REFLECTIONS ON FREEDOM OF CONTRACT IN CAMEROON LABOUR LAW

Written by ***Irene Ngum Asanga***

Senior Lecturer, Faculty of Law and Political Science, University of Douala, Cameroon

ABSTRACT

Classical contract law upholds the theory of private autonomy reflected in the parties' freedom to contract. This is a sacrosanct principle. However, the need for regulation is seen in special contracts such as that of labour and this is the approach adopted by Cameroon labour law. *Laissez faire* has been replaced by welfare; social security. The question that preoccupies us in this paper is whether freedom of contract actually exists in the domain of labour law in Cameroon, given the inequality of bargaining power amongst others on one hand and State regulation on the other hand. Considering the need for State intervention to regulate various aspects of labour relations, one ponders how far the parties to a labour contract are expected to exercise freedom of contact and on the other hand, how adequate the existing State regulation and collective bargaining act as countervailing forces in protecting the weaker party, that is, the worker. The crux of the matter is whether one can talk of actual freedom of contract in labour law and the extent of such freedom.

Keywords: Freedom, Private Autonomy, Labour contract, Regulations, Collective bargaining

INTRODUCTION

Development of the Freedom of Contract Theory

Freedom of contact is indisputably a basic, established and cardinal principle of the law of contract. This concept developed with the classical law of contract, particularly during the latter half of the nineteenth century and is based on a *laissez faire* economy. This was established during a period of industrialization and increasing economic activities and commerce in general. The best way of allowing wealth to develop was to let the businessmen and women the freedom to regulate their affairs, with the courts simply playing the role of arbiter. The parties to a contract were to be governed by rational self-interest.[i] Sir George Jessel in *Printing and Numerical Registering Co. V. Sampson*[ii] stated, "If there is one thing more than another which public policy requires, it is that men of full and competent understanding shall have the utmost liberty in contracting and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by the Courts of Justice."

The doctrine of freedom of contract is said to have found early expression in the Constitution of the United States of America, Article 1, and S.10[iii]. Jeremy Bentham and John Stuart Mill with the principle of utilitarianism saw freedom of contract as a means of freeing the individual from the needless restraints imposed upon him, howbeit with the inherent setback being the failure to recognize that freedom of contract without any form of restriction was tantamount to slavery.[iv] However, it was later on realized that although liberty and equality before the law are essential to democracy, they have not in themselves any necessary connection with economic justice and in the case of economic disparity between individuals, it could lead to oppression.[v]

In the American case of *Lochner V. New York*[vi] for example, the Supreme Court found that the right to make a private contract is a fundamental right. In that case, a 5-4 majority of the Supreme Court overturned the misdemeanour conviction of a bakery owner for requiring or permitting an employee to work more than the sixty hours in a week under a State law that prohibited bakery employees from working more than ten hours per day and sixty hours per week.

This absolute utilitarian freedom of contract had weaknesses especially in the domain of labour law. During the nineteenth and early twentieth century, the theory of absolute freedom of contract led to poor working conditions for most workers in the industrialized western world and countries such as England and the United States of America.[vii] Society recognized the need

to protect the young and vulnerable and it was generally recognized that although private enterprise was vital in achieving public good, freedom of contract must at times yield to the exigencies of the State and equally that private enterprise predicated some degree of economic equality if it were to operate without injustice.[viii]

Thus, although classical contract law upholds the theory of private autonomy reflected in the parties' freedom to contract, the need for regulation is seen in special contracts such as that of labour. This is the approach adopted by Cameroon labour law. *Laissez faire* has been replaced by welfare; social security.

The question that preoccupies us in this paper is whether freedom of contract actually exists in the domain of labour law in Cameroon, given the inequality of bargaining power amongst others on one hand and State regulation on the other hand. Considering the need for State intervention to regulate various aspects of labour relations, one ponders how far the parties to a contract are expected to exercise freedom of contact and on the other hand, how adequate the existing State regulation is in protecting the weaker party, that is, the worker. The crux of the matter is whether one can still talk of freedom of contract in labour law and the extent of such freedom.

The Evolution of Cameroon Labour Law

The pre-colonial period of labour relations was characterized by slave labour and unpaid family or communal labour as well as cooperative or associative labour in an agrarian society. This was followed by a period of forced labour in plantations and road construction during the German colonization and the period under the French and the English mandate and Trusteeship. The idea of contractual labour was therefore nonexistent.[ix] Apart from slave labour, there was also collective cooperation[x] which consisted of being assisted by a group of family and friends in carrying out work that was beyond the capacity of an individual or his family. All that was required consisted of the provision of food. In like manner a solidarity group could assist each other in jointly carrying out work on a rotatory basis. This practice has survived in agrarian societies till date and is practiced in the Northwest grass field region of Cameroon.[xi]

Colonial Period

The evolution of labour law in Cameroon can be traced from the colonial period, independence, re-unification in a Federal Republic and unification till date. Following the defeat of the Germans in the First World War, Britain and France shared Cameroon as war booty. Cameroon

became a mandated and subsequently trust territory of the League of Nations in 1922 and United Nations Organization in 1945 respectively. France took the larger share and Britain took a smaller portion of what became the British Southern Cameroons and Northern Cameroons respectively.

Britain administered her part of territory as an integral part of her Nigerian colony. Several labour statutes were enacted from 1945 such as the Indigenous labour Code, the Trade Unions Ordinance, the Wages Boards Ordinance, Factories Ordinance, Trade Disputes Ordinance and Workmen's Compensation Ordinance.[xii] Most of these laws were inspired by English law.

In French *Cameroun* under the League of Nations mandate and United Nations Trusteeship, a number of Decrees were signed regulating labor relations in 1922, 1925 and 1937, mostly dealing with recruitment and the health of workers, as well as compensation in case of accidents at the workplace. A Decree signed on the 7th of January 1944 organizing indigenous labour,[xiii] declared the freedom to work for natives ("*dans le territoire du Cameroun, l'indigène se consacre librement au travail*"). This was followed by a more elaborate decree of 23rd August 1945 governing labour contracts, collective agreements, paid leave, maternity leave workplace accidents, *et cetera*. The Brazzaville conference of 30th January to 8th February 1944, presided over by General De Gaulle proclaimed the absolute freedom of labour and made recommendations, which led to the passing of the decree of 7th August 1944 creating professional syndicates and the decree of 17th August 1944 creating a special body of labour inspectors.[xiv] The development of labor law in Francophone Cameroon progressed with the promulgation of Law N° 15-1322 of 15 December 1952, instituting the Labour Code for French Overseas and Associated Territories (*Code du travail dans les territoires et territoires associés relevant du Ministère de la France Outre-Mer*). This code was more elaborate and contained 241 sections in 10 chapters. It dealt with labour contracts and collective agreements, forbade forced labour and contained regulations on general conditions of work.[xv] This was followed by other pieces of legislation and decrees governing family allowances, sickness and accident benefits.

The Federal Republic

Francophone Cameroon got its independence from France on 1st January 1960 and on 1st October 1961 Anglophone Cameroon re-united with the independent Republic of Cameroon to form the Federal Republic of Cameroon, after having voted in a United Nations organized plebiscite on the 11th of February 1961 in favour of re-unification. As far as labour law is

concerned, after a period of transition with different laws for the Federated States of West and East Cameroon, on 25th May 1965, the Ministry of Labour was created and Laws enacted, which helped in the process of harmonizing the two systems concerning labour and social insurance. Law N° 67/LF/6 of 12th June 1967 instituting a labour code for the whole country was promulgated. Other decrees and orders followed as well as laws on social security.

Unification till Date

The constitutional form of the State changed though a referendum on 20th May 1972 to a Centralized Unitary State. The 1967 labour code was subsequently amended and abrogated by a new labour code which came into being through Law N° 92/007 of 14th August 1992. Cameroon labour law is as such regulated by this main piece of legislation as well as International labour Conventions, case law, decrees and ministerial orders as well as collective agreements.

ASPECTS OF FREEDOM IN LABOUR CONTRACTS

Freedom of contract entails the individual's choice whether or not to enter into a contract and with whom, that is, 'party freedom' as well as the freedom to decide on the content of the contractual obligations undertaken, that is, 'term freedom.'[xvi] Everyone has the constitutional right and obligation to work in Cameroon, implying that everyone is free to seek for work and conclude a contract of employment.[xvii] Although current labour laws restrict freedom of contract through legal provisions and collective agreements, it nevertheless exists to a certain extent.

Freedom to Conclude a Contract

Private autonomy implies the freedom to contract. It is understood as a possibility granted to an individual through the legal system, to regulate his or her legal relations by concluding transactions under law and shape his or her legal relations by way of self-determination and self-responsibility. This implies a high degree of freedom in the realm of private life. In the domain of contract it means being able to decide freely whether to conclude a contract, with whom and what the contents should be.[xviii] According to the Cameroon labour code, a contract of employment shall be an agreement by which a worker undertakes to put his services under the authority and management of an employer against remuneration and it shall be negotiated

freely.[xix] This implies the freedom to choose where to seek employment and whether to conclude a contract with a certain employer. It equally implies the freedom on the part of the employer, to decide the type of workers with whom to conclude contracts of employment.

As Lord Cairns said in the case of *Cundy V. Lindsay*[xx], there must be *consensus ad idem*, that is, a meeting of the minds, for a contract of employment to be valid. There must be an offer and acceptance as illustrated in the Supreme Court case of *ICC v Madam Gisele Guerrinaud*[xxi]where it was held that the respondent could not unilaterally introduce new terms on pay into her employment contract. A state of necessity that indirectly obliges a worker to consent to all the conditions of a labour contract, which might be unfavourable does not amount to free consent. Such consent is vitiated. The absolute freedom to contract is somehow restricted by the principle of non-discrimination on the bases of race, sex, tribe or political affiliation. An employer cannot condition his offer only to a particular sex or tribe for example. The employer is likewise restricted by legislative provisions intended to protect minors. He is not totally free to contract with a minor by virtue of lack of capacity.[xxii]

The contract of employment could be concluded for a specified or unspecified duration as agreed upon by the parties. According to Section 25 (1) (a) of the Labour Code, a contract of specified duration is a contract whose termination is fixed in advance by both parties. It may not be concluded for a duration of more than (2) two years renewable once. Contracts for the execution for of specific tasks such as a building project are also considered to be contracts of specified duration. On the other hand, the parties are equally free to conclude a contract of unspecified duration, which according to Section 25 (1) (b) of the Labor Code, is a contract whose termination is not fixed in advance and may be terminated at any time by the will of the worker or the employer, provided that the required prior notice is given. However due to inequality in bargaining power, one cannot likewise talk of freedom on the part of both parties to choose the type of contract to conclude.

Freedom to Determine the Contents of the Contract

It is imperative to first of all postulate here that a labour contract could either be verbal or written -and its existence could be proven by any means available to the parties, [xxiii]- except specific contracts that must be expressed in writing, such as a contract of employment of specified duration exceeding three months, or requiring the worker to live away from his usual place of residence and with a foreigner[xxiv], as well as probationary hiring.[xxv]

The contents of a labour contract are important in describing the nature of work to be carried out and the conditions under which such work is to be done, as well as the consideration for it in the form of wages. There are however express, discretionary terms of the contract, to be decided upon by the parties, as well as obligatory terms imposed by the law, to be respected and complied with.

The labour contract can as such specify the workplace and working hours but all these are subject to regulations concerning maximum working hours fixed by the labour legislation, as well as regulations concerning night work and overtime. In this connection, the maximum working hours are forty (40) hours per week and 48 for agricultural establishments as well as 5 hours for workers in the security service.[xxvi]The labour contract however specifies the exact time during which the work is supposed to be done.

The employer has the freedom according to section 29 (1) of the Labour Code, to unilaterally draft Internal Rules and Regulations, which are somehow imposed on the worker upon signature of the labour contract. These rules must nevertheless be endorsed by the labour inspector before they become valid. Such internal rules have been held to form part of the labour contract if the employer had acted on it.[xxvii]

Freedom to Suspend and Terminate the Contract

Under normal circumstances, the parties to a labour contract could decide to have it suspended without any ensuing problems. The law however provides a number of circumstances that permit the suspension of the contact,[xxviii] all in a bid to protect the worker.

The termination of a labour contract by agreement of the parties is one of the most important aspects that clearly illustrates the private autonomy of the parties.[xxix] A labour contract can be terminated for a number of reasons including the death of a party or the elapsing of the term of the contract of specified duration. Apart from these, the law guarantees the freedom to either of the parties to terminate a contact of unspecified duration at will, subject to prior notice that should be given to the other, stating the reasons for the termination.[xxx] In effect, the worker is free to resign from his job and the employer is equally free to dismiss the worker at any time with reason and prior notice. In the case of *Ngo Minyemek Catherine V. COMACICO,*[xxxi] the court held that an employer was legally at liberty to terminate a contract of employment. The law is however protective of the worker and requires serious and precise reasons for

termination, which amounts to dismissal on the part of the employer.[xxxii] The right to terminate is equally restricted as far as the contracts of staff representative are concerned. The employer is bound to seek the prior authorization of the competent labour inspector,[xxxiii]failure of which it would be deemed not simply to be a case of unjust dismissal but null and void[xxxiv] as in the case of *Kouokam Abraham c/ Secretaire Médical du CEBEC.*[xxxv]

A contract of specified duration could equally be terminated before the specified time if the parties freely agree to do so in writing.[xxxvi] A contract of specified duration, according to Section 25(1) (a) of the Labour Code, is a contract whose termination is fixed in advance by both parties. It may not conclude for a duration of not more than (2) two years renewable once. Assimilated to this type of contract is equally, a contract whose termination is subject to the occurrence, which does not depend exclusively on the will of the parties, of a future but certain event that is precisely indicated a well as a contract concluded for the execution of a specified task such as a building contract.

LIMITS TO FREEDOM OF CONTRACT

Absolute freedom of contract cannot be spoken of as far as labour contracts are concerned due to the inherent inequality in bargaining power and the fact that more often than not, the worker is presented with a standard contract.

Unequal Bargaining Power in Labour Contracts

The Freedom of contract theory operates on the premise that each side bargains from a position of strength, resulting in contracts that are formed through mutual assent.[xxxvii] This is not however the case with labour contracts, since the parties are not on an equal footing and do not have the same bargaining power. A labour contract according to section 23 (1) of the Cameroon Labour Code[xxxviii] "shall be an agreement by which a worker undertakes to put his services under the authority and management of an employer against remuneration." However, this inherent freedom is not practically possible where the parties are not on the same footing and leverage.

The rate of unemployment, puts job seekers at a disadvantage when faced with the choice of type of employment and the contents of a labour contract. In Cameroon, the present rate of unemployment although not very high stands at 3.30 percent as of March 2020[xxxix], while the youth unemployment rate (that is, the labour force ages 15-24 without work but available for and seeking employment) is 5.69 percent.[xl] Poverty and a resultant state of lack and want puts the prospective worker in a very disadvantaged position vis a vis the employer. One cannot therefore talk of freedom to seek employment and negotiate the terms on the part of worker, who might feel obliged to accept whatever offer for reasons of survival.

Labour contract as a standard form (Adhesion) contract

The process of mass production and distribution, which has largely supplanted individual effort, has introduced the mass contract - a uniform document which must be accepted by all who would deal with large scale organizations.[xli] Insurance policies, Bills of lading, and charter parties are examples.

Many public and private corporations have found it useful to adopt, as the basis of their transactions, these standard forms with which their customers have little to do but to comply. The French lawyers have an appellation for it, known as "*contrat d'adhesion*." "The term *contrat d'adhesion* is employed to denote the type of contract of which the conditions are fixed by one of the parties in advance and are open to acceptance by anyone.

Employers find it convenient to present certain standard form contracts to employees for signature. The contract, which frequently contains many conditions, which are favourable to the employer, is presented for acceptance *en bloc* and is not open to discussion."[xlii] The desperate worker has no choice in this case than to accept the contract as proposed or to reject it. The only remedy to the worker can be found in State regulation through legislation and collective bargaining.

CHECKS ON ABUSE OF FREEDOM

The law intervenes to prevent absolute freedom of contract in the interest of the weaker party in the domain of labour law. There are prohibitions that are protective in nature concerning the personal characteristics of an individual.

In order to put a check on absolute freedom of contract in labour relations, mandatory legislative and regulatory provisions in the form of laws, decrees and ordinances as well as orders have been used to protect the weaker party in labour relations, who is the worker. The Minister of Labour and Social Security issues orders to regulate working conditions and is equally empowered to approve and validate certain aspects of the labour relationship. One can even talk of a paternalistic approach in labour law, because any legal rule that prohibits an action on the ground that it would be contrary to the actor's own welfare is paternalistic.[xliii]

State and Legislative Regulation of labour Relations

The parties to a labour contract do not have the absolute freedom to decide on all the terms. They are free to agree on certain express terms of the contract such as the job description, place and hours of work, date of payment of wages, et cetera. This is however subject to prohibitions on discrimination as to race, sex, family situation and trade union. There are protective measures in the form of restrictions and prescriptions concerning wages, safety and security as well as measures intended to protect women and children which constitute implied terms of the contract.

Minimum Wage

Remuneration is an important component of a labour contract and constitutes consideration. It is an important term of the contract, to be agreed upon by the parties. Section 23 (1) of the Cameroon Labour Code clearly includes remuneration in the definition of a labour contract, leaving the freedom to the parties to determine the amount of remuneration in each case. The duty falls on the employer to pay the agreed wages. The code provides that "wages" means remuneration or earnings, however designated or calculated, capable of being evaluated in terms of money and fixed by mutual agreement or by the provisions or regulations or collective agreements which are payable by virtue of a contract or employment by an employer to a worker for work done or to be done or for services rendered or to be rendered.[xliv] Collective agreements therefor mitigate the effect of exploitation in the determination of wages to a certain extent. Any envisaged discrimination on the basis of sex, age, status and religion is equally prohibited.[xlv]

It must however be agreed upon that considering the inequality in bargaining as well as the fact that the amount of wages is usually proposed by the employer, regulatory measures restricting

freedom that could border on exploitation and slavery exists, imposing minimum wages in labour contracts. In this connection, according to the provisions of Section 62 (1) of the Labour Code[xlvi], Decree N° 2014/2217/PM of 24h July 2014 revising the Minimum wage[xlvii] in the private sector, fixed it at the sum of thirty-six thousand, two hundred and seventy (36.270) francs CFA.

This amount does not however seem to be sufficient to cater for the basic needs of a worker and his or her family as provided for by the ILO Convention N° 131 Concerning Minimum Wage,[xlviii] Article 3 of which provides:

"The elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include--(a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups; (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment."

Thus, while there is regulation limiting the freedom of the parties in determining wages, the extent of protection appears relatively insufficient.

Trade Unionism and Collective Agreements

Trade Unions and collective bargaining influence labour relations in Cameroon. Workers' Trade Unions help in negotiating better working conditions for its members and could in this respect be said to have substituted the employee's freedom and right to bargain for that of collective bargaining, although on the other hand, workers are free to decide whether to join a trade union or not.[xlix] In this connection, Cameroon has ratified ILO Convention N° 98 on the right to organize and do collective bargaining, 1949.[l]

Every worker and employer shall have the right to join a trade union or employers' association of his own choice in his occupation or kind of business. According to Section 18(1) (e) of the Cameron Labour Code, trade unions and employers' associations may make contracts or agreements with any other trade unions, employers' associations, companies, undertakings or persons. A collective agreement is an agreement intended to regulate labour relations between

employers and workers either of an enterprise or group of enterprises or of one or more branches of activity and can be concluded between the representatives of one or more trade unions or a federation of trade unions on the one hand and the representatives of one or more employers' associations or any other group of employers or one or more employers acting individually on the other hand.[li] The provisions of collective agreements could be extended to all workers within the industrial or territorial sector of activity by the minister of labour upon reasoned opinion of the National Labour Advisory Board.[lii]The terms of such collective agreements are binding terms on the parties concerned and incorporated in the labour contract as was decided in the Supreme Court case of *Bakehe Joseph V. Regie des Chemins de Fer*.[liii] However although collective agreements could result in more favourable conditions for workers, it cannot override rights derived from statutory provisions.[liv]

CONCLUSION

Freedom of contract remains a cardinal and sacrosanct principle of the law of contract, which cannot be ignored. However, there has been a shift from the protection of this absolute freedom towards social welfare and protectionism, especially in the domain of labour law. Cameroon labour law has made an attempt to affect this balance principally through legislative provisions, regulatory measures and collective bargaining, backed by judiciary interpretation. Freedom in this area of the law remains superficial in Cameroon given the relative gross disparity in bargaining power due to the high rate of unemployment. Concrete regulatory measures on wages would equally be welcome in such an economic setting where standard form labour contracts are equally common.

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