

CONTEXTUALISING UNEMPLOYMENT THROUGH REGURGITATED LEGAL NORMS

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Abstract

This article focused on the concept of unemployment within the context of legal norms on job protection. It considered unemployment as a major labour market risk, and distilled it from the closely-related concept of underemployment. It also underscored the adverse impact of unemployment on both the global and domestic labour workspaces against the backdrop of data from the International Labour Organisation and the National Bureau of Statistics. In articulating spectrum of options in addressing the unemployment challenge and entrenching job security in Nigeria, it looked beyond existing constitutional huddles and provided strong base for judicial activism as leeway for the National Industrial Court of Nigeria to efficiently and responsively wade into the specific challenge of wanton termination of employment through the application of international

labour standards and global best practices. The article indicated the modes in which labour legislation influence and impact on unemployment rate, and recommended, inter alia, that labour regulations be re-couched in a manner that prevents job loss through wanton termination of employment through the application of international labour standards and global best practices on termination of employment by the National Industrial Court of Nigeria. The article concluded with the need to remodel laws, policies and programmes aimed at addressing existing gaps in employment protection regime and provide relief to the unemployed segment of the labour force population.

Key Words: Unemployment; Unemployed; Jobs; Workplace; Labour.

Introduction

People build much of their lives around their jobs.¹ Where the requisite jobs that afford some sort of fulfilment and incomes are not accessible or obtainable, satisfaction of personal needs and family support become threatened with all sorts of ripple effects on the society and even on the employed segment of the workforce. As detached as it may appear, unemployment also threatens development programmes.² For the world's poorest countries, development programmes are fundamental for enhanced livelihoods and poverty reduction. As a manifestation of under development,³ unemployment also contributes to political instability in the sense that the unemployed

consider the state as an oppressor with nothing to offer.⁴ This is particularly so in cases where the unemployed are not educated or trained. As a critical multi-facet challenge, the growing unemployment rate calls into question the commitment of nations across the globe in advancing social justice and addressing the need of the populace.⁵ In the colonial era, it was hard to come by unemployed graduates.⁶ However, this trend has changed with increasing number of graduates churned into the labour market every year. With the larger numbers of young workers entering the African labour market every year, the need to create employment opportunities becomes even more pressing.⁷ Even the employable fraction of these graduates had to contend with the

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1 Emeka Chianu, *Employment Law* (1st edn, Bemicov Publishers (Nigeria) Ltd 2004) 1.
2 SC Srivastava, *Industrial Relations and Labour Law* (5th edn, Vikas Publishing House PVT Ltd 2007) 7.
3 Udegbonam Charles, *Graduate Unemployment in Nigeria: A Critical Analysis of the Genesis, Structure and Impact on Development of Abuja* (Abuja Express Services Consultants 2006) 50.
4 Ibid 123.
5 In Nigeria, it is common for the issue of unemployment and job creation to dominate the agenda of political parties seeking votes during electioneering campaigns.
6 Udegbonam (n 3) 23.
7 International Labour Organization, *World Employment and Social Outlook: Trends 2020* (International Labour Organization 2020) 43.

challenge of unemployment. The share of agriculture and manufacturing sectors in total employment absorption is shrinking across all country.⁸ Attempts by countries to deal with unemployment challenge have brought about myriad of adjustments in policies, regulations and programmes. The outcomes of these adjustments vary from country to country. Even at this, unemployment still remains a major concern for the modern workplace. This is an indication of misplaced priorities, and validation of the fact that a number of solutions sought to address the unemployment challenge end up addressing symptoms rather than causative element. In the most critical instance, there is dearth or paucity of efforts at identifying and articulating workable options that may serve as panacea to this challenge. As between developed and developing nations, the situation in the latter is critical. It is, therefore, expedient to rigorously undertake an assessment of the unemployment phenomenon, rejig the mechanism for absorbing unemployment, extend focus to non-conventional areas of engagements and address gaps in extant legal regime on job protection.

Concept of Unemployment

Unemployment is the direct opposite of employment. The term “unemployment” is quite elastic and can be expanded to include all cases of termination of service either voluntary or by the act of parties.⁹ In the absence of a homogeneous definition, countries often adopt definition that suit their priorities and circumstances. In the loose sense, unemployment is a colloquial term for joblessness - a situation whereby people who are physically fit, capable, qualified and ready to work at any time are without jobs.¹⁰ This construction underscores the fact that unemployment is occasioned by the surplus of labour supply over labour demand. In other words, unemployment epitomises a mismatch between labour supply and demand. Interestingly, the mismatch between labour demand and supply extends far beyond unemployment to creating large labour market

slack which is unlikely to diminish in the context of the current subdued global economic outlook.¹¹ However, in the strict sense, being unemployed or jobless, without more, does not sufficiently denote unemployment. The state of being unemployed or jobless must necessarily be coupled with employability/fitness for task(s), and active search for the job. This is predicated on the fact that people who are not actively seeking a job but actually want to find one are not considered unemployed¹². It is on this basis that the International Labour Organisation (ILO) construe unemployment as the best-known form of labour underutilization in which people who are available to take up employment but unable to find a job despite their search efforts¹³. The search for work has to be in reference to specified reference period(s), and those which such search for work relates covers persons aged 15-64 who during the reference period were available for work, actively seeking work, but were but were without work or unable to find work¹⁴. Those in self-employment are clearly outside the unemployment bracket.

The ILO construction of unemployment brings to bear the distinction between *labour force population* and *non-labour force population*. On the one hand, *labour force population* (comprising of the employed, underemployed and unemployed) covers all persons aged 15 to 64 years who are willing and able to work regardless of whether they have a job or not¹⁵. On the other hand, *non-labour force population* includes persons younger than 15 or older than 64, as well as those within the economically active population (ages 15-64) who are unable to work, not actively seeking for work or choose not to work and/or are not available for work¹⁶. It, therefore, follows that unemployment relates directly to the segment of the labour force population comprised of persons of working age and excluding individuals who have stopped looking for jobs owing to reasons such as retirement and disability¹⁷. Available statistics appears to have pegged the

8 International Labour Organization (*World Employment and Social Outlook: Trends 2019*) (International Labour Organization 2019) 14.

9 Srivastava (n 2) 174.

10 Olawunmi Omitogun and Adedayo Emmanuel Longe “Unemployment and Economic Growth in Nigeria in the 21st Century: VAR Approach” *Acta Universitatis Danubius* [2017](13)(5) 155.

11 International Labour Organization (n 7) 26.

12 Unemployment <<https://corporatefinanceinstitute.com/resources/knowledge/economics/unemployment/>> accessed 6 August 2020.

13 International Labour Organization (n 7) 30.

14 National Bureau of Statistics, *Labour Force Statistics - Volume I: Unemployment and Underemployment Report (Q4 2017-Q3 2018)* (National Bureau of Statistics Dec 2018) 4, 8 and 9.

15 Ibid, 4.

16 Ibid.

17 It should be noted that simply looking at job advertisements without responding to same will not count as actively seeking job placement.

working age in Nigeria at ages 15-64¹⁸ and the non-working age at ages less than 15 and more than 64¹⁹. However, this categorisation is in discordance with the prime legislation aimed at protecting the rights of the Nigerian Child²⁰. Beyond the prohibition of exploitative labour²¹, Child's Rights Act 2003 defines a "child" as a person under the age of eighteen years, and it further construes the "age of majority" to mean the age at which a person attains the age of eighteen years²². This is in tandem with the definition under article 1 of the United Nations Convention on the Rights of the Child 1989, which defines a child to mean every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Persons between ages 15-17 may be open to employment in the light of ILO construction of unemployment. However, extant legal regime in Nigeria frowns against such except where such employment is by a member of the child's family on light work of an agricultural, horticultural or of domestic character or as domestic help within his own home or family environment²³. While it is admitted that there are a number of causes of child labour, adult unemployment remains a common cause. As a symptom of poverty²⁴, child labour leads to decrease in schooling hours and human capital

formation of the child²⁵. It suffices that child labour not only undermines the basic rights of children to be able to acquire the skills and education needed for a better future; it also perpetuates poverty and inequality and inhibits national economies through losses in competitiveness, productivity and income²⁶. Since eliminating child labour is an important facet of the ILO's Decent Work Agenda, it behoves ILO's constituents to make it a priority to withdraw children from child labour and provide them with education, and assist their families with employment opportunities for adults of working age²⁷.

In consonance with recent global trends, the Nigerian unemployment rate has been on the incline since the economic crisis in 2014²⁸. This may not necessarily translate to increase in job loss, which is one of several causes of unemployment²⁹. It could mean that the rise in unemployment is underscored by increase in the number of people searching for jobs or those previously outside the labour force (e.g. students, housewives, etc.) have decided to join the labour force and are now in active search of jobs³⁰. Unemployment in Nigeria has traditionally been an urban phenomenon³¹. Although rural unemployment exists, the rate is insignificant as what is more prevalent in the rural areas is underemployment³². Much of the underemployment in the rural areas is attributed to the seasonal nature of agricultural production³³. At the moment, government remains the largest employer of labour³⁴. This gives room for the interrogation of the role of the private sector in the soaring employment rate and, perhaps, even relieving the government of the wider employment capacity and shifting government's role to

18 National Bureau of Statistics (n 14) 4.

19 Ibid. Please note that the working age is not a representation of the minimum age for employment which is 12 years. Even at this, a child under 12 years can be employed to work in any family enterprise on light work of an agricultural, horticultural or domestic nature approved by the Government. A child must not be required to lift, carry or move anything so heavy as to injure his physical development. Young person under fourteen years of age can be employed on daily wage and day to day basis, except where they are employed in domestic service. They must be employed on a day to day basis, be paid their daily wage, and return to their residence place. Minimum age for employment in industrial undertakings is 15 years. However, this cut-off age is not applicable to the work done by young persons in technical schools or similar institutions if the work is approved and supervised by the relevant government department (Ministry of Education). Young persons, under the age of sixteen, may not be employed to work underground or on machine work or on public holiday. They are prohibited to work in circumstance where they are unable to return to their residence place except with the approval of the authorized Labour Officer, or where the employment is evidenced by a written contract that conforms to the requirements of the Labour Act with respect to a contract of employment. Please, see section 59 Labour Act 2004; sections 28 and 29 Child's Rights Act 2003, Cap. C50, Laws of the Federation of Nigeria 2004, as updated to 31st December 2010.

20 The Child's Rights Act 2003, Cap. C50, Laws of the Federation of Nigeria 2004, as updated to 31st December 2010 provides blueprints for various states of the federation in enacting similar legislations at the state level for the protection of the child. Section 1 Child's Rights Act 2003 provides that in every action concerning a child the best interest of the child shall be the primary consideration. See also section 2(1) Child's Rights Act 2003, Cap. C50, Laws of the Federation of Nigeria 2004, as updated to 31st December 2010.

21 Ibid section 28.

22 Ibid section 27.

23 Section 28(1)(b)(d) Child's Rights Act 2003, Cap. C50, Laws of the Federation of Nigeria 2004, as updated to 31st December 2010. See also section 59(1)(a) and (b) Labour Act 1971, Cap. L1, Laws of the Federation of Nigeria 2004, as updated to 31st December 2010.

24 International Labour Organization and Centre for Economic and

International Studies, *Understanding Trends in Child Labour: A joint ILO, UNICEF and World Bank Report* (International Labour Organisation and Centre for Economic and International Studies Nov 2017) 44.

25 Chakraborty Bidisha and Chakraborty Kamalika, *Low Level Equilibrium Trap, Unemployment, School Quality, Child Labour and Human Capital Formation* <https://mpra.ub.uni-muenchen.de/74621/1/MPRA_paper_74621.pdf> accessed 6 August 2020.

26 International Labour Organisation and Centre for Economic and International Studies (n 24) 1.

27 This will be in line with target 8.7 of the Sustainable Development Goals (SDGs) in which the international community has shown commitment to ending child labour in all its forms by 2025.

28 National Bureau of Statistics (n 14) 42.

29 Ibid 2, 6.

30 Ibid 2.

31 Tayo Fashoyin, *Industrial Relations in Nigeria: Development and Practice* (2nd ed, Learn Africa Plc 1992) 26.

32 Ibid.

33 Ibid.

34 Akintunde Emiola, *Nigerian Labour Law* (4th edn Emiola (Publishers) Limited 2008) 461.

predominantly that of policy formulation and labour market regulation.

Unemployment vis-a-vis Underemployment

Unemployment and underemployment are closely related but distinguishable concepts. Underemployment is a form of labour underutilization which occurs where one works less than full time hours (40 hours) but work at least 20 hours on average a week and/or if one works full time but engaged in an activity that underutilizes skills, time and educational qualifications³⁵. Underemployment exists where employed persons have not attained full productive capacity. Workers affected by underemployment include those that are engaged in low-pay jobs, those overqualified with education, experience or skills beyond the requirements of the job, and those engaged on part-time basis in spite preference to work on full-time basis. It, therefore, follows that underemployment may assume the nature of time-related underemployment which occurs where workers work fewer hours than they would like to and are working less than a specified number of hours (often less than 35 hours per week)³⁶ or inadequate employment situations which are due to other limitations in the labour market that inhibits capacities of workers.

Underemployment often occurs on account of unemployment³⁷. However, unlike unemployment, underemployment has been declining gradually at the rate of 20.1 per cent in the last quarter of 2018³⁸. This is a reflection of the fact that many workers have no choice but to take poor quality work, lacking security, decent pay and social protection³⁹. While poverty is often associated with joblessness, a significant proportion of the poor are actually employed⁴⁰. This is the fulcrum of the concept of “working poor” that is used to describe working people whose incomes fall below a given poverty line due to lack of work hours and/or low wages⁴¹.

This means that being in employment may not necessarily guarantee a decent life. This is so because many workers find themselves having to take up vulnerable jobs (especially in the informal economy) which are associated with low pay and little or no access to social protection and rights at work⁴². In any case, the international construction of unemployment and underemployment is not a function of job satisfaction or quantity/suitability of wages earned, but rather a function of a person's involvement or otherwise in economic activity even if that activity is performed solely to make ends meet and not for satisfaction or enjoyment⁴³.

Impact of Unemployment on Labour Outlook

Unemployment rate is a labour market performance indicator that is determined using employment-to-population ratio (EPR). In practice terms, unemployment directly affects the *working age population* of the labour force (those between ages 15 to 64)⁴⁴. By implication, the *non-working age population* (those less than the age of 15 and above 64)⁴⁵ cannot be subject of unemployment. With estimated 188 million people are unemployed in 2019⁴⁶, the International Labour Organisation pegged the global unemployment rate at 5.4 per cent⁴⁷. This means an estimated 5.4 per cent of the global labour force was unemployed in the period under review⁴⁸. It also means that the world economy is currently not generating enough jobs to absorb all of the new labour market entrants⁴⁹. The current global unemployment rate is a slight increase from the previous rate of 5.0 per cent with an estimated 172 million people unemployed⁵⁰. The slight adjustment in global unemployment rate aligns with earlier projection that the global unemployment rate is expected to remain at roughly the same level between 2019 and 2020⁵¹. As an indication of labour underutilization in the global workspace, the global unemployment rate

poverty entails a situation where a worker lives in a household with income or consumption per capita of less than US\$1.90 per day in purchasing power parity (PPP) terms; while moderate working poverty entails a situation where a worker lives on a household with income or consumption per capita of between US\$1.90 and US\$3.20 per day in purchasing power parity (PPP) terms.

35 Richard Idubor, *Textbook on Employment and Trade Dispute Law in Nigeria* (1st edn, Sylva Publishers Ltd 1999) 9.

36 International Labour Organisation (n 8) 23.

37 Doyle Alison, *The Differences Between Underemployment and Unemployment* <<https://www.thebalancecareers.com/underemployment-definition-and-examples-2064158>> accessed 6 August 2020.

38 National Bureau of Statistics (n 14) 42.

39 International Labour Organisation (n 8) 28.

40 <<https://www.definitions.net/definition/working+poor>> accessed 6 August 2020.

41 International Labour Organisation (n 8) 15, 16; Under the jurisprudence of the International Labour Organisation, working poverty may assume the nature of extreme working poverty or moderate working poverty. Extreme working

42 Ibid 6.

43 Ibid 9.

44 Ibid 4.

45 Ibid.

46 International Labour Organization (n 7) 18, 19, 32.

47 Ibid 12, 30.

48 Ibid 30.

49 Ibid 32.

50 International Labour Organisation (n 8) 2, 5.

51 Ibid 2, 7, 19.

has significant impact of the regional and domestic workplace of countries across the globe.

In Africa, unemployment remains a critical issue. Among the sub-regions in the world, North Africa has the highest unemployment rate⁵². In virtually all African countries, wage employment constitutes a small proportion of the labour force⁵³. In the urban areas where most wage employment opportunities exist, the growth of employment has been sluggish for most countries in Africa⁵⁴. For those in employment, many have no choice but to take up jobs with abysmal terms and conditions. This is against the backdrop of the fact that available jobs in Africa are deeply ingrained decent work deficits and informality⁵⁵. The reality of employment in Africa is that the expanding informal sector (small-scale business) is the last resort for the unemployed⁵⁶.

In Nigeria, unemployment has been identified as one of the major challenges confronting the economy⁵⁷. The domestic unemployment rate rose from 23.1% unemployed in the third quarter of 2018 to 27.1% in the second quarter of 2020⁵⁸. Unemployment is prevalent among youths, and usually, the unemployed youth is ill-educated, unskilled and inexperienced⁵⁹. The upward surge in the unemployment rate is concomitant with the prevalence of crimes and criminality, including insurgency, militancy, armed robbery, kidnappings and drug abuse, among others. In addition, the high unemployment rate underscores the insignificant impact of the National Social Investments Programmes (NSIP) in addressing employment deficit in Nigeria⁶⁰.

Individuals who require jobs to survive under the current unemployment level are inherently

disadvantaged and imbued with inferior bargaining power⁶¹. Technological changes whose influences precipitate some degrees of unemployment and redundancies are capable of creating favourable conditions for strikes and other forms of industrial actions⁶². Unfortunately, trade unions that are imbued with legitimacy to augment the disadvantaged position of individual workers are at present in a state of arrested growth as a result of massive unemployment⁶³. Unionisation can only arise when individuals are gainfully employed in workplaces with established trade unions affording platform for trade union membership. Though unemployment rate can be unstable particularly for dynamic labour markets characterised by continuous inflows and outflows in the workspace, rise in unemployment can occur as a result of several factors. First scenario is where formal employment opportunities are not keeping up with the rapidly growing labour force⁶⁴. The second is where people previously outside the labour force (e.g. students, housewives, etc.) decide to join the labour force and are in search of jobs⁶⁵. Third is where people previously working have lost their jobs and are in search of jobs⁶⁶. When young people are not in employment, education or training, they are unable to gain skills that are valued in the labour market. This reduces their future chances of finding employment and, in the long run, undermines the ability of an economy to grow over a sustainable period⁶⁷. More so, consumer spending/purchasing power, which is one of key drivers of economic growth is lowered.

Strengthening Legal Regime on Employment Protection

Labour law can be modelled or remodelled to facilitate or promote the efficient formulation implementation of policies and programmes to provide relief to the unemployed⁶⁸. From a legal perspective, termination of contracts of employment has been identified as a major source of loss of jobs and cause of unemployment⁶⁹. This,

52 International Labour Organization (n 7) 13, 42.

53 Fashoyin (n 31) 219.

54 Ibid.

55 International Labour Organization (n 7) 43.

56 Fashoyin (n 31) 220.

57 Omitogun and Longe (n 10) 156.

58 <<https://www.vanguardngr.com/2020/08/breaking-nigeria-records-27-1-unemployment-rate-says-nbs/>> accessed 20 August 2020.

59 Fashoyin (n 31) 26.

60 The National Social Investment Programme (NSIP) are a group of programmes under the National Social Investment Office (NSIO) created in 2015 by the Federal Government of Nigeria to manage social investment programmes within Nigeria. One of such programmes is the N-Power Programme which is a job creation and skills empowerment programme designed to help young Nigerians (between the ages of 18 and 35) acquire and develop life-long skills. N-Power graduates are deployed to the chosen sector of vocation and paid a monthly stipend of N30,000 per month. Please, see <<https://n-sip.gov.ng/>> accessed 6 August 2020.

61 Dafe Otobo, *Industrial Relations: Theory and Controversies* (Malthouse Press Limited 2013) 7.

62 VC Obodo, *An Investigation into the Phenomena of Industrial Actions (Strikes) and Industrial Relations* (Fab Anieh Nigeria Limited 2013) xv.

63 Chianu (n 1) 73.

64 International Labour Organisation (n 8) 20.

65 Ibid 7.

66 Ibid.

67 International Labour Organisation (n 8) 67.

68 Srivastava (n 2) 7.

69 Ibid 7.

therefore, raises concern on the utility of extant legal regime in ameliorating unemployment. In *N.I.I.A. v Ayanfalu*,⁷⁰ the Court of Appeal identified ordinary master-servant relationship under common law⁷¹, employment with statutory flavour⁷², and employment-at-will as forms of employment⁷³. At common law, from which a large chunk of extant labour regime is drawn⁷⁴, the employer has an unfettered right to “hire and fire,”⁷⁵ and can terminate the contract of employment of an employee for good, bad or no reason at all⁷⁶. The motive for termination is immaterial provided the employer complies with the notice period as provided in the contract of employment⁷⁷. In other words, a willing employee cannot be imposed on an unwilling employer⁷⁸. This default common law rule applies to ordinary master-servant relationship and employment-at-will. For employment with statutory flavour, the prescriptions for termination are embedded in applicable the statute. At a point, Nigerian Courts had largely relied on the default common law rule in deciding a number of cases⁷⁹. In *Momoh v C.B.N.*,⁸⁰ the Court made the following observations:

Ordinarily, at common law, a master is entitled to dismiss his servant from his

employment for good or bad reason or for no reason at all. In consonance with this principle, the courts rarely order specific performance of contract of employment so as not to create a situation whereby a willing employee will be foisted upon an unwilling employer, just as no employer could be allowed to prevent an employee from seeking employment elsewhere. However, where there is a written contract of employment, statutory provisions and regulatory conditions of employment or service, equity demands that the courts should hold the parties bound by the terms of the employment agreement⁸¹.

This means that an employer who is actuated by malice or bad faith can just comply with the provisions of a statute regulating an employment (in the case of employments with statutory protection) or terms of the contract of employment (in the case of contract of employment without statutory protection)⁸². The employer is not bound to give reason for determination of contract of employment. However, where the employer relies on any reason and the employee makes an issue of it on pleaded facts, the onus lies on the employer to substantiate such reason⁸³. The reason given will only be examined within the confines of the terms of the contract of employment and not for reason of termination⁸⁴. Apart from contracts of employment with statutory protection, remedy for wrongful termination lies in damages measurable by what stands to be earned by the employee for the period of notice required to terminate such contract⁸⁵. While the default common law rule has been relaxed through interventions by Nigerian Courts⁸⁶, the basis or foundation of such interventions are not on all squares with the international labour standards on termination of contracts of employment at encapsulated in the Termination of Employment

70 (2007) 2 NWLR (Pt 247) 247 at 265.

71 Ordinary master-servant relationship is a traditional work arrangement in which the servant works at the direction of the master and engages in work for the benefit of the master. Where the master terminates such employment, albeit wrongfully, the contract of employment remains effectively determined. The only remedy available to such employee is the award of damages and nothing more. Please, see JO Utobo, 'Employee's Contract of Employment and Wrongful Dismissal From Service' *African Journal of Politics and Administrative Studies* [2017](1) 7.

72 Employment with statutory flavour is one whose incidents are protected by statute which forms part of the terms and conditions of such employment. The termination of such employment must be according to the provision of applicable statute, otherwise the purported termination would be null and void.

73 Employment-at-will is one that the employee holds an office at the pleasure or discretion of the employer. There are no special criteria for its termination; the employer can terminate the employment whenever he desires.

74 Oladosu Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (2nd edn, Folio Publishers Limited 2004) 5.

75 Srivastava (n 2) 327.

76 *Olaniyan & 2 Ors v University of Lagos & Anor* (1985) 2 NWLR (Pt 9) 599, 612; *Nigerian Oil Mills Ltd v Daura* (1996) 8 NWLR (Pt 468) 601; *Isiewore v NEPA* (2002) 13 NWLR (Pt 784) 417, 434.

77 Emmanuel OC Obidimma, MI Anushiem and UMJ Ekeneme “Unfair Dismissal in Nigeria: Imperative for a Departure From the Common Law” *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* [2016](7) 134.

78 *Savannah Bank Plc v Fakokum* (2002) 1 NWLR (Part 749) 544; *De Francesco v Barnum* (1890) 45 Ch.D 430, 438; *Chigozie Nwagbara, Determination of Contract of Employment and Remedies for Wrongful Dismissal* (Tait Publishers 2000) 106.

79 *Evans Bros (Nig) Pub Ltd v Falaiye* (2003) 13 NWLR (Pt 838) 568; *Layade v Panalpina World Transport (Nig) Ltd* (1996) 6 NWLR (Pt 456) 544; *Olaniyan v University of Lagos* (1985) 2 NWLR (Pt 9) 98.

80 (2007) 14 NWLR (Pt 1055) 508; *Obo v Comm of Education Bendel State* (2001) 2 NWLR (Pt 698) 625; *Aaromi Rubber Estates Ltd v Orogun* (1999) 1 NWLR (Pt 586) 302.

81 *Momoh v CBN* (2007) 14 NWLR (Pt 1055) 508.

82 *Isiewore v NEPA* (2002) FWLR (Pt 124) 398 @ 408 SC; *Obidimma and others* (n 77) 141.

83 *NEPA v Eboigbe* (2009) 8 NWLR (Pt 1142) 150 at 152; *Angel shipping & Dyeing Ltd v Ajah* (2000) 13 NWLR (Pt 685) 532; *Obe v Nigersol Const. Co Ltd* (1972) 2 UILR (Pt 11) 121.

84 *Evans Brothers (Nig) Ltd. v Falaiye* (2003) FWLR (Pt 152) 15 @ 34 CA.

85 *Ibid.*

86 *Longe v First Bank of Nigeria Plc* (2010) 6 NWLR (Pt 1189) 1; *Olaniyan v University of Lagos* (1985) 2 NWLR (Pt 9) 599; *Adeniyi v Governing Council of Yaba College of Technology* (1993) 6 NWLR (Pt 300) 426; *UNTHB v Nnoli* (1994) 8 NWLR (Pt 363) 376 (SC).

Convention 1982 and Termination of Employment Recommendation 1982⁸⁷. These instrument guarantee the security of tenure of employment, and represent the international labour standards on termination of employment. The protection afforded by the Termination of Employment Convention 1982 applies to all branches of economic activities and to all employed persons⁸⁸. It, therefore, makes no difference whether the contract of employment is one with or without statutory protection and one for contract of service and contract for service. However, the following categories of employed persons may be excluded the from all or some of the provisions of the convention: workers engaged under a contract of employment for a specified period of time or a specified task; workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; and workers engaged on a casual basis for a short period⁸⁹. In spite of this leverage, it appears no exclusion of workers can be effected by signatories to the convention where the aim is to avoid the protection afforded by the convention⁹⁰. By predicating termination on valid reason(s), this convention represents a fundamental digression from the default common law rule. Accordingly, article 4 Termination of Employment Convention 1982 provides as follows:

The employment of a worker shall not be terminated unless there is valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

A reason for termination is valid if and only if it is connected with the capacity or conduct of the worker's capacity or conduct or based on the operational requirement of the undertaking, establishment or service⁹¹. Valid reasons connected with capacity may include lack of the skills or qualities necessary to perform the tasks of a job.

Those connected with conduct of an employee include as gross misconduct, incompetence, disobedience, negligence⁹². Valid reasons connected with operational requirements of an undertaking, establishment or service include transfer of undertaking, privatization, merger and acquisition or takeover of an undertaking⁹³. By insisting on a valid reason, the possibility for the employer to unilaterally end an employment relationship is placed in abeyance. On the other hand, section 5 Termination of Employment Convention 1982 outline invalid reasons for termination of contract of employment as follows:

- a. Union membership or participation in union activities outside workings hours or, with the consent of the employer within working hours;
- b. Seeking office as, or acting or having acted in the capacity of a workers' representative;
- c. The filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- d. Race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- e. Absence from work during maternity leave.

In addition to the above, age (subject to national law and practice regarding retirement) and absence from work due to compulsory military service or other civic obligations (in accordance with national law and practice) do not constitute valid reasons for termination⁹⁴. Other invalid reasons for termination include temporary absence from work because of illness or injury⁹⁵. What this entails is that when the illness is protracted and in such a nature that it affects the capacity of the employee to carry out the object of the contractual relationship, it may well justify termination of the contract of employment⁹⁶. Even in instances where the reason of termination is valid, affected employee must be afforded the opportunity to defend himself against the

87 The Termination of Employment Convention 1982 was adopted on 22nd June 1982 and entered into force on 23rd November 1985. This treaty replaced the Termination of Employment Recommendation of 1963.

88 Article 2(1) Termination of Employment Convention 1982.

89 Ibid article 2(2).

90 Ibid article 2(3) and (4).

91 Ibid.

92 GG Otuturu "The Limits of the Application of the Rules of Natural Justice in Contract of Employment" *Nigerian Journal of Labour and Industrial Relations* [2008](2)(1)80.

93 Ibid.

94 Article 5 Termination of Employment Recommendation 1982.

95 Article 6(1) Termination of Employment Convention 1982.

96 Obidimma and others (n 77) 137.

allegation(s) unless the employer cannot reasonably provide such opportunity⁹⁷. While this clearly reiterates the principles of fair hearing, the provision is undermined by the absence of exhaustive list of the circumstances under which employer is not reasonably expected to provide an employee with opportunity to defend himself. The circumstances or grounds that constitute invalid reasons for determination of contract of employment seem open-ended.

The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning⁹⁸. Again, the employment of a worker should not be terminated for unsatisfactory performance unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed⁹⁹. A worker who considers that his employment has been unjustifiably terminated is entitled to appeal against that termination to an impartial body such as a court, labour tribunal, arbitration committee or arbitrator at the place where termination occurred¹⁰⁰. A worker is deemed to have waived his right to appeal his termination if he does not exercise that right within a reasonable time after termination¹⁰¹. The body under reference is empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified¹⁰². The burden of proving the existence of a valid reason for termination of employment before the body rest on the employer¹⁰³. In deciding the case, the impartial body must have regard to evidence produced by parties and procedures provided by national laws¹⁰⁴. In cases of termination for reasons based on the operational requirements of the undertaking, establishment or service, the impartial body is empowered to

determine whether the termination was indeed for these reasons¹⁰⁵. If the impartial body finds that the termination is unjustified, or where it is not empowered or do not find it practicable in accordance with the national law and practice to declare the termination invalid or to propose reinstatement of the worker, it is empowered to order payment of adequate compensation or such other relief as may be deemed appropriate¹⁰⁶. A worker whose employment is to be terminated shall be entitled to reasonable notice or compensation in lieu unless he is guilty of misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period¹⁰⁷.

Against the backdrop of non-ratification and non-domestication of the Termination of Employment Convention 1982 and Termination of Employment Recommendation 1982¹⁰⁸, the question that follows is to what extent are these instruments of utilitarian value within the Nigerian legal space. Under Labour Act 1971¹⁰⁹, contract of employment can be terminated by the expiry of the period for which it was made; by the death of the worker before the expiry of that period; or by appropriate notice or in any other way in which a contract is legally terminable or held to be terminated¹¹⁰. The modes of termination that can be inferred from this provision are termination by performance, by frustration and by notice¹¹¹. This provision is still by far short of the circumstances or grounds outlined in the international labour standards on termination of employment. However, there is on-going effort at address a number of the deficits in the Labour Act 1971 through the *Labour Act (Amendment) Bill 2019 pending before the House of Representatives*¹¹². The Legislative Bill seeks to, inter alia, criminalise casualisation of workers in Nigeria by prohibiting the engagement of casual workers beyond six

105 Ibid article 9(3).

106 Ibid article 10.

107 Ibid article 11.

108 OD Amucheazi and MI Anushiem *The National Industrial Court of Nigeria and the Application of Fair Hearing in Master-Servant Employment Disputes: A Critique* UNIZIK Journal of Commercial and Property Law [2018](5)(2) 7.

109 Cap. L1, Laws of the Federation of Nigeria 2004, as updated to 31st December 2010.

110 Section 9(7) Labour Act 1971, Cap. L1 Laws of the Federation 2004.

111 Chioma Kanu Agomo, *Nigerian Employment and Labour Relations: Law and Practice* (Concept Publications Limited 2011) 159.

112 The *Labour Act (Amendment) Bill 2019 which is still pending in the House of Representatives* was sponsored Hon. Olawale Raji.

97 Article 7 Termination of Employment Convention 1982.

98 Article 7 Termination of Employment Recommendation 1982.

99 Ibid article 8.

100 Ibid article 8(1) Termination of Employment Convention 1982.

101 Ibid article 8(3).

102 Ibid article 9(1).

103 Ibid article 9(2)(a).

104 Ibid article 9(2)(b).

months. It also outlines penalties for employers (both individuals and businesses) that fail to comply with these requirements.

Gaps in Extant Legal Regime on Employment Protection

There appears to be linkage between unemployment and racism. The growing xenophobia and xenophobic attacks on migrant workers witnessed in South Africa and a number of countries can be attributed to the shrinking workspace of indigenous nationals. Although the right to protection against unemployment is guaranteed under international law¹¹³, albeit theoretically, a large chunk of protection afforded by international labour standards are emasculated and undermined by the legal requirement for domestication of international treaties. Under Nigerian *grundnorm*, no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly¹¹⁴. In *Registered Trustees of National Association of Community Health Practitioners of Nigeria & 2 Ors. v Medical and Health Workers Union of Nigeria & Ors.*¹¹⁵, the Supreme Court of Nigeria unanimously held that ratified ILO conventions are not applicable in Nigeria until domesticated by the National Assembly in accordance with section 12 Constitution of the Federal Republic of Nigeria 1999. While this makes domestication a prerequisite for application of treaties¹¹⁶, the amendments introduced by the Constitution of Federal Republic of Nigeria (Third Alteration) Act 2010 appears to have extricated international labour standards (Conventions, Recommendations and Protocols) from the constitutional requirement on domestication.⁶⁷ The re-established National Industrial Court of Nigeria¹¹⁷ is saddled with exclusive jurisdiction on matters relating to, connected with or pertaining to the application or interpretation of international

labour standards¹¹⁸. Under relevant provisions of the Constitution of Federal Republic of Nigeria 1999 (as amended), the National Industrial Court of Nigeria has exclusive jurisdiction over:

254C(1)(f)

...(matters) relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters;

254C(1)(h)

...(matters) relating to, connected with or pertaining to the application or interpretation of international labour standards;

254C(2)

...any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.

These provisions do not expressly abrogate the requirement for domestication under section 12(1) Constitution of Federal Republic of Nigeria 1999 (as amended). Rather, they merely empower the National Industrial Court of Nigeria to apply, rely and take cognizance of international labour standards in the exercise of its jurisdiction. As between ratified and unratified international labour standards lies the question as which category the National Industrial Court of Nigeria is obliged to take cognizance. On the one hand, section 7(6) National Industrial Court Act 2006 took a broad approach by allowing the National Industrial Court of Nigeria to have regard to “good or international best practices in labour or industrial relations.”¹¹⁹ On the other hand, section 254C-(2) Constitution of Federal Republic of Nigeria 1999 (as amended) appears to have restricted the jurisdiction of the National Industrial Court of Nigeria to ratified international labour standards¹²⁰. While

113 Article 23(1) Universal Declaration on Human Rights 1948.

114 Section 12(1) Constitution of Federal Republic of Nigeria 1999 (as amended).

115 (2008) 2 NWLR (Pt 1072) 575.

116 Chioma Agomo 'Legal Protection of Workers' Human Rights in Nigeria: Regulatory Changes and Challenges' in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulations* (Hart Publishing 2010) 239, 240.

117 The National Industrial Court of Nigeria is vested with jurisdiction on matters relating to, pertaining to or connected with labour, employment and industrial relation as well as matters connected application of international labour standards. Please, see 254C(1) Constitution of Federal Republic of Nigeria 1999 (as amended).

118 Section 254C(1)(f) and (h) Constitution of Federal Republic of Nigeria 1999 (as amended).

119 Section 7(6) National Industrial Court Act 2006; Agomo (n 111) 94. By virtue of the provision of section 7(6) National Industrial Court Act 2006, what amounts to “good or international best practices in labour or industrial relations” is a question of fact.

120 This therefore displaces the requirement of domestication created by the decision of the Supreme Court in *Registered Trustees of National Association of Community Health Practitioners of Nigeria & 2 Ors v Medical and Health Workers Union of Nigeria & Ors* (2008) 2 NWLR (Pt 1072) 575.

international best practices are distinguishable from international labour standards, the contraction that appears from the juxtaposition of these provisions is superficial. Although domestication of treaties is an ideal approach, international labour standards need no ratification to gain enforceability¹²¹. Put in another way, constitutional prescriptions cannot be to defeat the fulfillment of international obligations imposed by international labour standards¹²². It, therefore, follows that notwithstanding the non-domestication of the Termination of Employment Convention 1982 and Termination of Employment Recommendation 1982, the National Industrial Court of Nigeria can justifiably insist on having valid termination of contract of employment premised on at least a valid ground or circumstance as outlined in the international labour standards reflected in the Termination of Employment Convention 1982 and Termination of Employment Recommendation 1982¹²³. In *Petroleum and Natural Gas Senior Staff Association of Nigeria v Schlumberger Anadrill Nigeria Ltd.*¹²⁴, the National Industrial Court of Nigeria, per Justice Adejumo, PNICN, observed:

The respondent also argued that it has the right to terminate the employment of any of its employees for reasons or no reason at all. While we do not have any problem with this at all, the point may be made that globally it is no longer fashionable in industrial relations and practice to terminate an employment without adducing any reason for such a termination. The problem we however have here is, when a reason is given for the termination, whether the affected staff cannot contest the reason. It is our opinion that when an employer terminates an employment and gives reason for such termination the employee has the right to contest the reason¹²⁵.

This view represents a significant shift in the labour jurisprudence in Nigeria. It also charts novel and more pragmatic approach for future decisions to adopt or rely on the global best practices as it relates to termination of employment which the National Industrial Court of Nigeria is statutorily empowered to apply in its decisions in the interest of justice. This is clear indication of shift from strict common law principles to progressive international labour standards that entrench social justice in the workplace. Courts can discourage arbitrary termination of employment through the award of steep damages¹²⁶. In *Folarin Oreka Maiya v The Incorporated Trustees of Clinton Health Access Initiative, Nigeria & 2 Ors.*¹²⁷, the aggrieved worker brought an action against her employer on the basis that she was dismissed on the basis of pregnancy. The National Industrial Court of Nigeria held that dismissal breached the worker's rights to protection from discrimination and inhuman, malicious, oppressive and degrading treatment under the Constitution of the Federal Republic of Nigeria 1999 and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004. In addition to reliance on domestic law, the court also made reference to ILO's Discrimination (Employment and Occupation) Convention 1958. In the same vein, in *Konrad v Victoria Police & Ors.*¹²⁸, Federal Court of Australia use of international law as a guide for interpreting domestic law¹²⁹. It has been settled in a long line of authority that in cases of ordinary contract of employment where the terms provide for a specific period of notice before termination or salary in lieu thereof, the only remedy available to an employee who is wrongfully terminated is the award of salary for the period of the notice and other legitimate entitlements due to him at the time the employment was brought to an end¹³⁰. These instances show that judicial intervention is remains inevitable to augment identified legislative gaps or deficits. This is more so that policy makers are largely politicians whose formulation of policies is influenced largely

121 Section 254C(1)(h) Constitution of Federal Republic of Nigeria 1999 (as amended); Section 19(5) Constitution of the International Labour Organisation 1919.

122 Agomo (n 116) 103-104.

123 OD Amucheazi and PU Abba, *The National Industrial Court of Nigeria: Law, Practice and Procedure*. (Wildlife Publishing House 2013) 294.

124 (2008)11 NLLR (Pt 29) 164.

125 Ibid 11.

126 *British Airways v Manganjuola* (1993) 8 NWLR (Pt 38) 276 CA.

127 Case No. NIC/ABJ/13/2011.

128 (1999) FCA 988.

129 See also the decision of the National Industrial Court of Nigeria in *Ejike Maduka v Microsoft* (unreported) Case No. NICN/LA/492/2012.

130 *Ativie v Kabelmetals Nig. Ltd.* (2008) 5-6 SC (Pt 2) 47; (2008) 10 NWLR (Pt 1095) 399; *Union Bank of Nigeria Plc v Soares* (2012) LPELR-8018(CA), pp 22-24, paras. B-A.

by political consideration and lesser concern for the economic implications of the resulting labour policies and regulations.

Recommendations

It is imperative to resolve the conflicting and contradictory nature of the provisions in sections 12(1) and 254 C (1) (f) and (h) of the Constitution of Federal Republic of Nigeria 1999 (as amended) so as to pave way for the application of the international labour standards and global best practices on termination of employment by the National Industrial Court of Nigeria. It is also important for labour regulations to be re-couched, through appropriate amendment, in a manner that prevent job loss through wanton termination of employment. Resort to white-collar jobs should be de-emphasized with attention shifted from paid employment to skill acquisitions, self-employment, and technical/vocational training.

In addition, a national system of unemployment registration should be developed under the auspices of the National Directorate of Employment. The National Social Investment Programmes should be expanded in a manner that will accommodate more unemployed graduates.

The passage of the Age Discrimination Against Job Seekers (Eradication) and Allied Matters Bill 2018, which seeks to ban age discrimination against job seekers in Federal Government Ministries, Agencies and Departments (MDAs), should also be expedited by the National Assembly. Trade unions should adopt workable strategies to end casualization of jobs and minimise the incidence of decent work deficits.

Conclusion

It has been shown that unemployment challenge pose threats that extends beyond the precinct of the workplace to the broader economic spectrum. The extent to which deficits or gaps in extant labour regulations impacts on unemployment has also been espoused. Unemployment is not just the offshoot of economic and related failures, but also that of deficits or gaps in extant employment protection regime. Development plans must take into consideration the unemployment challenge. Whatever progress aimed at reducing unemployment must also be matched with improvement of the quality of employment by reducing underemployment and working poverty.