

INSTITUTIONAL FRAMEWORK FOR CONSUMERS PROTECTION IN NIGERIA

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ABSTRACT

This study examined the framework institutionalised for the protection of consumers in Nigeria. In particular, it x-rayed the administrative and regulatory mechanisms put in place for the protection of consumers and considered the attitude of the courts in matters affecting the consumers. It was evidenced from the study that there are several regulatory agencies, with functions sometimes overlapping, set up to advance the consumer's course. The effectiveness of these agencies is brought into scrutiny, as sometimes, their existence is hardly known to the consumers. The study exposed a general lacklustre approach of the courts in consumer protection cases and its adverse effect on the consumers. If the consumer is to take benefit of whatever legal framework institutionalised for his protection in Nigeria, some level of judicial activism are required.

Keywords: *Institutional framework, Consumer, Protection, Courts*

INTRODUCTION

Consumption is the essence of production of goods and services. The process of production would be worthless if the products of that process are not consumed. In Nigeria however, the incidence of fake, substandard, defective and adulterated product assumes an alarming dimension. The quality of services rendered by service providers leaves much to be desired. The consumer is left in a precarious position, having to pay for shoddy services, sometimes no services, and for goods that are below the regulated standards. Consumers of goods and services have been exposed to myriad of problems including problem of safety and quality of product and service.

Some framework has been institutionalised to address these consumer problems. These take the form of administrative interventions that regulate the activities of manufacturers and suppliers of goods and providers of services. Furthermore, the courts are there to enforce consumer legislation and award appropriate remedies to aggrieved consumers. This study analyses the existing framework for the protection of consumers in Nigeria. To achieve the objective of this study some cases that relate to consumer protection have been critically appraised to determine the attitude of Nigerian courts towards consumers protection.

A consumer is broadly defined as a person who buys or uses goods and services¹. This definition imports contractual nexus into the concept of consumer. It presupposes that the consumer retains his freedom; freedom to choose what and where to buy and freedom to choose to use or not to use a particular product or

service. The consumer is therefore someone who acts freely and is not in any way coerced or forced into the relation. The pertinent question is whether the consumer needs to be protected from his own ignorance and failure to exercise due diligence in freely exercising his right of choice to purchase and, or use a product or service. Put differently, should the consumer be protected when freely exercising his right of choice, what interest of his should be protected, how and against what is he protected?

The wheel of commerce grinds when the consumer is active. When the consumer meets his needs, suppliers of goods and services are activated, and in the producers bid to meet the ever increasing needs of the consumer commerce thrives with a consequential flourishing effect on the economy. This way, the consumer is projected as the king, he activates the course of commerce, the producer and service provider would only be ready to produce goods and provide services when the consumer is ready to pay for them. But is the consumer always the king? Reflecting on this, Monye portrays a picture of the consumer thus:

It is a truism that there is high incidence of fake and substandard products ... The problem, ... cuts across various fields including ... the supply of services. Most often, consumers find themselves saddled with shoddy services, or even non-performance. Unfortunately, they rarely seek redress due to a number of reasons, the most prominent reason being ignorance The supply of shoddy products and services constitutes a big problem to the consumer².

This expression, which finds support in several commentaries³, reveals that the consumer is anything but the king he ought to be, that the consumer is in a sordid state. A typical legal rationale for protecting the consumer is based on the notion of policing market failures, dishonesty and inefficiencies, such as inequalities of bargaining power between a consumer and a business⁴. The need for the consumer to be protected therefore arises.

THE ADMINISTRATIVE PERSPECTIVE

Bureaucrats view consumer concern as a matter within the dominion of public law. To them, consumers concern, that is, issue of defective and adulterated products, shoddy services, exorbitant prices, and other forms of unfair trade practices impact negatively on the state, and is indeed a threat to public safety. To bureaucrats, injury caused to one consumer as a result of unwholesome trade practice portends danger to the entire public. It becomes imperative for the state to protect itself and the populace from the antics of unscrupulous producers and service providers by way of administrative intervention. There is a conscious legal policy by the government inspired by the recognition of the vulnerable position which the consumer occupies in the market place⁵. The government has sought to ensure the protection of consumer by assigning specific functions to some governmental agencies⁶. Furthermore, administrative intervention institutionalising appropriate legal framework has been put in place, leading to the creation of some regulatory agencies. The agencies are vested with authority to supervise, monitor and regulate the activities of producers and providers of services.

The Consumer Protection Council established by the Consumer Protection Council Act⁷ is the most direct consumer administrative agency in Nigeria, others are the National Agency for Food and Drugs Administration and Control⁸ to control and standardise the manufacture, importation, sale, advertisement of regulated products such as food and drugs, the Standard Organisation of Nigeria⁹ to safeguard product standards, and the Nigerian Communications Commission¹⁰ set up to cater for the interests of consumers of telecommunication services, the Utilities Charges Commission¹¹ to guard against the exploitation of consumers in the rates charged for public utilities, the National Insurance Commission¹² set up to cater for consumer insurance interests, and the Nigerian Tourism Development Corporation¹³ set up to encourage the provision and management of tourism amenities including the development, regulation, registration, classification of hotels, and hospitality enterprises¹⁴.

These agencies are conferred with extensive functions relating to setting of standard, control of quality, and investigation of consumer complaints¹⁵. Their mandates are basically administrative in nature, they seek to regulate the production, supply and provision of goods and services. The Consumer Protection Council being the most direct consumer protection agency in Nigeria merits some detailed comments here. The Council was established perhaps to fall in line with the United Nations Guidelines on Consumer Protection¹⁶. The mandate of the Council covers both goods and services and its functions¹⁷ include providing speedy redress to consumer complaints through negotiations, mediation and conciliation; eliminating hazardous products from the market, and causing offenders to replace defective products with safer and more appropriate alternatives; publishing from time to time list of products whose consumption and sale have been banned, withdrawn, restricted or not approved within or outside the country; issue guidelines to manufacturers, importers, dealers and wholesalers in relation to their obligation under the Act; encourage trade industry and professional associations to develop and enforce in their various fields quality standards designed to safeguard the interest of the consumer and encourage the formation of voluntary consumer groups or associations for consumer well being.

The Council is charged with the administrative responsibility of ensuring that consumers' interests receive due consideration at appropriate forum and providing redress in cases of unscrupulous exploitation of consumers by producers and service providers¹⁸. The Council is empowered to apply to court to prevent the circulation of products which constitute imminent public hazard; compel a manufacturer to certify that all safety standards are met in their products; cause quality test to be conducted on consumer products; demand production of label showing date and place of manufacture of a product and certification of compliance; compel manufacturers, dealers or service providers to give public notice of health hazards inherent in their products; and ban the sale, distribution and advertisement of products which do not comply with safety or health regulations.

The mandate of the Council focuses on the health and safety of consumers by empowering the Council to eliminate oppressive trade practices, through unfair bargains, consumer education and information, and adequate compensation and relief for consumers who have suffered injuries from defective goods and services. By section 4 of the Act, State Committees are established to assist the Council in realisation of its mandate. There is a consensus by writers¹⁹ that the Council and the State Committees are administrative bodies that discharge her mandate by the instrumentality of the criminal law process²⁰. Monye, has queried whether an aggrieved consumer who has obtained redress through the Council or State Committee may maintain a civil action against the offending producer or service provider²¹. She contends that to allow the consumer maintain such a civil action in addition to the action taken by the Council or State Committee will weaken the position of the Council or State Committee, which took pains to investigate the complaint with a view to securing appropriate remedy for the consumer, and further raises the issue of double jeopardy against the accused person²².

Monye concludes that the better approach was to give the consumer the option to seek redress either through the Council or State Committee, or to institute a civil action to enforce his right²³. This position, though probably premised on the desire to encourage the Council in actualising its mandate and in securing the right of the accused producer, appears not to be supported by law. Firstly, there is nothing in the Act or any other law in Nigeria that bars a consumer who has been injured or otherwise affected by defect in goods or services supplied to him from enforcing his civil claims against such a producer or provider of services, by reason only that he has lodged a complaint against the said producer or service provider to the Council or State Committee.

Secondly, while the Act empowers the Council to investigate cases of unfair trade practices and enforce compliance against unscrupulous traders, the Constitution²⁴ guarantees the consumer's right to institute an action against anyone who infringes or threatens to infringe his constitutionally guaranteed rights²⁵. Thirdly, besides lodging a complaint to the Council or State Committee, it does not seem that the consumer is empowered by the Act to compel the Council or Committee to prosecute or take any action at all against the producer or provider of services complaint about. The consumer does not have any authority to direct the Council or Committee in the discharge of its duties before, during, or after its investigation of the complaint.

It is humbly submitted, that in addition to lodging a complaint against any producer or provider of defective goods or services, the consumer reserves his right to enforce his claims by civil action. It has been expressed that if the Council effectively discharges its mandate, "*it will go a long way in redressing consumer complaints and improving the power relations of consumer viz-a-viz producers [sic]*".²⁶ The establishment of the Council is an important government policy, and it remains the most potent action directed at consumer protection.

It is important to note that administratively, consumer policy focuses on two strategies in the protection of consumer²⁷. One is the preventive strategy which objective is to prevent the consumer from getting injured in the first place. The objectives of the Standards Organisations of Nigeria (SON) and the National Agency for Food and Drugs Administration and Control (NAFDAC) fall primarily into this category. Two, is the redress strategy which involves providing appropriate compensation or redress to an injured consumer. The objectives of the Consumer Protection Council (CPC) as a regulatory agency fall into this category. Generally, an amalgam of the two strategies is needful to have an effective consumer protection regime.

From the foregoing, an inter-relationship of functions of these administrative agencies is unavoidable. It is instructive to note that a jurisdictional conflict is hardly to be avoided. An effective government policy is necessary to be institutionalised for the proper management of the inter-relationship of functions to prevent the imminent conflict from impacting negatively on the consumers. However, doubt has been expressed as to whether the consumer can pursue a claim for injury or defect in products against a regulatory agency on the ground that he relied on the agency's quality assurance on a product to consume the product, which turned out to be harmful to him²⁸.

JUDICIAL ATTITUDE TO CONSUMERS PROTECTION IN NIGERIA

The judiciary is generally seen as the last hope of the common man; the hope of the hopeless, the help of the helpless, and the safe sanatorium for the legally injured²⁹. In the power relation between the consumer and the producer, the consumer is seen as a weeping child, the common man. He therefore looks up to the court for protection from the antics and vagaries of unscrupulous businessmen, who would usually resort to sharp and unfair trade practices to maximize profits at the consumer's expense. The incidences of the supply of deficient and adulterated goods, coupled with provision of shoddy services in the market place have assumed an alarming situation in Nigeria³⁰. To check this tide, a variety of approaches have been adopted for the protection of the consumer.

The judiciary provides the primary venue for obtaining redress in consumer protection matters. From the judicial perspective therefore, consumption is perceived as one of the rights of citizens³¹. The Constitution of the Federal Republic of Nigeria provides for fundamental right to citizen. Section 33 of the Constitution provides for right to life. This presupposes the right to consume safe food, water, air, services and other articles for the sustenance of the citizen's life. It would seem that the judiciary views issue of consumer protection as a matter that is very fundamental and near life threatening in Nigeria as reflected in the possible dangers adulterated and fake products pose to the life of the consumer. Commenting on the susceptible state of the Nigerian consumer, Aniagolu, JSC, in *Nigerian Bottling Co. Ltd. v Ngonadi*³² expressed:

Nothing appears to be more elementary in this country where it is often the unhappy lot of the consumers to be inflicted with shoddy and unmerchantable goods by some pretentious manufacturers, entrepreneurs, shady middlemen and unprincipled retailers whose avowed interest seems only, and always, to be to maximise their profits leaving honesty a discounted and shattered commodity.

This expression by the apex court in the land would give the impression that our consumer protection is given the highest attention by the court. In reality, consumer protection appears to be a concept that is yet to be fully acknowledged by the court. This position reflects in the dictum of Edozie, JCA in *Hill Station Hotel Ltd. v Adeyi*, when he said, "I have myself scanned through the law of the country but have not been able to find any statute bearing on the subject Hotel Proprietors' and Innkeepers' liability³³. It seems doubtful if there exists any law in this country similar to the English Hotel Proprietors Act (1956)³⁴". This expression by His Lordship is bereft of support, and for a number of reasons reveals the shallowness of the judiciary in the perception of consumer protection matters. His Lordship proceeded as if the Statute (of General Application)/common law distinction in bailment was inapplicable in Nigeria³⁵.

The expression which appears to be a mirror of the attitude of the court to consumer protection in Nigeria can be said to be a product of hastily conclusion. First, historically, the regulation of common inns and hotels, the concern in the case, was through the common law. At common law innkeepers were held strictly liable for the loss of their guests' goods, a position that was given statutory flavour by the English Innkeepers Act of 1368³⁶. By the peculiar colonial status of Nigeria, one wonders why His Lordship did not have recourse to common law or the English Act³⁷. Secondly, it is difficult to concede to His Lordship that in 1996 when *Hill Station Hotel* was decided there were no local legislation in Nigeria similar to the English Hotel proprietors Act. Statutory regulation of hotel and hotel proprietorship in Nigeria is within the ambit of the legislative powers of the state³⁸.

This is as a result of the review of pre-1900 English Statutes of General Application by the Law Reform Commission in 1987 whereby certain laws were assigned to the states. The Draft Laws which were the product of that exercise were sent to the states for purposes of enacting them as their local legislation³⁹. Some states like Akwa Ibom and Kaduna complied, hence the enactment of the Innkeepers and Hotel Proprietors Law of Akwa Ibom State⁴⁰ and the Innkeepers and Hotel Proprietors Edict of Kaduna State⁴¹. It follows therefore that as at 1996 when His Lordship made the expression, there were the Innkeepers and Hotel Proprietors Edict 1988 of Rivers State and 1990 of Kaduna State. It is with this legislation on hotels and inns that this study is concerned. It can therefore not be said that there are no local legislation on this subject matter in Nigeria. Although our courts are enjoined by law to take judicial notice of all legislation⁴², possibilities are that the courts may not just be familiar with the concept of consumer protection.

Although, the concurrent judgment of Aniagolu, JSC in Ngonadi's case appear to have brought the consumer something to cheers about, it is however doubtful if the cheers were not short-lived. With Ngonadi decided in 1985 by the Supreme Court, the legal development of consumer protection in Nigeria would by far be quite advanced today⁴³. This does not appear to be the case. In most of the cases that followed Ngonadi⁴⁴ the courts' decisions did not seem to reflect the charge by Aniagolu, JSC. In *Anyah v Imo Concorde Hotels Ltd. & 2 Ors*⁴⁵, the appellant had gone to Owerri for a book launch. He went to the 1st respondent's hotel and booked for accommodation for a night. At the gate of the hotel, the 2nd and 3rd respondents, who were the hotel security men on duty, registered the number plate of the appellant's car, and issued him with a plastic disc No. 2. The appellant drove in, parked his car in the parking space of the hotel, and checked into the room allocated to him.

In the morning the appellant checked out of the hotel but discovered that his car had been stolen. He reported the matter to the hotel management. The appellant then sued the respondents for the value of the car and other expenses incurred as a result of the absence of the car, alleging that the respondents were negligent in allowing his car to be stolen. The respondents denied owing the appellant any duty in respect of his car for which performance they were negligent. The High Court entered judgment for the appellant, but which the Court of Appeal overturned. Upon appeal to the Supreme Court the judgment of the Court of Appeal was allowed, leaving the consumer without a remedy. In this case, the Supreme Court ostensibly placed a near impossible to discharge burden of proof on the consumer, when it said, per Kalgo JSC:

*... the appellant gave evidence of the loss of his car but gave no detailed evidence of the fact and circumstance giving rise to the loss of the car. Nor did he explain the relationship between him and the respondents upon which the duty of care for his car would arise, and how that duty was breached*⁴⁶.

It is doubtful how the court expects this burden "of giving detailed evidence of how the car was stolen" to be discharge by a consumer, in matter which was not argued under bailment. Where it is under bailment, the burden of proof would have been shifted to the respondent to disprove his negligence. His Lordship expressed that if the appellant had after being given the plastic or metal disc, parked his car, locked it up, gave the key to the hotel security men and drew their attention to where he parked the car, then there may arise a duty of care on the part of the security men to ensure that the car was safe⁴⁷. Or had the appellant established that the respondents left the gate unattended and the car was driven out through the gate, only then would the appellant discharge the onus of the existence of a prima facie duty of care⁴⁸. These were however not to be. One wonders if these facts were or could be within the knowledge of the consumer. Certainly, a man who parked his car and went to sleep could not have seen the car being removed to be expected to give such detailed evidence of the removal of the car as required by the court. Also, a sleeping man could not have seen the respondents leave the gate unattended to and his car driven

out. It is doubtful if any consumer in the circumstances of this case can discharge this onerous burden of proof⁴⁹.

On the issue of relationship between the appellant and the respondent to warrant a duty of care for the car to arise, one is taken aback that in circumstance, where the appellant was given the hotel disk to enter and park in the hotel premises after his car number plate had been registered by the hotel security men, the court still demanded of the appellant evidence of duty of care for the car. The appellant did not just drive his car into the hotel, he went through all the security processes required of him by the hotel, as directed by the latter's security men. The burden of proof placed on the consumer in this case was quite onerous. Commentators are agreed that in placing such onerous burden of proof on the consumer, the Nigerian courts appear unmindful of the fact that the allocation of the burden of proof is usually resolved by policy consideration, fairness and probability⁵⁰. If these considerations were brought to bear by the Supreme Court in deciding Anyah, it is doubtful if the near impossible to discharge burden of proof would have still been placed on the consumer, the result would have probably been to place the burden of disproving negligence on the respondent, and not vice visa.

One wonders why the Supreme Court came to the decision in Anyah's case without advertent to the English case of *Williams v Linnitt*⁵¹, which facts were in all fours with Anyah's case. The facts of Williams' case are that the Plaintiff stopped at the Defendant's inns, parked his car in the inns' car park, which had a disclaimer of liability notice displaced, and had drinks with his friends at the inn. An hour later the Plaintiff found that his car had been stolen. The English Court of Appeal held that the car park was within the hospitium of the inn. The court considered the following facts: that the car park was contiguous to the inn and one in which a guest with a car was customarily invited to leave it; that no evidence was adduced that the inn provided an alternative accommodation for cars; and that part of the inn's normal business was to provide accommodation for the cars of guests.

The court held that the Defendant was liable and that the notice at the car park did not relieve the inn of its liability. Neither the parties nor the court in Anyah's case relied on Williams' case. It would appear that the court would have reached a different decision if it had advertent to Williams' case. Although Williams' case was based on the relevant English Law, the spirit underlying it, which is, to protect lodgers⁵², is recommended for adoption in Nigeria. In addition, the consumer in *Kabo Air Ltd v Oladipo*⁵³ did not fare any better. Although this is a Court of Appeal decision, the court seems to have been guided by the binding precedent of the Supreme Court in *Ibidapo v Lufthansa Airline*⁵⁴. The facts of the two cases are in *pari materia*⁵⁵.

In *Kabo Air*, the respondent boarded the appellant's aircraft on December 30, 1994 from Kaduna to Lagos to attend a family wedding and to celebrate the New Year with his family. He checked in his luggage and was issued with a luggage tag. When he arrived Lagos, he however discovered that his luggage was not checked

into the aircraft he boarded. He lodged a complaint with the appellant, but was asked to await the arrival of the appellants' next flight from Kaduna. On arrival that flight did not have the luggage. The respondent cut short his holiday and returned to Kaduna as he could neither attend the wedding nor the New Year celebration with his family. The respondent sued the appellant at the Kaduna State High Court claiming special and general damages.

The appellant was not represented at the trial, the respondent led evidence and obtained judgment. The appellant filed an application at the trial court praying the court to set aside its judgment. The application was dismissed, whereupon the appellant appealed to the Court of Appeal. Unanimously allowing the appeal, the Court held that the Carriage by Air (Non-International Carriage) (Colonies, Protectorates and Trust Territories) Order of 1953 is an existing law and is applicable in Nigeria as earlier held by the Supreme Court in *Ibidapo*. The court also held that the State High Court had no jurisdiction to have tried the matter in view of the Federal High Court (Amendment) Decree of 1991⁵⁶.

The consumer in this case was left disappointed. It is instructive to note that the relationship between an air carrier and its passenger in relation to the carriage of goods and luggage is one bailment, where a duty exists for the bailee to deliver the article to the bailor upon request. The relationship is also regulated by the Warsaw Convention adopted by the 1953 Order. While liability regime in bailment appears more liberal and consumer friendly, the decision in the case of *Kabo Air* does not seem to portray this. The court appears to have sacrificed the consumer's interest in that case on the altar of technicalities. One wonders why the court allowed technicalities to defeat the cause of the consumers in *Kabo Air* and *Ibidapo* when the circumstances of loss of luggage in both cases, that is, common carriers and air travellers, were similar to the loss suffered by the consumer in *Halliburton v Chapele*⁵⁷ and *Hill Station Hotel Ltd. v Adeyi*⁵⁸. It would appear that if the court adverted to consumer policy consideration and fairness in arriving at its decision in *Kabo Air* possibilities are that a different decision would have been reached by the court.

Although the consumer appeared to have had cause to smile in the more recent case of *Edward Okwejinor v Gbakeji and Nigerian Bottling Co. Plc.*⁵⁹, as will be seen shortly, the case compounded the consumer's dilemma. The fact of the case has it that Mr. Edward Okwejinor, the appellant at the Supreme Court, returned from work hungry and thirsty. He reached for a bottle of Fanta orange from a crate he purchased from the 1st respondent. While drinking the Fanta orange, he allegedly felt some sediments and rubbish down his throat. He stopped halfway and took a closer look at the content of the bottle and found that it contained a dead cockroach.

To the appellant, the quantity of the Fanta that he took gave him much discomfort, which led to incessant spitting and loss of appetite. He later developed stomach pain and was rushed to the hospital, where he was diagnosed as suffering from food poisoning after his stool and a sample of the fanta were sent for laboratory

analysis. The trial High Court held that the particulars of negligence pleaded by the plaintiff were proved and entered judgment in favour of the plaintiff. The 2nd respondent, Nigerian Bottling Co. (NBC) Plc., appealed to the Court of Appeal, that court allowed the appeal and entered judgment for the NBC⁶⁰. Dissatisfied with the Court of Appeal decision, the appellant appealed to the Supreme Court. The Supreme unanimously allowed the appeal, set aside the judgment of the Court of Appeal and restored that of the High Court. Concern was however raised for consumers when the Court held per Muhammed JSC, that from the totality of the evidence adduced, it would amount to a serious miscarriage of justice to hold Gbakeji, the 1st respondent, who was the retailer of the drink liable.

The statement by His Lordship on Gbakeji, seems to have adjusted the principle in the tort of negligence. Until then, the general perception was that those in the chain of distribution could not absolve themselves from liability on the sole excuse that they were not the manufacturers. It was believed that on the principle of joint and several tortfeasors, the retailer or the consumer could claim contribution from the manufacturers. The rationale for this could have been that the victim/consumer may not be able to reach the manufacturers, especially for imported product. Whereas, the retailer is more often than not known and accessible by the consumer, the manufacturer may never be known or reached by him. Nevertheless, there exists privity contract between the retailer and consumer (buyer), which by principle of contract may exclude the manufacturer. Under the provisions of the Sale of Goods Laws the retailer (seller) owes a duty to the consumer that the goods he is selling are not only free of defect, fit for the required purpose, but also of good quality⁶¹.

In Ngonadi's case the Supreme Court held to the effect that section 15(a) of the Sale of Goods Law of Bendel State⁶² does not draw a distinction between manufacturer and retailer and that both can be liable for breach of implied warranty as to fitness. In the words of Oputa, JSC, "Section 15(a) ... does not draw that distinction. In express language, its provision apply 'whether he is the manufacturer or not.' Secondly it is far too late in the day to draw that distinction [going by the principle of Lord Atkin in *Donoghue v Stevenson*]⁶³" In contract the retailer's liability is indisputable. Accordingly, the retailer's liability was not only allowed by the law of tort, but also by contract.

The distinction, Oputa JSC was referring to, which is now commonly known as the Atkinian principle, is that between the retailer and manufacturer in relation to liability. His Lordship's expression was merely a restatement of the law of negligence, where anyone in the distribution chain can be held liable. The pronouncement of Muhammed, JSC, in respect of the retailer's liability did not leave the position expressed in the Atkinian principle which was re-echoed by the same Supreme Court in Ngonadi's case undisturbed. It can rightly be asserted that by Okwejinor the consumer's dilemma was compounded as the Supreme Court succeeded in throwing more spanners into the works of consumer protection, apparently taking away with the left hand what it had given the consumer with the right hand.

The court must be considered as one of the institutions for the advancement of consumer protection, the other being the legislative administrative processes. Horowitz identifies six distinguishing characteristics which not only differentiate the adjudicative process from the other process, but equally serve as the institutional limitations of the court⁶⁴. One, adjudication is focused and essentially deals with individual rights and duties, and not necessarily with broad policy issues. Two, the courts have a limited variety of remedies compared with the broader range of alternatives available to the other institutions. Three, adjudication is piecemeal, and is rather apposite for a gradual adjustment.

Four, courts are passive and reactive, and so make litigation *ex post facto*. Fifth, facts finding in adjudication is ill-suited to ascertaining broad social facts concerning the broad policy issues raised in individual cases. Six, adjudication makes no provision for monitoring and assessment of the unintended behavioural impact of decisions and policy review. He sums up by asserting that these limited characteristics are more or less important depending on judicial familiarity with the regulatory are concern⁶⁵.

An assessment⁶⁶ of the level of familiarity of our courts with consumer protection regulatory concerns leaves much to be desired. Horowitz' assertion in respect of institutional limitation of the courts has come under attack by Chayes⁶⁷. Chayes identified the following as the institutional advantages for the duties the courts assumes. One, is that the judicial process is presided over by a judge or magistrate whose professional ethics separates him from undue political pressures. Two, is that the judicial process allows *ad hoc* applications of broad national policy in situations of limited scope, where solutions are adapted to meet the need of a particular condition and flexibility administered as experience develops. Three, is that the judicial process allows a relatively high degree of participation by those who will be directly affected by the decision or their representatives. Four, is that the information required and used by the courts to arrive at a decision is often not filtered through the rigid structures and preconceptions of bureaucracies. Five, is that the judicial process is an effective mechanism for registering and responding to grievances generated in a regulatory state as it responds to the complaints of the aggrieved.

The task here is that of balancing the importance of competing policy interests in any specific situation. Six, is that the judiciary is non-bureaucratic in nature, with the advantage of tapping the energies and resources outside itself and government in the exploration of the situations and the assessment of remedies as it does not work through a rigid, multilayered hierarchy of numerous officials, but through a small, representative task force, assembled *ad hoc*, and easily dismantled when the problem is eventually resolved⁶⁸. Chayes argument has been noted to be generalised within the specific cultural, legal and political realm of the United States of America⁶⁹.

It is doubtful if it is apposite for Nigeria which has a legal system akin to the English, with the Common law tradition. Even though developed by the Americans within the context of judicial review of legislative actions particularly, regarding

constitutional matters, the concept of "judicial restraint" has been generally expressed within the common law realm⁷⁰. Adumbrating on this, Justice Uwais, then CJN expressed to the effect that judicial self restraint has given rise to the doctrine of *locu standi*, "or the interest which a person must have to invoke the court's intervention in constitutional cases. This according to His Lordship resulted in a deliberate policy to avoid adjudication of such cases, which he regarded as "self imposed" than inherent. He sums up by describing the process as "... an attitude motivated by self restraint which finds practical expression in a policy of avoidance⁷¹".

The expression of His Lordship, though made in respect of exercise of judicial review of legislative action, is of paramount relevance in the wider issue of when or when not to hold torfeasor liable by a court. This issue transcends the borders of Nigeria, as Lord Dinning in *Candler v Crane, Christmas & Co.*⁷², divided his fellow judges into two categories, that is, category one being the timorous souls who were fearful of allowing a new cause of action, and category two being the bold souls who were ready to allow it if justice so required. From this categorisation, and attitude of our courts in consumer protection, one is tempted to conclude that our judges are rather reluctant and develop heavy hand in making pronouncement that involve consumer's right. Considering the line up of cases reviewed herein, the temptation is to wonder if the Supreme Court in Anyah's case did not allow a rare opportunity of developing and entrenching a positive judicial policy on consumer protection to slip away.

CONCLUSION

One of the purposes of law is that law must solve the changing problems of the society. It can be gleaned from this study that the present institutional framework in place in Nigeria is far from meeting the needs of the consumer. From the line-up of cases reviewed in this study, it is obvious that beside the problem of lack of appropriate legislation, the court has hardly been able to rise to the occasion, whenever a consumer approaches it for redress. It would appear that what is required is legislative intervention. Until then judicial activism is the only lifeline available to the consumer. Adumbrating judicial activism, Oputa, JSC posits:

We [the judiciary] are not to fold our hands and do nothing. No. Our judges have to so interpret the law that it makes sense to our citizens in distress and assure them of equal protection of the law, equal freedom under the law, and equal justice. And this is what judicial activism is all about⁷³.

His Lordship went on to identify Lord Denning as a judge whose activism impacted positively on the state and litigants. According to him, several "jurisdictions have been positively affected by Denning's activism and many of their judges have adopted his approach of making law a handmaid of justice and making law solve the changing needs of dynamic society - The Sociology of Law.⁷⁴" Protection the consumer is a social challenge in Nigeria, and social justice require the *hunc et nunc*- the here and now, it entails solving social problems that now exist with laws

and legal procedures tailored to suit the peculiar circumstances of the society. To protect the Nigerian consumer requires the progressive application the fundamental principles of the constitution and international policies like the United Nations Guidelines on Consumer Protection and the Model Law for Consumer Protection in Africa, the principles of equity, justice and purposeful advancement of the consumer welfare.

NOTES

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³**Chukwu, I. M.** (2005). Advertising Practice and Consumer Protection. *Consumer Journal* (1)1,137

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Igweike, K. I. (2001). Consumer Protection in a Depressed Economy, 12th Inaugural Lecture, University of Jos, Jos, Nigeria, at 1.

Kanyip, B. B. (1979). *Consumer Protection in Nigeria: Law, Theory and Policy*. at p. 1;

Mickleburgh, J. (2010). *Consumer Protection*. Oxon: Professional Books. ⁴Available at <http://en.wikipedia.org/wiki/Consumer> (accessed May 3, 2010).

⁵**Boma, A. F.** (2008). Control of Advertisements as a Consumer Protection Measure in Nigeria. Unpublished Ph. D. Thesis, University of Calabar, Calabar, Nigeria, , at p. 178.

⁶These include ministries of Trade and Industry; Health; Human Resources, ⁷This Act was promulgated in Nigeria by Decree No. 66 of 1992, and signed into law on November 23, now the Consumer Protection Council Act Cap. C25 LFN 2004, hereinafter referred to as the Act.

⁸Established by Decree No. 15 of 1993, now the National Agency for Food and Drugs Administration and Control Act Cap. N1 Laws of the Federation of Nigeria, 2004.

⁹It was established by the Standards Organisation of Nigeria Decree No. 56 of 1971, now the Standards Organisation of Nigeria Act Cap. S9 Laws of the Federation of Nigeria, 2004, hereinafter referred to as the SON Act.

¹⁰Set up by Decree No. 75 of 1992, now the Nigerian Communications Commission Act Cap. N97 Laws of the Federation of Nigeria, 2004.

¹¹Set up by Decree No. 104 of 1992, now the Utilities Charges Commission Act Cap. U17 Laws of the Federation of Nigeria, 2004.

¹²Set up by Decree No. 1 of 1997, now the National Insurance Commission Act Cap. N53 Laws of the Federation of Nigeria, 2004.

¹³Established by the Nigerian Tourism Development Corporation Act Cap. N137 Laws of the Federation of Nigeria, 2004.

¹⁴See s. 4 of the Nigerian Tourism Development Corporation Act. By s. 7 of the Act State Tourism Boards are established for the states of the federation with corresponding functions. Pursuant to this section there is for instance the AkwaIbom State Hotels and Tourism Board, with a Tourism Board Law, Cap. 132 Law of Akwa Ibom state 2000 in place for the day to day running of the Board.

¹⁵Boma, at p. 179.

¹⁶ The UN General Assembly adopted these Guidelines in 1985 by Resolution 39/248 of April 1985. There is much similarity between the goals of the Act and those of the UN Guidelines on

Consumer Protection, and to those spelt out in the Model Law for Consumer Protection in Africa which was adopted at a conference held at Harare, Zimbabwe from April 28- May 2, 1996. Under paragraph 3 of the UN Guidelines, the goals intended for the protection of the consumers are:

- a. The protection of consumers from hazards to their health and safety.
- b. The promotion and protection of the economic interests of the consumers.
- c. Access of consumers to adequate information to enable them make informed choices according to individual wishes and needs.
- d. Consumer education, and
- e. Availability of effective consumer redress.

Article 3 of the Model Law for Consumer Protection in Africa lists the goals for consumer protection to include health and safety in the consumption of technology, goods or services, the provision of basic or essential needs, amenities and facilities, consumer education, true and timely compensation for damages suffered by consumers, the right of association and access to the appropriate competent authorities and judicial bodies for the protection of their legitimate interests at reasonable cost.

¹⁷See ss. 2 and 3 of the Act.

¹⁸S. 2(i) of the Act

¹⁹Ibid; see also Agbale, E. A., "Regulatory Schemes and Consumer Protection: A Critique" (1993) 7 JBLs p. 24; Monye, "Enforcement of Consumer Protection Laws in Nigerian" (2007) 3 No. 1 Delta State University Law Review, p.89; Monye, F. N. (2003). Law of Consumer Protection, (Ibadan: Spectrum Books Ltd. Ukwueze F. O. (2008). Consumer Protection through Criminal Law in Nigeria" *Nigerian Journal of Public Law*, vol. 1, No. 1, p.123.

²⁰For example s. 12 of the Act criminalises the sell, offer to sale any hazardous goods, or the provision of any service or any advertisement which cause injury or loss to a consumer, and prescribes punishment of N50,000 or a term of five years imprisonment or both to anyone found guilty of the offence.

²¹Monye, "Enforcement of Consumer Protection Laws in Nigerian", at p. 95. ²²She contends further that to so allow will impose additional burden on the accused person who would be required to defend himself both before the Council or State Committee and the Court.

²³Monye, "Enforcement of Consumer Protection Laws in Nigerian", at p. 95.

²⁴S. 46 Constitution of the Federal Republic of Nigeria 1999, hereinafter referred to as the Constitution.

²⁵S. 35(1) of the Constitution guarantees the citizens right of life. It would appear that the to supply to a consumer goods or services that are defective or deficient as to endanger the life of the consumer may constitute the infraction or likely infraction of this section of the Constitution.

²⁶Kanyip, Consumer Protection in Nigeria: Law, Theory and Policy, at pp. 312-313.

²⁷Kanyip, B. B., "Legal Issues in Consumer Protection in Nigeria", being a paper presented at the Refresher Course for Judges and Kadis, held at Andrews Otutu Obaseki Auditorium, National Judicial Institute, Abuja, from March 23 to 27, 2009 at p. 29.

²⁸Inigbedion, N. A., "Consumer Merchantability and Standards Organization of Nigeria" (1993) 2 Edo State University Law Journal, p. 79. The argument is that it should be possible for a customer to sue SON if it negligently certified a product which turns out not to be merchantable or caused injury to the consumer; see also Kanyip, B. B "Reflections on Consumer Protection Law in Nigeria" in Ayua, I. A., (ed.) Law Justice and the Nigerian Society (Lagos: NIALS, 1995) pp. 300 - 301. A detailed discussion on this has been captured in note 4.6.1 under the SON in chapter 4.

²⁹Oputa, Chukwudifu A., "Quod Vadis- Nigerian Supreme Court: Judicial Activism or Judicial Rascality", in Towards Functional Justices: Seminar Papers of Justice Chukwudifu A. Oputa, ed. by Okeke, Chris (Ibadan: Gold Pres Ltd., 2007) 356 at p. 368.

³⁰Monye, Law of Consumer Protection, at p. 1.

³¹See Cap IX, Constitution of the Federal Republic of Nigeria 1999, hereinafter referred to as "the Constitution".

- ³²[1985] 1 Nigerian Weekly Law Reports (Pt. 4) 739, at p. 753.
- ³³Italics mine for emphasis.
- ³⁴Hill Station Hotel Ltd. v Adeyi [1996] 4 Nigerian Weekly Law Reports (Pt. 442) 294, at p. 312.
- ³⁵Kanyip, Consumer Protection in Nigeria: Law, Theory and Policy, at p. 175.
- ³⁶Borrie, Gordon and Diamond Aubrey L., *The Consumer Society and the Law*, 3rd ed. (Middlesex: Penguin Books, 1977) at pp. 14-15 and 238-242.
- ³⁷This being a Statute of General Application by virtue of Ordinance No. 3 of 1863; see *Attorney General v John Holt & Co.* (1910) 2 Nigerian Law Reports, 1.
- ³⁸See item 18, Part II to the 2nd Schedule to the Constitution.
- ³⁹Kanyip, Consumer Protection in Nigeria: Law, Theory and Policy, at p. 177.
- ⁴⁰The Innkeepers and Hotel Proprietors Law Cap 63 Laws of Akwa Ibom State 2000.
- ⁴¹The Innkeepers and Hotel Proprietors Edict No. 3 of 1990 Laws of Kaduna State; the Innkeepers and Hotel Proprietors Law Cap. 71 Laws of Rivers State 1999; and The Innkeepers and Hotel Proprietors Law of Lagos State.
- ⁴²S. 74(1) (a) and (b) of the Evidence Act Cap E14 Laws of the Federation of Nigeria, 2004.
- ⁴³Kanyip, "The Supreme Court and the Development of Consumer Protection in Nigeria" unpublished seminar paper of the author, at p. 2.
- ⁴⁴Anyah v Imo Concorde Hotels Ltd. & 2 Ors [2002] 12 Nigerian Supreme Court Quarterly Reports, 231, 12 S.C. (Pt. II) 77; *Ibidapo v Lufthansa Airline* [1997] 4 Nigerian Weekly Law Reports 124 SC; *Kabo Air Ltd v Oladipo* [1999] 10 NWLR 517 CA; *UTA French Airlines v Williams* [2000] 14 Nigerian Weekly Law Reports 271; *Amadi v Essien* [1994] 7 Nigerian Weekly Law Reports 91 CA; *Cf the High Court case of Atuegbu v NEPA* [1980] 1 PLR 469.
- ⁴⁵Supra
- ⁴⁶Anyah's case (above cited) at pp. 245-246.
- ⁴⁷Anyah's case (above cited), at p. 246.
- ⁴⁸Anyah's case (above cited), at p. 249.
- ⁴⁹Commentators on consumer protection in Nigeria have recognized that the greatest set back to consumer recovery in our courts is placing the onus of proof on the consumers even when it is practically impossible for them to discharge. See generally, Kanyip, *Consumer Protection in Nigeria: Law, Theory and Policy*, at pp. 279-296; Monye, "The Defence of Foolproof System of Production" (2005) 1 *Consumer Journal*, No. 1 (2005) at pp. 1-34; and Agomo, C. K.: "Liability for Defective Products", at p. 68.
- ⁵⁰Fleming, John. G., *The Law of Torts* 7th ed. (Sydney: The Law Book Co. Ltd.1987) at p. 285; Adekunle, A., "Consumer Protection in Nigeria: An Update" (1993) 9 *Justice* No. 7 p. 72 at pp. 74-75; Kanyip, "The Supreme Court and the Development of Consumer Protection in Nigeria", at p. 10.
- ⁵¹[1951] 1 All E R 278.
- ⁵²Adediran, M. O. & Oyelade, O. S., "Responsibility of Hotel Proprietors for Loss of Lodgers' Properties: An Examination of Anyah v. Imo Concorde Hotel & Ors" (2004) 3 No 1 *Ibadan Bar Journal*, p. 130, at p. 135.
- ⁵³Supra
- ⁵⁴Supra
- ⁵⁵While *Kabo Airlines* relates to local air passenger, *Ibidapo* relates to international air passenger.
- ⁵⁶[2008] 33 Nigerian Supreme Court Quarterly Reports (Pt. II) 863.
- ⁵⁷*Okwejinor v Gbakeji and Nigerian Bottling Co. Plc.*, [1998] 8 Nigerian Weekly Law Reports 295, CA
- ⁵⁸Ss. 13-15 *Sale of Goods Act 1893*; ss. 12-14 *Sale of Goods Law Cap 117 Laws of Akwa Ibom 2000*; ss. 14-16 *Sale of Goods Law Cap 174 Laws of Lagos 1994*; ss. 14-16 *Sale of Goods Law Cap 150 Laws of Bendel State 1976* applicable in Edo; ss. 15-17 *Sale of Goods Edict No. 15 of Kaduna 1990*; and ss. 12-14 *Sale of Goods Law Cap 115 Laws of Rivers 1999*. In this paper *Sale of*

Goods Law is hereinafter referred to as "SOGL"

⁵⁹Now applicable in Delta State, with similar provisions in s. 14 s SOGA, s. 13(1) SOGL Akwa Ibom, s. 15(a) SOGL Lagos, s. 16(1) SOGE Kaduna; and ss. 13(1) SOGL Rivers

⁶⁰See Ngonadi's case, at p. 750.

⁶¹Horowitz, D L., *The Courts and Social Policy* (Washington D. C.: Brookings, 1977) at pp. 34-56.

⁶²Horowitz, at p. 58; see also Kanyip, "The Supreme Court and the Development of Consumer Protection in Nigeria", at pp. 3-4.

⁶³An exercise undertaken in few paragraphs above.

⁶⁴Chayes, A., "The Role of the Judges in Private Law Litigation" (1976) 9 *Harvard Law Rev.* 1281.

⁶⁵Kanyip, "The Supreme Court and the Development of Consumer Protection in Nigeria", at p. 4.

⁶⁶Kanyip, at p. 4, cited in Note 64.

⁶⁷Kanyip, at p. 4, cited in Note 65.

⁶⁸Uwais, M. L., "The Courts and the Legislative Privileges" a paper presented at the 2003 All Nigerian Judges' Conference held at Nicon Hilton Hotel, Abuja, between December 9 and 13, 2003

⁶⁹[1951] 2 K. B. 164 at p. 178; 1 All E. R. 426 at p. 432.

⁷⁰Oputa, Chukwudifu A., "Legal and Judicial Activism in an Emerging Democracy: The Last Hope for the Common Man?" in *Towards Functional Justices: Seminar Papers of Justice Chukwudifu A. Oputa* ed. by Okeke, Chris (Ibadan: Gold Press Ltd., 2007) 12 at p. 27.

⁷¹Oputa, Chukwudifu A., "Judicial Activism or Judicial: A Catalyst for Political Development or Rascality" , 37 at p. 58, cited in Note 69