many of the problems created by modern economic conditions in Nigeria. By the socialisation of the law of contract, is meant the exercise of control by the legislature and judiciary over the institution

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[1] The spirit of the English contract doctrine in the nineteenth century is epitomised in the oft-quoted words of Sir George Jessel, V.R.: "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice" See Printing and Numerical Registering Co. V. Sampson (1875) L.R. 19 £9,462 at P 465


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of contract in the interest of society's welfare. In this article, there will be an examination of what attempts have been made by the legislators of Nigeria to exercise control over the institution of contract in order to overcome problems that have arisen in the country and what other efforts may need to be undertaken by such legislators.

Legislative control of contracts may be exercised in various ways for instance, through the statutory incorporation of compulsory terms in certain types of contracts, through the prescription of a statutory form for certain kinds of contracts, through a declaration of certain contracts or terms in such contracts to be void or unenforceable, if certain statutory requirements are not complied with, through compelling certain persons to enter into certain kinds of contracts, and through the prohibition of particular kinds of terms, e.g. exemption clauses, from particular kinds of contracts. Such control is usually asserted in pursuance of some social policy objective or other.

Land Use Act, 1978

A basic example in Nigeria of legislative control over freedom of contract, in pursuit of a social policy objective was the enactment of Land Use Act in 1978. Under section 1 of the Land Use Act, all land within the territory of each state in the Federation is vested in the Governor of the state to hold upon trust for the use and common benefit of all Nigerians in accordance with the provisions of the Act. Section 5 empowers the Governor in respect of land whether or not in an urban area, to grant statutory right of occupancy to any person for all purposes, while section 6 empowers the appropriate Local Government in respect of land in a non-urban area to grant a customary right of occupancy to any person. By Sections 34 and 36 former owners of land become deemed holders of rights of occupancy into which their former ownership rights have been transformed by operation of law. What this means is that in Nigeria there is no more absolute ownership of land which can be transacted upon by contracting parties as they freely desire. Every alienation of land must conform to the provisions of the Act. In Makanjuola V. Balogun Wali, JSC confirmed the position when he stated that:

3 See Friedmann, W., Law in a changing society (Stevens, London, (1959), P. 106
4 See Eorsi, "The Validity of Clauses excluding or limiting liability" (1975) 23 AM. J Comp. L. 2 15 at P.279
5 First promulgated as Land Use Decree NO. 6 of 1978 but it has now been codified as Land Use Act, Ca. 202, Laws of the Federation of Nigeris, 7990
"the Land Use Act, 1978 has vested absolute ownership of land in each state in the governor of that state and any person other than the governor can only have possessory title--be it statutory or customary".

Thus since absolute ownership is vested in the governor, no individual can absolutely transfer land anymore. He can only transfer his right of occupancy. Thus the right of occupancy is the highest interest any person possesses in land in Nigeria today. Explaining the nature of the right of occupancy in the case of L.S.D.P.C.V. Foreign Finance Corporation" Ademola, JCA (as he then was) stated as follows:

"The right of occupancy is in nature of hybrid between a License and a Lease for a fixed term on terms and conditions which upon breach by a rightful holder is subject to revocation by the Governor"

Another major consequence of the rights of occupancy system in Nigeria is that by virtue of the Act, any alienation or transfer of right of occupancy in respect of the land or improvement thereof, such as buildings, without the requisite consent of the governor or the Local government, where applicable, renders such transaction or transfer null and void. Section 26, an all-embracing provision, renders null and void any transaction in violation of the Act. It reads:

"Any transaction or any instrument which purports to confer on or vest in any person, any interest or right over land other than in accordance with the provisions of this Act shall be null and void".

These provisions must be compiled with as severe adverse consequences attend any violation of same. A case that amply illustrates this is the case Savannah Bank of Nigeria Ltd & Allor v. Ajilo & Anor. where the respondent mortgaged his building as security for a loan from the appellant bank without obtaining the consent of the Governor to the transaction. Upon default by the mortgagor, the bank sought to sell the property offered as security and the respondent resisted the sale. It was held by the Supreme Court of Nigeria that the failure to obtain the consent of the governor to the mortgage as required by Section 22 of the Act rendered the transaction null and void and the bank could not exercise any power of sale under the mortgage.

8 (1987) 1 NWLR (pt 50) 413 at 444.
9 See Sections 15, 21, 22, 26, 34 and 36.
The Land Use Act thus illustrates an interventionist state policy in relation to contracts concerning land. The government realised that if it allowed unmitigated freedom of contract to operate between land owners and other parties, land would not be available for government developmental projects and undesirable consequences would result. The mischief aimed at by the Land Use Act was the abrogation of absolute ownership or freehold interest by the community, the family and the individual.\(^\text{11}\)

Secondly, there was the issue of security of title of Land buyers. It was found necessary to curtail the freedom of contract of land owners and purchasers by ensuring proper documentation, consent and registration of title to ensure security and sanity in land matters.\(^F\)

The Land Use Act has been described as the most impactful legislation Nigeria has had since attaining full nationhood!\(^n\) It is "more of management legislation"!\(^n\) and has nationalised all land in the country to be regulated by government.\(^15\) Interventionism during the colonial era was usually done to guarantee the title of the foreign entrepreneur and to secure lands acquired by the colonial government for residential and other purposes!"

**Price Control**

Price control is another area of interventionist by state policy to control the freedom of contract of sellers and buyers of goods in Nigeria. The desire of the government to control prices more effectively should be viewed within the context of the economic conditions of the times. The free trade policy for imports was rejected in favour of import control effected through import licensing. Part of the reason for this was the increasing imbalance between foreign exchange earnings and the cost of imports. The cumulative effect of import licensing and foreign exchange shortage was the creation of scarcities in foreign commodities. A consequence of these scarcities was that, to allow the market forces of supply and demand to have free play would lead to very high prices. This consequence, the Government was not prepared to accept.

\(^{11}\) See Savannah Bank of Nigeria Ltd. V. Ajhilo 91987) 2 NWLR (PT 57) 421 @ p. 429 per Kolawole, JeA.

\(^{12}\) See J.F Fekumo, The Land Market Under the Land Use Act Vol. 2. No. 9 CREPL P.29


\(^{14}\) See Olorunfemi V. Asho (J999) 1 NWLR (pt 585) 1 at p.9; See also Okpalugo V. Adeshaye (1996) ION. W.L.R (pt 476) 77 at p. 100.

\(^{15}\) J. Omotola, "Does the Land Use Act Expropriate?" (985) 3 Journal of Private and Property Law 1 at P. 6'

\(^{16}\) See Seidman, R.B., "Contract law, the free market, and state interventionism: A Juridiprudential perspective (1971) 7 Journal of Economic Issues P. 553, esp. pp. 560 et seq.
The Price Control Act, was the statutory weapon adopted by the government to combat the market forces in the interest of consumers and the economy. The Act authorises the Prices Control Board to fix the maximum prices at which goods of any description specified in the schedule may be sold. A machinery of price control inspectors is established to enforce these regulations. It is a crime to sell goods at prices not in compliance with the controlled price. The penalty for non-compliance with any price control order is a fine not exceeding NZ,000 or imprisonment not exceeding six months or both in the case of a retailer or a fine not exceeding N10,000 or imprisonment not exceeding twelve months or both in the case of a manufacturer. All goods in respect of which the offence is committed are also to be forfeited to the state. "Hoarding" of controlled commodities is also an offence under the Act. An inspector on reasonable grounds can requisition and seal any premises which is directly or indirectly used to frustrate the operation of the Price Control Act. The court is also enjoined to prohibit any person convicted of selling above the controlled price from further conducting any trade of controlled commodities for two years.

The Price Control Act thus constitutes a determined attempt to provide a legislative framework within which to join battle with the market forces and distorters of the market. It seems, however, that these rules have been effective only in the supermarkets and retail outlets of the established large distributors. It is even doubtful if they are still effective in Nigeria today. In the market places, the small kiosks and the small shops of the petty traders from whom most Nigerians buy their consumer goods, the price control regulations are of little effect. Even in the heart of the cities, in Lagos, Port Harcourt, Kane, Ibadan, Aba, Onitsha, Abuja, the market women sell goods much above the controlled price largely with impunity. These city dwellers are so glad to come by some of the goods which periodically become short that the price at which they buy them becomes not as important as the access to the goods. This experience of Nigeria in the area of price control raises the larger issue whether it is not an exercise in futility to attempt to control prices in an economy where the business and distributive outlets are predominantly privately owned and where many commodities are in short supply.

17 Chapter 365, laws of Nigeria, 1990
18 See sections 4 and 5 of the Act
19 See section 9 of the Act
20 Section 6 (2) a of the Act
21 Section 6 (2) b of the Act
22 See section 7 of the Act
23 SeeSection 12 (1) of the Act
24 See section 13 (1) of the Act
Productivity And Prices Incomes Board

The governmental intervention in private contracts to regulate prices is not limited to sale of goods contracts. Wide-ranging interventionist powers are conferred on the Productivity And Prices Incomes Board created by Productivity and Prices Incomes Board Act 25. The Act contains provisions attempting to control freedom of contract in a very wide area. Section 4 of the act provides that the Board may from time to time, and shall when so directed by the National Council of Ministers, prepare guidelines on any question relating to wages or other forms of income or to prices, charges or other sums payable under transactions of any description relating to any form of property or rights or to services of any description or to returns on capital invested in any form of property, including dividends. The Act thus authorises and gives the Board wide latitude to regulate wages, prices of goods and services, and rates for properties and so on. To facilitate its efforts in this regard the Board has four operational arms namely, the Civil Service Pay Research Unit, the Incomes Analysis Unit, the Productivity Unit, and the Price Intelligence Unit. 26

The penalty for transacting any business otherwise than in compliance with the provisions of section 4 of the Act is a fine of N5,000 or imprisonment for two years or both. Whatever may be the merits of this legislation, it is submitted that it is an obviously preposterous and unworkable legislation in an inflationary economy such as the Nigerian economy. It seems that this legislation is archaic and should be amended or replaced. The conditions in the seventies when this law was enacted have considerably changed, thus making the law largely irrelevant to the prevailing milieu in the country.

The Productivity, Prices and Incomes Board Act, thus constitutes an unrealistic attempt to control the freedom to increase prices for all goods and services, salary and wages in an economy that is still predominantly controlled by private interests. Such a policy would have little chance of implementation in a non socialised economy

Public Control Of Consumer Contracts

The kind of state intervention embodied in the Price Control and Productivity, Prices and Incomes legislation discussed above has been directed primarily at regulating the price mechanism and controlling the quantum of consideration payable under the regulated contracts. State


26 See section 3 (l) of the Act
intervention of the kind discussed does not tackle the problem of eliminating unfair or improper terms that may have been imposed because of great inequality in the bargaining positions of the parties. However, many consumer contracts in capitalist economies require state intervention of the kind that re-opens the bargain and regulates its terms in the interest of fairness to consumers. The mischiefs spawned by standard contracts or contracts of adhesion are now too well known to merit recounting. These mischiefs need to be met by an avowed socialisation of many of the recurrent kinds of consumer contracts in order to square their terms with the reasonable expectations of consumers. This socialisation or public control of consumer contracts can be achieved by a two-pronged control mechanism. One control modality is to police the terms of standard contracts but allow these to continue to be drawn up by the suppliers of goods and services; the other basic modality is for the state to intervene to draw up or stipulate the core provisions of various kinds of contracts of a recurrent kind, and to say that the suppliers of the goods or services covered by these kinds of contracts must use these provisions without modifying them to the disadvantage of consumers. Such suppliers may supplement the core provisions with their own terms so long as such terms do not detract from the substantive advantages of the core provisions. The best strategy is probably to combine both modalities.

As regards the policing modality, Israeli- and Swedish- legislation offers interesting models and possibilities. The Swedish legislation, because of its activist orientation, offers particularly interesting ideas for the fashioning out of a Nigerian solution. The Swedish remedy against improper or unfair contract terms is not left to be sought at the initiative of the parties to the contract. Rather, there is a Consumer Ombudsman charged with seeking out improper contract terms in standard contracts and doing something about them. This Swedish legislation is contained in an Act of 30 April 1971 (No. 11 Z) prohibiting improper contract terms in standard contracts and doing something about them. This Swedish legislation is contained in

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an Act of 30 April 1971 (No. 11Z) prohibiting improper contract terms and its substantive provision is to the following effect:

"If an entrepreneur when offering a commodity or service to a consumer for personal use applies a term which, in regard to the payment or other circumstances, is to be considered as improper toward the consumer, the court may, if the public interest so requires, issue an injunction prohibiting the entrepreneur from using that term or a term substantially the same in similar cases in the future".

The primary responsibility for securing enforcement of this provision is laid on the Consumer Ombudsman, a lawyer whose office was created by the related Market Court Act. This ombudsman is given wide discretion as to where to intervene, his only instruction being to "inquire into marketing practices and contract terms within areas where improper procedures are especially common or have great practical importance for consumers."

This basic idea of allowing state intervention through a full-time investigating office which refers to a court term in standard contracts which are unfair to consumers is an interesting one and one that should be paid careful study. All cases to prohibit "improper contract terms" are initiated by the consumer ombudsman either on his own initiative or upon receiving a complaint from the public. The Ombudsman does not take all cases straightaway to the market court. He first seeks voluntary compliance by negotiating with the enterprise concerned. He may also issue legally binding "cease and desist orders" against the continued use of improper terms, in cases not of great importance. But in all matters of great importance or where matters of principle are involved, he has to bring the case before the market court for adjudication.

It ought to be possible to localise these ideas within the Nigerian setting and produce a strategy for state intervention in standard contracts to eliminate terms unfair to consumers. The idea of the consumer ombudsman is quite appealing and deserves study by the Nigerian authorities. Because of the activist role of the consumer ombudsman in ferreting out "improper terms", the Swedish model is preferred to the Israeli model for the control of standard contracts, although elements from the Israeli model can be incorporated into a future Nigerian solution.

The Israeli solution is to give courts the power to refuse to enforce any "restrictive term" in a standard contract if they consider this to be just and

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30 A translation of the Act is appended as appendix A to Sheldon's article. See Sheldon, op. cit. At p. 68
31 See Sheldon, op. cit. At p. 29
necessary in the interest of the party who did not participate in its drawing up. A "standard contract" is defined in the Israeli standard contract Law 5274 1965 as:

"a contract for the supply of a commodity or a service, all or any of whose terms have been fixed in advance by or on behalf of, the person supplying the commodity or service (hereinafter 'the supplier') with the object of constituting conditions of many contracts between him and persons undefined as to their number or identity (hcrcinatter (the customcr'I.V

The meaning of a "restrictive term" is set out in the law and basically the defining section constitutes an enumeration of many types of obnoxious terms frequently used in standard form contracts. By this approach then, obnoxious clauses in standard contracts can be refused enforcement by the Judges as and when these come to their notice in the course of private litigation.

But the drawback of this approach is that the effect of some exemption clauses and other kinds of unfair terms may be to deter the consumer from going to court. Terms in a standard contract may give the consumer a misleading impression of his rights and he may consequently give up without a fight. If he does this, then under the Israeli model, the judicial authority to intervene in his contract will avail him nothing. That is why the Swedish model is preferred. Nevertheless, the general authority granted to judges to declare void obnoxious clauses in standard contracts relied on in litigation before them is a salutary one and well worth incorporating into a Nigerian solution. This judicial power of avoidance is recognised by the Israeli law to introduce an element of uncertainty into all standard contracts and therefore the suppliers of goods and services who draw up these contracts are permitted by law to submit their standard contracts in advance of litigation to an administrative agency for approval. Approval of a standard contract by this agency means that it cannot be challenged in litigation. This is another notion worth considering in the Nigerian context.

In sum then, what is being urged is that an institutional framework be created in Nigeria for the policing of terms of standard contracts because freedom of contracts notions are unworkable in this area. The problems associated with standard contracts have been experienced in almost all modern economies. One can therefore fashion out an eclectic solution drawing on the experience of other countries, but with a determined effort

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32 Diamond, 'The Israeli Standard Contracts Law 5274 (1965) 14 I.C.L.Q. 1410
to localise and attune the various foreign solutions to the circumstance of Nigeria.

**Basic Standard Contract Forms**

The other basic modality of controlling the terms in standard contracts is for the state to prescribe the basic contents of some selected kinds of contracts. A very well-known example of this is the standard fire policy in use in many states in the United States. Originating as the New York Standard Fire Policy, it has been adopted by many other states. The purpose of its adoption has been to control the complex, confused and misleading fire policies that the various competing companies churned out. 33

The New York Standard Fire Policy provides a compulsory basic contract form, but insurers are permitted to add riders expanding the benefit to consumers.

Similarly, compulsory basic standard contract forms could be enacted for various other kinds of contract of significance in Nigeria. For a start, the lead of the New York example could be followed in the insurance field. Indeed, perhaps legislative authority already exists for such a strategy in insurance field. By the Insurance Act, 1990 35 the office of the Director of Insurance is created in Nigeria and one of the Director’s functions is the approval of standard conditions to apply to policies of insurance. 36

However, the Director has so far not laid down any standard conditions for any class of insurance contracts. But some of the terms in widespread use in insurance contracts in Nigeria clearly need to be controlled. Pre-eminent among these is the ‘basic clause’ which makes the truth of each and every answer given by the insured on the proposal form a warranty. Consequently, breach of the clause entitles the insurer to avoid the contract. Relying on this clause, insurers are entitled to avoid having contracts for completely immaterial and innocent mis-statements of facts.”? In any standard statute-prescribed insurance contract form, the basis clause’s operation should clearly be restricted in such a way as to prevent it from producing unjust results for the consumer. The Director of insurance could prescribe a clause entitling an insurer to avoid the policy on the ground of the falsity of an answer given by the insured on the proposal form, only when the insured mis-statement is both material and fraudulent.

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34 The form is set out in the statute. N. V. Laws 1943, c. 671.
35 Cap. 183, Laws of the Federation of Nigeria, 1990
36 Sec section 5 (c) of the Act
37 See e.g. Duwsons V. Bonnin (1922) 2 A.C. 4/3; Mackay v. London General Insurance (1935) 51 L i. L Rep. 201.
This technique of the state drawing up a fair contract and compelling suppliers of goods and services of a particular kind, to use that prescribed form can be said to be indirectly deployed when terms are by statute compulsorily incorporated into contracts of a particular kind and the parties to such contracts are not allowed to contract out of such terms. The Rivers State of Nigeria Sale of Goods Edict 1988\textsuperscript{38}, defined what the fundamental obligation of a seller is. It is the duty of the seller to deliver the goods to the buyer. The effect of the section is, therefore, to insert a compulsory provision in all contracts of sale, in terms of the fundamental obligation of the seller described above. The statutory provision therefore contradicts the subsequent House of Lords' decision in Suisse Atlantique V. M, V. Rotterdamsche Kolen Centrale\textsuperscript{?} where the House held that the fundamental obligation of a contracting party is capable of exclusion through an exculpatory clause."? In Nigeria, the fundamental obligation of a seller e.g. goods cannot be excluded by contract.

The Sale of Goods Edict, provides for another compulsory term in sale of goods contracts. Section 13 (2)(a) contains a statutory implied condition to the effect that goods sold are free from defects which are not declared or known to the buyer before or at the time when the contract for sale of those goods is made. This implied condition is made inapplicable in certain circumstances where the defects would have been discovered by the buyer's reasonable examination.' This two examples from the Sale of Goods Law/Act constitute legislative attempts to control freedom of contract in the interest of the protection of the consumer. A similar attempt at such control is embodied in Section 3 of the Hire Purchase Act \textsuperscript{42}, which declares void certain terms which if embodied in hire-purchase contracts would prejudice the interest of the consumer.

**Conclusion**

The above exposition of the various ways in which legislative power in Nigeria has been used to limit freedom of contract is not an exhaustive account of all such legislative intervention. But the exposition seeks to bring out the function of such intervention. This function is usually the protection of the community or a section of it from the harmful consequences of untrammelled freedom of contract. Such state intervention might be thought by some, to contradict the traditional conception of essence of contract as a free bargain between the parties to it. The response to this query is that such essence is missing in any case

\textsuperscript{38} Edict No 15 of 1988 Laws of Rivers State of Nigeria
\textsuperscript{39} (1999) 2 W.I.S. 944
\textsuperscript{40} Ibid. at pp. 968-969, 981-982 and 987-988
\textsuperscript{41} See Section 13 (2) (a) of the Edict
\textsuperscript{42} Cap 169, Laws of the Federation of Nigeria, 1990
from most standard consumer contracts and many contracts reached in strong "sellers market" situation. The purpose of many legislative interventions is to make the terms imposed on consumers by such contracts fairer. Indeed, it seems to the present writer that any modern conception of contract must include a recognition of the public control element as part of the very essence of the modern contract. For as Kessler and Sharp have said 43

"In the evolution of the law of contracts; the basic assumption of the past that contract deals with the individual relations of man with each other has gradually given way to the realisation that in large sectors of our social and economic life contract is no longer an individual and private affair) but a social institution affecting more than the interests of the two contracting parties. An analysis, therefore] of present-day contract exclusively in terms of volition and agreement does not do justice to contract as a social institution. Social control has become an integral part of contract itself, and cannot be omitted from any analysis of the modern law of contract",