CONTRACTS MADE BY THE COURTS

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INTRODUCTION

"The rights and duties with which jurisprudence busies itself again are nothing but prophecies..."

To make a statement, such as the one contained in the heading to this essay, that "courts do make contracts" would ordinarily be treated with disdain and regarded as a blunder or impropriety. The often-repeated dogma is that courts do not make contracts for parties due to the concept of party autonomy and freedom of contract. However, I dare say, that in practice many contracts are held to exist by the courts in circumstances in which the parties did not intend to create one, or did not realize that they were creating. More so, further obligations are held to exist by the courts which are not actually said to be contractual but which, nevertheless, arise out of assumed and/or failed contractual situations. There indeed is a major difference between contracts made by the parties and contracts *"made by the courts"*.

Party-made contracts viz-a-viz court made contracts

When parties themselves make contracts, their aim is to do so in advance. In that, the purpose of the contract is to regulate some future arrangement although they may at times conclude agreements which lack this element of futurity. That notwithstanding, any time parties enter into a contract, they are either dealing with the present or the future. In my humble submission, court made contracts usually operate differently as courts mostly deal with the past. Courts declare that as a result of what the parties have already done, certain obligations lie upon them.

In further justifying the imposition of these obligations, courts ordinarily would declare that there was a contract between the parties. It is mostly due to the failure of pre-agreed rules on the validity of an offer and its corresponding acceptance which leads to contractual obligations or contracts created by the courts. The contracts created by the courts are imposed on the parties rather than arising from the actual agreement of the contracting parties.

No general duty of good-faith under common law

Under common law, the concept of good faith in contract law is non-existent whether in the formation of the contract or in the performance of same. Thus, common law does not impose an overarching duty of good faith in the making of contracts. Similarly, the **Contracts Act, 1960 (Act 25)** does not explicitly recognize a general duty of good faith in contract making. Thus, parties who negotiate with each other do so *"at arm's length"* and each of the parties is to stand on his or her own feet and look after his or her own interests.

However, in practice, this is often found by the courts to be incompatible with ideas of fairness and justice. Thus, because of the absence of any general concept of good faith, the technical means by which courts impose these duties are sometimes strained. Judges would usually not hesitate to use whatever technique in order to achieve justice and fairness upon the application of the objective or reasonable man's test. In doing so, judges make contracts.

The secondary function of contract law: allowing courts to do justice

The primary function of contract law is to enable the making of future arrangement by autonomous and private contracting parties. However, the secondary function of contract law is basically a corrective or remedial one which is – enabling the courts to do justice by imposing obligations on people as a result of what they have done, rather than what they have agreed. Thus, in practical terms, courts resort to the use of other legal doctrines to justify action of this kind which amounts to making contracts for the parties and thus sinning against the principle of freedom of contract and party autonomy.

It must be admitted that the distinction between these two (2) functions is often not clear cut. Whenever parties are in dispute over an unforeseen result, it is mostly unclear whether the ultimate legal solution is made by the parties or by the court and for that matter whether the contract is made by the former or the latter. Usually, all manner of contracts are "implied" in a wide range of circumstances and most at times the implication is genuine or fictitious. Whatever the case may be, in correcting or attempting to apply a remedial function to contracts, courts make contracts and imposed obligations not necessarily agreed to or contemplated by the parties.

Conclusion

Indeed courts, it is submitted, mostly imply obligations affecting parties who have entered into some contractual or similar relation although it is usual for courts to deny that they are imposing anything on the parties. But when looked carefully, it can be seen that those agreements are rather the creation of the courts mainly because the parties have no option than to act rather than to have agreed. Even here, it is possible for the court to imply a contract, and it is then a good deal more difficult to adhere to the pretence that the court is not imposing its solution on the parties. In such situations, the whole contract formed becomes a legal construct of this kind discussed in this paper.

God bless!

ABOUT THE AUTHOR

REGINALD NII ODOI is a Barrister and Solicitor of Ghana who obtained his Master of Laws (LLM) Degree from Harvard Law School in Cambridge, USA. He is also a proud alumnus of Kwame Nkrumah University of Science and Technology (KNUST) where he graduated with First Class Honors and notably served as the President of the Law Students' Union and the Legal Affairs Commissioner of the SRC, amongst others. He was called to the Ghana Bar in 2016. His research areas include Comparative Constitutional Law; Corporate & Commercial Law; International Investment Law and Arbitration and International Law. His goal is to contribute to re-envisioning the way effective lawyering could be done in today's world.