

Reckonings: Legal Regulatory and Business Issues in Casual Employment in Nigeria



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Introduction

Exploitative practices has always been the subject of animated discussions within the local and the international labour community. Indeed, several Nigerian legislation, especially the **1999 Constitution of the Federal Republic of Nigeria (1999 Constitution)** and the **Labour Act, 1 (LA)** prohibit or lean against such unfair or anti-labour arrangements.² Undeniably, non-standard work arrangements (NSWAs),³ especially casual employment (CE),⁴ are often perceived as ‘exploitative tools’ of employers, by potentially sidestepping more beneficial pro-employee contractual obligations. Depending on geography or jurisdiction, this perception can be poignant or otherwise, given the relevant factual context, *vis-a-vis* the applicable regulatory framework.

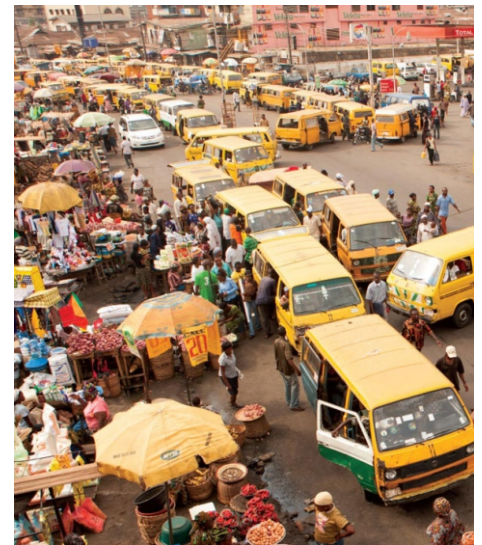
In Nigeria - as in many other emerging economies - NSWAs can be incidences

of economic pressure arising from underlying socio-economic factors, high level of unemployment and the general ‘power imbalance’ between employers and prospective ‘employees’. Thus, many stakeholders constantly demand better working conditions and stronger pro-labour regulatory framework. It is in this light that the Nigerian Senate (the Senate) recently considered passing “**The Prohibition of Casualisation Bill 2020**” (the PCB), which according to its long title, seeks: “to provide for the prohibition of casualisation in all forms of employment in the private and public sector in Nigeria and for related matters therewith”⁵

Given its prevalence, CE has become firmly ensconced in the forefront of labour discourse, especially as it is also not totally without benefits, even to workers. Furthermore, it is not constructive to view CE with an insular lens for the purposes of any discourse; to achieve results, its many

underpinning issues also deserve attention.

Against this background, this article attempts a critical analysis of CE in Nigeria, against the contextual linkages of applicable legal regulatory framework, the compelling socio-economic realities whilst proffering thoughts on how it could be enhanced and better utilised towards optimising the human capital factor of production for all parties’ benefit.



1. *Cap. L1, Laws of the Federation of Nigeria (LFN) 2004*. Although the LA is limited in scope as it applies only to “workers”, who are defined under **section 91** as employees in manual labour or clerical work in expressed or implied terms, this does not affect the enforceability of its provisions for protecting employees in employment relationships.

2. See for example, **section 34 1999 Constitution** which guarantees the right to the dignity of the human person thus prohibiting the subjection of any person to slavery and servitude and **section 42** which prohibits discrimination even in the workplace. Similarly, **section 5 LA** prohibits deduction of employee’s wages except upon prior consent duly sought and obtained. **Section 73** prohibits forced labour, and **section 46** penalises the ill-treatment or neglect of workers. **Section 45** also regulate recruitment practices and prohibits deceptive or fraudulent recruitment. In further effort to address the concept of unfair labour practice and pursuant to **section 12, 1999 Constitution**, Nigeria has ratified all the eight (8) core International Labour Organisation (ILO) Conventions to promote fundamental rights at work, in view of restrictions on the trade union rights of workers, discrimination, child labour and forced labour. See ‘**Internationally Recognised Core Labour Standards in Nigeria**’, ITUC: ituc-csi.org/IMG/pdf/final_Nigeria_TPR_CLS_2_.pdf (accessed 30.03.2022).

3. According to two commentators, “Nonstandard work arrangements (NSWAs) are those other than full-time, permanent positions (e.g., seasonal, part-time, on-call, temporary agency work) and those that involve individuals whose services are acquired via a contractual arrangement with another organization.” See James R. Thompson and Sharon H. Mastracci, ‘**Nonstandard Work Arrangements in the Public Sector: Trends and Issues**’, *ResearchGate*, December 2005; https://www.researchgate.net/publication/228966361_Nonstandard_Work_Arrangements_in_the_Public_Sector_Trends_and_Issues (accessed 12.01.2022).

4. In this article, CE is used interchangeably to describe ‘casualisation’ or ‘casual work’, as the specific context allows.

5. The PCB sponsored by Senator Ayo Akinyelure (Ondo Central), seeks to strike a balance between employers and employees’ contracting rights and statutory restrictions, reportedly underwent 1st and 2nd readings in the Senate on 4th March 2020 and 18th February, 2021 respectively. Unfortunately, the Authors were unable to access a copy of the PCB as at the time of writing this article; hence, its evaluation is based on available information in the news media. According to reports, Senator Akinyelure, while lamenting the increasing intensity of casualisation and associated menaces in Nigeria, stated that: “Nigerian graduates are treated as second class citizens in their own country of origin while foreigners from underdeveloped countries from Asian, Indian, Pakistan, Lebanon with less qualification to Nigerian graduates are placed as managers above Nigerian graduates in many Private and even Government establishments in Nigeria... Apart from the fact that these categories of workers are working under a spate of uncertainties, casualisation also reveals a brutal work growth process similar to slave labour.” - See ‘**Senate Begins Work on Bill to Prohibit Casual Jobs for Graduates in Nigeria**’, *DailyTrust*, 18.02.2021: <https://dailytrust.com/senate-begins-work-on-bill-to-prohibit-casual-jobs-for-graduates-in-nigeria>. See also, ‘**Bill to Prohibit Casualisation of Workers Passes Second Reading in Senate**’, *Premium Times*, 02.18.2021: <https://www.premiumtimesng.com/news/more-news/443692-bill-to-prohibit-casualisation-of-workers-passes-second-reading-in-senate.html>. Henry Umoru, ‘**Bill for Prohibition of Casualisation of Employment Passes Second Reading in Senate**’, *Vanguard*, 18.02.2021: <https://www.vanguardngr.com/2021/02/bill-for-prohibition-of-casualisation-of-employment-passes-second-reading-in-senate/>; (all accessed 01.10.2021). Nigeria has also been collaborating with the ILO through the **Decent Work Country Programme (DWCP) I and II** respectively; the DWCPs promote decent work as a key component of national development strategies. See ILO’s ‘**Decent Work Country Programmes (DWCPs)**’: <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/program/dwcp/lang-en/index.htm>; and ‘**Nigeria Decent Work Country Programme II, (2015-2018)**’: file:///C:/Users/LELAW/AppData/Local/Temp/wcms_561063.pdf (accessed 11.01.2021).

Concept Analysis: Flipping the Coin of Casual Employment in Nigeria

CE is typically a form of NSWA characterised by informality, insecurity, contingency and falling short of traditional employment standards.⁶ Generally, under CE, casual workers fare poorly regarding entitlements or rights relative to their peers in ‘permanent’ or ‘regular’ employment.

Despite its long existence, there is no standard definition of CE. According to some learned authors, “In *Ogunyale & Ors. v. Gbolahan (2013) 30 NLLR (Pt. 85) 49*, the [National Industrial Court] NIC held that the term ‘casual worker’ though a fact or reality in workplace... the Nigerian labour law does not mention it.”⁷

According to a commentator:

“Definitions of casual employment are often a site of confusion and controversy, marked by conflicts between vernacular, regulatory and contractual meanings. It is only necessary to note that the everyday understanding of casual is a form of employment in which the worker is deprived of many rights and benefits including lack of paid entitlements such as annual leave, paid sick leave, paid public holidays, notice of dismissal and redundancy pay. It is a form of

employment that can be regarded as largely unprotected because it misses out on many types of social protection developed for permanent employees.”⁸

Another writer that attempted to describe CE with precision, stated:

“Casualisation is a term used in Nigeria to describe work arrangements that are characterised by bad work conditions like job insecurity, low

wages, and lack of employment benefits that accrue to regular employees as well as the right to organise and collective bargaining. In addition, workers in this form of work arrangement can be dismissed at any time without notice and are not entitled to redundancy pay. Hence it is an unprotected form of employment because it does not enjoy the statutory protection available to permanent employees (Labour Act).”⁹

According to the International Labour Organisation (ILO): “Casual work is the engagement of workers on a very short-term or on an occasional and intermittent basis, often for a specific number of hours, days or weeks, in return for a wage set by the terms of the daily or periodic work agreement.”¹⁰

The Court of Appeal (CoA) in *Owena Mass Transportation Co. Ltd. v. Okonogbo*¹¹ described the practice thus:

“Traditionally, casual labour refers to work conducted for defined periods and during peak business periods... casual jobs are commonly understood as jobs that attract an hourly rate pay but very few of other rights and benefits, such as the right to notice, the right to severance pay and most forms of paid leave.”



6. In Nigeria, the LA is the primary legislation that deals with employment relationship in the private sector; however, it does not define casualisation or CE. Section 7(1) LA only mandates that employment relationship be regularised by written contract not more than three months after the commencement of such contract. It is obvious from the definition of “workers” in section 91 that the LA is limited in scope as it applies only to employees in manual labour or clerical work in expressed or implied terms. Thus, contract of employment (CoE) plays a huge role in defining the employment relationship between employers and persons/counterparties outside the category of “workers”. Nonetheless, this does not affect the enforceability of salient LA provisions offering employee protections in employment relationships.

7. Elizabeth A. Oji and Offorize D. Amucheazi, ‘Employment & Labour Law in Nigeria’, (Mbeye & Associates, (2015)), p. 72. Commenting further on the decision, the authors stated: “There is no legislation in place in Nigeria recognizing, regulating, or protecting casual workers. However, a worker employed as a casual worker but has worked for upward of three to five years, and during this period, varying statutory deductions have been made from his salary will qualify as a permanent employee moreso as the [LA] is silent on the issue of casual workers. Such an employee shall be accorded all the workplace right of a permanent employee as envisaged by the labour laws.” Emphasis supplied.

8. Oyesola Animashaun, ‘Casualisation and Casual Employment in Nigeria: Beyond Contract’, NJLIR, Vol. 1, No. 4 (2007), p. 17. Cf. some statutory definitions of “employees” and “employers” in Nigeria: (a) Section 73, Employees’ Compensation Act Cap. E7A, LFN 2004: “ ‘employee’ means a person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary, apprenticeship or casual basis and includes a domestic servant who is not a member of the family of the employer including any person employed in the Federal, State and Local Governments, and any of the government agencies and in the formal and informal sectors of the economy”; and “ ‘employer’ includes any individual, body corporate, Federal, State or Local Government or any of the government agencies who has entered into a contract of employment to employ any other person as an employee or apprentice”; (b) Section 108 Personal Income Tax Act Cap. P8, LFN 2004 (PITA): “ ‘employment’ includes any appointment or office, whether public or otherwise, for which remuneration is payable, and “ ‘employee’ and “ ‘employer’ shall be construed accordingly”; (c) Section 120 Pension Reform Act No. 4 of 2014 (PRA): “ ‘employee’ means any person employed in the Service of the Federation, the [FCT], a Government of a State of Nigeria, Local Government Council or private company or organisation or firm”; (d) Section 16 Industrial Training Fund Act, Cap. 19 LFN 2004 (as amended): “ ‘Employees’ means all persons whether or not they are Nigerians employed in any establishment in return for salary, wages or other consideration, and whether employed full-time or part-time and includes temporary employees who work for periods of not less than thirty days”; and “ ‘employer’ means any person engaged in industry or commerce with whom an employee entered into a contract of service or apprenticeship and who is responsible for the payment of wages or remuneration to the employee”. Although there are common denominators for respective definitions of “employees” and “employers” each could still be interpreted differently based on the specific statutory (and factual) context.

9. Rosemary A. Danesi, ‘Labour Standards and the Flexible Workforce: Casualisation of Labour Under the Nigerian Laws’, http://www.iera-directory.org/15thworldcongress/files/papers/Track_4/Poster/CS1W_32_DANESI.pdf (accessed 10.10.2021).

10. “What is Temporary Employment?”, ILO: https://www.ilo.org/global/topics/non-standard-employment/WCMS_534826/lang-en/index.htm (accessed 12.01.2022).

11. (2018) LPELR – 45221 (CA) 17-18G-E, per Ndukwue –Anyanwu, JCA.



It bears emphasis that NSWA is by no means limited to CE; diverse categories includes: temporary employment,¹² part-time work,¹³ on-call engagement,¹⁴ loan staffing,¹⁵

outsourcing services,¹⁶ and disguised employment.¹⁷ These categories of NSWA manifest in different dimensions in different jurisdictions.¹⁸

Many anti-CE advocates - especially trade unions - do so vehemently, based on perceived disadvantages (which apart from those previously mentioned), include: low and irregular earnings, lack of statutory backing or regulatory control, absence of employment rights and benefits enjoyed by regular employees, employees' vulnerability to unilateral changes in work schedules or engagement terms (by the employer), infringement of workers' right to unionise, lack of entitlement to notices such as termination notice, notice of change of employment terms and other requisite notices that affect the employment relationship.

The oft painted picture is that under CE, workers are not as valued as the most critical factor of production. For obvious reasons, the disadvantages are more amplified in developing countries.

To some proponents, the CE coin also has a positive side: CE helps to reduce labour costs. Sometimes CE may not be as bad as it seems, because casual workers may not necessarily get lower basic pay than their counterparts in permanent employment, offering same services. The difference could be because casual workers are not entitled to benefits or incentives such as paid holidays or leave (sick leave, annual leave, maternity/paternity leave etc.), redundancy pay, health insurance, performance bonuses and terminal payments in whatever shape.

Also, CE provides businesses (and sometimes workers) with flexibility; hence it has been noted that "...casual work is the price paid for flexibility and for prosperity in a modern economy."¹⁹ Thus, CE can enable employers to rapidly restructure staffing levels to match fluctuating business demands. Casual employees also have the liberty to accept or turn down work, as they deem fit and appropriate for their personal circumstances.²⁰ CE is therefore particularly advantageous to some categories of workers who do not have capacity, or prefer not to, work full-time.²¹

12. Employment relationships under this category is only for a specified period of time and usually for fixed projects, seasonal or task-based contracts.

13. This trend, as against full-time work, occurs when the peculiar working hours fall below the standard 40 hour work week. Although the LA does not specify standard working hours, section 13 gives both parties latitude to fix it by mutual agreement or collective bargaining within the organisation/industry concerned, or by an Industrial Wage Board.

14. "On-call work is characterized by variable and unpredictable hours - from zero hours to full-time work - and overlaps not only with casual work but also with part-time work". See **'Non-standard Employment Around the World: Understanding Challenges, Shaping Prospects'**, ILO, Geneva: ILO 2016, p. 21: https://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/dcomm/publ/documents/publication/wcms_534326.pdf (accessed 20.10.2021). On-call work manifests the typical features of part-time work to the extent that working hours can be determined by mutual agreement between both parties. However, on-call work does not have any preset schedule, while part-time work does. Employees are expected to go to work and perform their duties at any instant they are called upon by the employer. Even though employees get paid, time and hours of service are usually unpredictable. This form of non-standard employment is typically devoid of any written agreement whatsoever.

15. This reflects an agreement between two business entities where one provides its worker(s) to the other to work with the latter for a specified duration or project. Workers in this arrangement are described as loan staff. This practice is generally unacceptable, however Section 10 LA provides a condition that employment of a worker can only be validly transferred from one employer to another by free consent of the worker involved, first duly sought and obtained.

16. Outsourcing is the business practice in which one company hires another company (or outsourcing entity) to be responsible for a planned or existing activity or to perform services that ought to be traditionally performed internally by the company's own employees and staff. In which context, the outsourcing company usually provide personnel to work for its client but such personnel remains the staff or employees of the outsourcing company. The **Black's Law Dictionary**, (Bryan A. Garner (ed.), 9th ed. (2009), p. 1213) similarly defined an outsourcing agreement as "an agreement between a business and a service provider in which the service provider promises to provide necessary services, esp. data processing and information management, using its own staff and equipment, and usu. at its own facilities."

17. Disguised employment relationship has been defined as "... one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law or evading tax or social security obligations. It is thus an attempt to conceal or distort the employment relationship either by cloaking it in another legal guise or by giving it another form." See Sam Erugo, **'Introduction to Nigerian Labour Law (Contract of Employment and Labour Practice)'**, 2nd ed. (2019), (Princeton), p. 71.

18. The financial sector, especially the banking industry is critical to most economies. Nigerian banks are typically known for their high interest in youthful workforce (young graduates) but majority are notorious for issues surrounding diverse forms of NSWA. While the new generation banks justify CE as a competitive tool that helped them with nimbleness to gain market share, they also indirectly use jobs deficit as a tool to render employees powerless to negotiate better employment terms. A writer noted that "Contract staffers (sic) at Nigeria's banks can work for years without a raise, promotion, benefits or job security." See Ope Adetayo, **'No Career Path, No Raise for Nigeria's Contract Bank Workers'**, Aljazeera, 01.07.2021: <https://www.aljazeera.com/economy/2021/7/1/no-career-path-no-raise-for-nigerias-contract-bank-workers> (accessed 04.04.2022). It is in this light that the Nigerian Labour Congress recently called on the Central Bank of Nigeria (CBN), the Federal Ministry of Labour and Employment and the Bankers' Committee to regulate the "dysfunctions" in the system. See Gloria Nwafor, **'Labour Demands Legislation to Regularise "Non-Permanent" Staff in Banks'**, The Guardian, 29.03.2022: <https://guardian.ng/appointments/labour-demands-legislation-to-regularise-non-permanent-staff-in-banks/> (accessed 11.04.2022).

19. Oyesola Animashaun, (supra), p. 15.

20. **'Part-time and Casual Work - the Benefits and Disadvantages'**, The Salvation Army Employment Plus; <https://www.employmentplus.com.au/news/part-time-or-casual-work-the-benefits-and-disadvantages> (accessed 21.10.2021). Employees' freedom of choice in this context is rooted in section 34(1)(c) 1999 Constitution which protects against forced or compulsory labour.

21. For instance, 'unconstructed' work schedule may be preferred by workers who are students, married, nursing mothers or those who are ill but willing to work for few hours daily or those who need to balance work with their peculiar responsibilities to family or other organisations.

Because CE is characterised with informality and potentially less statutory flavour, parties enjoy greater ease of engagement and disengagement.²² Thus, either party can terminate the employment at any time as their peculiar natural, social, or economic situations may demand, with nil or limited risk exposure.²³ This to a large extent affords both parties, especially the employees, a reasonable measure of control over their work life. Incidentally, various studies have shown that a balanced and less regulated lifestyle enhances employees' morale, productivity and commitment.²⁴

Further, CE facilitates administrative convenience and avoidance of management risks. In other words, rigidity, standardisation and bureaucracy associated with management

of human capital will be minimal. CE may provide a test run scenario to gauge personnel performance on the job, before they are offered permanent employment. It may also help to retain valued employees who may not be able or willing to work under the formalities of traditional employment arrangement.

Considering the aforementioned benefits, CE may not be as harsh as it is often spoken of. Besides, labour exploitation which is the foundational ill engendering the clamour against CE, is clearly not pioneered by CE; this shall be expounded hereunder.

Prohibition of CE vis-à-vis Nigeria's Labour Market/Economic Reality

High rate of unemployment and underemployment is probably the

most significant factor that gives room for some employers/recruiters to take advantage of the saturated labour market, thereby promoting NSWAs and CE.²⁵ Despite Nigeria's enormous potential and relatively good access to skills, capital and technology, her socio-economic indices remain quite unimpressive, giving rise to widespread poverty, job scarcity and insecurity, incessant inflation and economic underdevelopment which negatively impact on employment standard and influence the realities in the labour market. Hence, CE is a multifaceted phenomenon which has emerged as a consequence of diverse predominant problems.



22. To terminate regular contract of employment, **section 11 LA** provides notice requirements which is binding unless the contract stipulates otherwise. In the latter case, the agreed termination procedure in the contract must be strictly adhered to. This without doubt takes time (except where summary dismissal is warranted and either party may be put at one disadvantage or the other before the expiry of notice of termination or by virtue of termination procedural error). In any case, employers are expected to observe procedural fairness before an employee is disengaged, regardless of nature of engagement and cause. In **Dudusola v. NGC Limited [2013] 10 NWLR (Pt. 1363), 423 at 438**, the Supreme Court (SC) held that: "the master has unfettered right and liberty to terminate his servant's employment or dismiss his servant from employment at any time and for any reason or for no reason at all, provided the terms of the contract of service between them are complied with." Similarly, in **University of Calabar v Essien [1996] 10 NWLR (Pt. 477), 225 at 262**, Iguh, JSC held: "where an employer dismisses or terminates the appointment of an employee on ground of misconduct, all that the employer needs establish to justify his action is to show that the allegation was disclosed to the employee, that he was given a fair hearing, ... and that the disciplinary panel followed the laid down procedure, if any, and accepted that he committed the act after its investigation." In our view, of CE or employment informalities should not erode the decency and fairness of dealing throughout the duration of the 'employment' relationship.

23. Outsourcing is typically illustrative of the mentioned advantage of CE. Outsourcing helps clients transfer personnel risk management and compliance to service providers. For example the state tax authority will not come ask clients for PAYE of CE staff, but will focus on the service providers. The client distances itself from employment litigation risk. Clients may want limited number of permanent (core) staff with rest (CE) just 'providing support'. It could be an avenue to test the waters whether the client actually needs to fill a role/function or not and how critical such role is to client's operations.

24. "Increased responsibilities at work" and "working longer hours" has been listed amongst common reasons that lead to a poor work-life balance. Furthermore, "Employers who are committed to providing environments that support work-life balance for their employees can save on costs, experience fewer cases of absenteeism, and enjoy a more loyal and productive workforce..." Employers that offer options as telecommuting or flexible work schedules can help employees have a better work-life balance." See Marisa Sanfilippo, 'How to Improve Your Work-Life Balance Today', Business News Daily, 03.12.2021: <https://www.businessnewsdaily.com/5244-improve-work-life-balance-today.html> (accessed 29.01.2022).

25. Peter Kalejaiye, 'The Rise of Casual Work in Nigeria: Who Loses, Who Benefits?', AJOL, African Research Review, Vol. 8 (1), Serial No. 32, January, 2014, at. Pp. 157-158: <https://www.ajol.info/index.php/afrr/article/view/101339> (accessed 20.10.2021). Following a labour force survey by the National Bureau of Statistics (NBS), it was reported that in Q2 2020, the economically active (working population aged 15 to 64 years) was 116,871,186 and those who were willing and able to work was 80,291,894. However, out of this figure, 22,942,003 were underemployed while 21,764,617 were unemployed. "The total population in Nigeria is divide into labour force (currently active) and non-labour force (not currently active). The labour force population covers all persons aged 15 to 64 years who are willing and able to work regardless of whether they have a job or not... The non-labour force includes population below 15 or older than 64, as well as those within the economically active population i.e. 15-64, who are unable to work, not actively seeking for work or choose not to work and/or are not available for work." According to the NBS, the unemployed are those: within the labour force, who were available for work, actively seeking work, but were unable to find work; the underemployed are those: who work less than full time hours, which is 40 hours, but work at least 20 hours on average per week, and /or working full time but are engaged in an activity that underutilises their skills, time and educational qualifications. See NBS, 'Labour Force Statistics: Unemployment and Underemployment Report (Q2) 2020 (Abridged Labour Force Survey Under COVID-19)', pp. 2, 8-9, and 19: https://www.nigerianstat.gov.ng/pdffuploads/Q2_2020_Unemployment_Report.pdf (accessed 09.11.2021). Likewise in Q4 2020, 122,049,400 were economically active and 69,675,468 were willing and able to work. Of the latter figure, 15,915,639 were estimated to be underemployed and a total of 23,187,389 were unemployed. See NBS, 'Labour Force Statistics: Unemployment and Underemployment Report (Q4) 2020', pp. 3-4 and 19: https://www.proshareng.com/admin/upload/report/14502-Q4_2020_Unemployment_Report-proshare.pdf (accessed 09.11.2021). A combination of both unemployment and underemployment rates in Q4 2020 stood at 56.1%.

According to the World Bank: *“inequality, in terms of income and opportunities, remains high and has adversely affected poverty reduction. The lack of job opportunities is at the core of the high poverty levels, regional inequality, and social and political unrest. High inflation has also taken a toll on household’s welfare and high prices ...”*²⁶ This further explains that CE is a product of continuing national dysfunctions. In this light, it is pertinent to ask *whether statutory prohibition of CE would suffice to eradicate the perceived associated abnormalities?* The answer to this question may well be in the negative.

There is no gainsaying that CE has spread its tentacles to virtually all sectors of the economy; small, medium businesses and even big corporates engage casual employees, which has more recently witnessed higher numbers of degree holders.²⁷ In the view of a writer:

“Employers in Nigeria are increasingly filling positions in their organisations, which ought to be permanent, with casual employees. In the past, casual work arrangement was predominantly for unskilled workers especially in the construction industry. However, at present, both skilled and unskilled persons are engaged as casual workers in the informal sector and even the organised private and public sectors of

*the economy.”*²⁸

Arguably, the endemicity of CE is attributable to statutory lags and generally, the unabating impact of socio-economic challenges to both employers and employees. Worsening economic circumstances and increasing poverty rate will compel an average jobseeker to settle for whatever is available to earn some income. Likewise, start-ups, will seek to keep labour costs low, after incurring some high variable costs to generate power, improve on security, and construct enabling infrastructures which ordinarily should be provided by government to the public.

According to the US Department of State: *“Nigeria’s underdeveloped power sector remains a bottleneck to broad-based economic development... forcing most businesses to generate much of their own electricity.”*²⁹ Undoubtedly, *“Energy remains a big infrastructural challenge in Nigeria, with its deficit-increasing operational cost for start-ups and reducing their survival rate... firms are taking out huge budgets to buy new generators, with SMEs the worst hit.”*³⁰ It is undoubted that stable power supply is only one of many critical inputs for business survival in Nigeria. Other factors like inflation, volatility of foreign exchange rate, etc. also constitute threats to the survival of small and

medium enterprises (SMEs). Likewise, challenges like lack of finances, insecurity and civil unrest, cultural biases, government policy flip flops, etc. may also hinder some businesses from thriving, hence compelling the need to engage some employees on NSWA basis, especially at their nascent beginning.

Some employers and employees prefer CE and the premium that comes with it. Aside that CE is resource conserving for employers, several studies have shown that no matter the industry, flexibility is incredibly important to employees’ motivation and satisfaction;³¹ likewise autonomy.³² It is trite that the shape of workforce continues to change rapidly over recent decades due to more dynamism, heavy reliance on technology, globalisation, etc. These emerging changes have profound impact on corporations and employment relationships.

Interestingly, things are done faster and work structure can be made less complicated. On this note, some employers and employees now find it necessary to lessen contract formalities and increase flexibility. In addition, some employees who do not enjoy monotonous tasks may prefer to stay on different jobs per time to beat more challenges, remain engaged and enhance their skills. CE may as well be an overpass into full-time employment.

26. The World Bank, ‘The World Bank is Helping to Fight Poverty and Improve Living Standards for the People of Nigeria with more than 130 IBRD Loans and IDA Credits since 1958’, 11.10.2021: <https://www.worldbank.org/en/country/nigeria/overview#> (accessed 10.11.2021).

27. This was noted by Senator Akinyelure when he reportedly stated that: “Statistics from the Nigeria Labour Congress shows that many workers in the telecommunications, oil and gas sectors are engaged as casual labourers by employers of labours. Other sectors with thousands of casual labourers include mining, steel, banking and insurance. In all these sectors, staff outsourcing and casualisation have become the order of the day as ... workers no longer have regularised employment terms...” He reportedly added that, “... Nigerian graduates are treated as second class citizens in their own country of origin while foreigners from underdeveloped countries from Asian, Indian, Pakistan, Lebanon (sic) with less qualification to Nigerian graduates are placed as managers above Nigerian graduates in many private and even government establishments in Nigeria.” - See Vanguard, (footnote 7, supra).

28. Simisola Lala, ‘Nigeria: Casual Work In Nigeria: The Shortcomings Of The Current Legal Framework’, Mondaq, 22.07.2020: <https://www.mondaq.com/nigeria/employee-rights-labour-relations/968122/casual-work-in-nigeria-the-shortcomings-of-the-current-legal-framework> (accessed 11.01.2022).

29. See ‘2020 Investment Climate Statements: Nigeria’, US Department of State: <https://www.state.gov/reports/2020-investment-climate-statements/nigeria/> (accessed 12.01.2022).

30. Josephine Okojie, ‘Transforming Nigeria’s Entrepreneurship Ecosystem through Economic Reforms’, BusinessDay, 26.07.2021: <https://businessday.ng/entrepreneur/article/transforming-nigerias-entrepreneurship-ecosystem-through-economic-reforms/> (accessed 12.01.2022).

31. “... the strict nine-to-five workday is outdated – and it won’t help employers attract or maintain today’s top talent. The 2018 Global Talent Trends study found that 51% of employees wish their company offered more flexible work options ... A whopping 84% of working parents said work flexibility is the number one most important factor in a job, with work-life balance ranking in as a close second at 80%.” See Alan Kohll, ‘What Employees Really Want at Work’, Forbes, 10.07.2018: https://www.forbes.com/sites/alankohll/2018/07/10/what-employees-really-want-at-work/?sh=4dccc2275ad3_ (accessed 15.01.2022). Similarly, another study on flexible work arrangement (FWA) explained that: “Despite the fact that less than 10% of the jobs advertised in the UK offer flexibility, 92% of millennials claim it is one of their top priorities. It’s not just younger people, however, 70% of UK employees believe flexibility makes a job more attractive, while older people are attracted to the idea of winding down to retirement with a FWA.” See Adaku Ezeudo, ‘Nigeria: Post COVID-19 and Flexible Working Arrangements’, ThisDay, 29.06.2020: <https://allafrica.com/stories/202006290331.html> (accessed 16.01.2022).

32. See Holger Reisinger and Dane Fetterer, ‘Forget Flexibility, Your Employees Want Autonomy.’ Harvard Business Review, 29.10.2021: <https://hbr.org/2021/10/forget-flexibility-your-employees-want-autonomy> (accessed 16.01.2022).

In light of the foregoing, while the legislature bothers with labour arrangements to protect workers due to their uneven leverage, caution should be taken for such protection not to become a deterrent with stifling effect or a clog in the wheel of business to hinder investment.

It is noteworthy that the perception for or against CE depends on individual's understanding of nature of standard work, work-life values, life circumstances, demands and peculiar needs, and other job satisfaction components. Also, employees in CEs can elect to accept or refuse the engagement when offered;³³ albeit it must be acknowledged that majority of casual workers in Nigeria are constrained, due to external factors beyond their control. To worsen the situation, non-regulation of CE has obviously reflected in its many downsides, including widespread abuse.

Comparative Lenses: CE in Some Jurisdictions

As previously noted, CE is a global phenomenon; but manifests with national flavours based on local regulatory context and circumstances. Accordingly, we examine developments in some developed and emerging markets below to highlight some common threads, as well as peculiarities. Essentially, many countries are

positively trying to transcend traditional formalities of employment, to regulating CE.

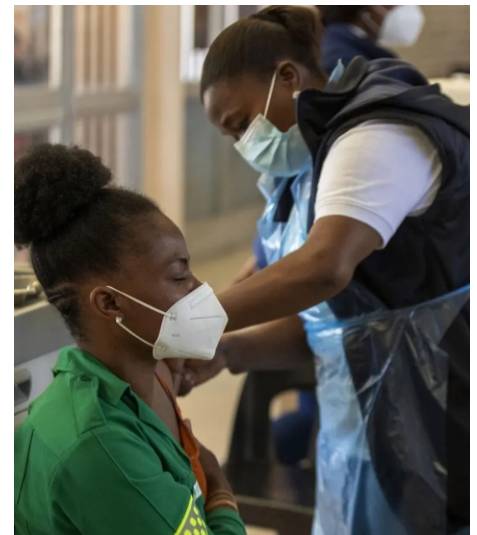
1. The United States of America (USA)

A recent publication by reported that employment figures between 2000 and 2019 have been sporadic; hence, the averagely long tenure of temporary and contract employees.³⁴ In the USA, temporary and contract employment amounted approximately to 16 million in 2019; even prior to this time, contingent employment (a term synonymous with CE), had been prevalent in several major sectors of the economy.³⁵

The USA has both Federal and State legislation for protection of employees. Some of the former include: **Occupational Safety and Health Act 1970 (OSHA)**, creating several specific safety provisions, including industry-specific guidelines for jobs relating to construction, maritime sector, and agriculture; **Fair Labor Standards Act 1938 (FLSA)**, which established minimum wage, overtime pay eligibility and child labor standards affecting full-time and part-time workers in both public and private sectors, to protect them from unfair pay practices; and **Family and Medical Leave Act 1993 (FMLA)**, which affords eligible employees opportunity to take 12 weeks unpaid leave per year, if they so decide, for healthy work-life balance.³⁶ Unlike

federal laws, States' labour and employment law vary from State to State.

All these laws contain provisions that safeguard the interests and rights of various categories of employees, including contingent workers. For instance, based on a concern that some employers may use temporary workers to avoid meeting or complying with statutory obligations, **OSHA** recommends that temporary staffing agencies and the host employers set out their respective responsibilities for compliance with applicable **OSHA** standards in their contract.³⁷ Although the extent of responsibilities of staffing agencies and host employers under the law is dependent on the specific facts of each case, both are jointly responsible for maintaining a safe work environment for temporary workers.³⁸



33. Under Section 15A(1) of Australia's FWA 2021, it is provided that in determining whether a person is a casual employee, it must be considered "whether the person can elect to accept or reject work." This significantly corroborates the fact that casual workers can exercise their right of choice to either accept or decline a CE offer.

34. See 'The Staffing Industry in the U.S. - Statistics & Facts', Statista, 08.27.2021: <https://www.statista.com/topics/1212/temporary-work/#dossierKeyfigures> (accessed 14.11.2021). A more recent publication also revealed that "the annual temporary and contract staffing employment in the United States from 2000 to 2020... amounted to approximately 13.6 million." See 'Annual Temporary and Contract Staffing Employment in the United States from 2000 to 2020', Statista, 19.04.2022: <https://www.statista.com/statistics/220682/us-total-annual-temporary-employment/> (accessed 22.04.2022).

35. GAO, 'Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification', Report to the Ranking Minority Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate, United States Government Accountability Office (GAO), June 2006, p. 1: <https://www.gao.gov/assets/gao-06-656.pdf> (accessed 18.11.2021). Contingent workers constituted a relatively constant proportion of the total workforce from 1995 - 2005. They comprised different overlapping categories of contract workers, misclassified independent contractors, temporary workers and part-time workers. As at June 2000, it was reported that almost 30% of the USA's total workforce were contingent workers lagging behind in terms of income and benefits; in 2005, there were about 42.6 million contingent workers in the workforce. In several States, the contingent workers face challenges of less pay, fewer benefits, less job security, than their permanent or full time counterparts. See Catherine K. Ruckelshaus and Bruce Goldstein, 'The Legal Landscape for Contingent Workers in the United States', at p.1: https://www.nelp.org/wp-content/uploads/2015/03/Legal_Landscape_US.pdf (accessed 18.11.2021). See GAO, 'Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce', GAO/HEHS-00-76 (Washington, D.C.: June 30 2000), p.3, cited in Catherine K. Ruckelshaus and Bruce Goldstein, 'The Legal Landscape for Contingent Workers in the United States', *Ibid*, p. 12.

36. Daniel Kurt, 'Laws that Protect Employees', Investopedia, 31.10.2021: <https://www.investopedia.com/articles/personal-finance/120914/8-federal-laws-protect-employees.asp> (accessed 18.11.2021).

37. Since temporary workers get placed in a variety of jobs, mostly hazardous jobs, they are more vulnerable in terms of workplace safety and health hazards than workers in traditional employment relationships. Thus the OSHA seeks to ensure that temporary workers enjoy adequate safety and health by mandating trainings and other regulatory obligations. It also seeks to avoid confusion as to the employer's obligations. See United States Department of Labour, 'Protecting Temporary Workers': <https://www.osha.gov/temporaryworkers/> (accessed 18.11.2021).

38. Their joint responsibility include ensuring that OSHA training, hazard communication, and recordkeeping requirements are fully met. See *Ibid*.

ii. Australia

Australia has also experienced high casualisation rate: the use of casual employees reportedly grew between early 1980s to mid-1990s, from around 13% to 24%.³⁹ The high proportion of CE continued to fluctuate in each State as influenced by differences in industries, size of firms, method of setting pay, employees' age and several other factors.⁴⁰ Amidst this, rather than eradicate CE, the Australian Parliament enacted the **Fair Work Act No. 28 of 2009**⁴¹ and the recent amendment thereto - the **Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act, (No. 25) 2021**.⁴² These now govern employment relationships in Australia and regulate CE, thereby creating greater certainty for both the employers and employees.

Thus, CE now forms a very specific category of employment. Amongst several significant provisions regulating labour practices, **section 15A(1), FWA 2021** defined "casual employee" as a person who accepts an employment offer with no firm advance commitment to continuing and indefinite work according to an agreed pattern of work.⁴³ Further, **Section 15A(2)** provides for factors to be considered in determining whether a person is indeed a casual employee. **FWA 2021** also provides for "casual conversion" by requiring employers, except small business employers, to convert casual employees' engagement to permanent employment within 21

days after the end of the 12 month of casual engagement, upon fulfilling certain stipulated eligibility requirements.⁴⁴



Casual employees, under **section 66F** have residual rights to request casual conversion. In addition, employers are also required to give casual employees "Casual Employment Information Statement" before, or soon after they begin, the job.⁴⁵ This statement containing information on the rights of casual employees will certainly help them ascertain their rights and entitlements.

Without doubt, the statutory advancement to CE in Australia is admirable and worthy of emulation in Nigeria. Thus, the **FWA** significantly demonstrates that regulatory changes to the employment system must march in synchronicity with developments in the labour market place, otherwise the law will lag behind, to workers' detriment.

iii. Africa

"In Africa, the structure of employment continues to stand in sharp contrast to that in much of the rest of the world. Africa remains characterized by limited wage employment, high informality..."⁴⁶ Casual workers typically enjoy little or no legal protection as most regulatory frameworks do not find CE worthy of any recognition, despite its proliferation over the years. Consequently, employers take a selfish view of employees' rights with minimal regulatory deterrence. Obviously, major threat is posed to employees' protection in the labour markets across Africa, especially in countries with unstable or 'poor' economies.

Virtually all African countries have a traceable record of surge in CE rate at one time or the other. Reportedly, in *Mali* and *Zimbabwe*, casual work accounts for over 35% of all wage employment. In *Kenya*, CE increased nearly twofold between 2001 and 2011 to more than 30 per cent,⁴⁷ while regular wage employment witnessed a decline from 21% to 13% of total employment. *Uganda* had the overall share of CE at 13.7% in 2011 and *South Africa* and *Morocco* continued to experience increasing casualisation amongst other forms of NSWA. While CE is still being vehemently fought against, few States have come to terms with this atypical work structure by ratifying or domesticating international standards and providing legislative recognition and regulations.

39. Geoff Gilfillan, 'Characteristics and Use of Casual Employees in Australia', Parliament of Australia, 19.01.2021:

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/CasualEmployeesAustralia (accessed 14.11.2021).

40. *Ibid.*

41. Available at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/81591/88706/F106767686/AUS81591%202019%20V1.pdf> (accessed 14.11.2021).

42. Available at: http://classic.austlii.edu.au/au/legis/cth/num_act/fwaajera2021680/sch7.html (accessed 14.11.2021).

43. Michael Coates and Lachlan Thorburn, 'Australia: Casual Employment in Australia - New Definition, Relief Against Double-dipping And Casual Conversion', *Mondaq*, 25.05.2021: <https://www.mondaq.com/australia/contract-of-employment/1072180/casual-employment-in-australia-new-definition-relief-against-doubledipping-and-casual-conversion> (accessed 16.01.2022).

44. See section 66B.

45. See section 125B.

46. See 'Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects', p. 70, at footnote 15, *supra*.

47. *Ibid.*

In South Africa, where the current labour market still has many forms of employment relations that differ from full-time employment, there has been a deliberate extension of labour rights to non-standard workers in the context of South African labour laws and the international framework.⁴⁸ As far back as 1996, in response to global social trend, the ILO sponsored *South African Labour Flexibility Survey (SALFS)* was conducted; thereafter,

there was the “flexibility debate” on the appropriate regulatory regime for the upward temporary and casual work trend. Consequently, South Africa adopted “regulated flexibility” through progressive legislative framework.⁴⁹

Uganda also has statutory instrument(s) recognising and/or protecting casual employees. **Section 2 Employment Act 2006**

defines “casual employee” as “a person who works on a daily or hourly basis where payment of wages is due at the completion of each day’s work.” By virtue of **Part VII, The Employment Regulations 2011** casual employees are further recognised as ‘Special Categories of Employees’ and specifically protected under **sections 39 – 42 of the Regulations**.⁵⁰

Conclusion

It is obvious that existing Nigerian labour legislation were drafted primarily to regulate and protect employees in the traditional full-time employment paradigm; they contain no provision for recognition of CE or protection of casual employees, despite the significant percentages of casual workers in Nigeria.⁵¹ Unsurprisingly, there has been multifarious initiatives and anti-CE advocacy by legislators, labour unions or activists, respectively.⁵² The unfortunate reality though, is that CE has continued to thrive even in the modern Nigerian labour system.

However, in recognition of current business realities, we believe that categories of jobs that do not conform strictly with formalities or traditions supported by the existing laws need not be prohibited or

viewed with disfavour. Rather, they should be regulated in their own class; for example collective bargaining with labour unions can recognise CE, and build architecture to protect the rights of casual workers. This should be accompanied by sensitisation programmes or trainings for relevant stakeholders with a view to give these ‘informal’ work arrangements, positive outlook.

As earlier mentioned, a fraction of casual workers desire CE as a matter of choice and for the associated benefits. Likewise, some start-up employers genuinely require casual arrangements at the business’ nascent stage, before attaining a firm footing in their respective industries. In order not to demoralise this category of employers or demotivate the said class of employees,⁵³ it is recommended that the proper focus

should be on regulating CE, rather than prohibiting or criminalising it. Such regulation should contain specific provisions stipulating the rights, entitlements and protection for casual employees.



48. See E. S. Fourie, ‘Non-Standard Workers: The South African Context, International Law and European Union’ SAFLJ, 2008: <http://www.saflii.org/za/journals/PER/2008/23.html#sdfnote14sym> (accessed 25.01.2022).
 49. Despite the protection already offered to workers under the *Labour Relations Act No. 66 of 1995* and *Basic Conditions of Employment Act 75 of 1997*, South Africa still enacted *Basic Conditions of Employment Act No. 3 of 1993* which recognised casual employees and provide them statutory protections, albeit limited. See E.S Fourie, *Ibid.* See also Christopher Albertyn, ‘Basic Conditions of Employment Act, 1983’, *Indicator, South Africa Vol. 1*, No. 2, 1983, p.4: https://journals.co.za/doi/pdf/10.10520/AJA0259188X_1488 (accessed 27.01.2022).
 50. See *The Employment Regulations 2011* at: https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/86721_98315/F615034846/JGA86721.pdf (accessed 11.04.2022).
 51. As at 2018, the Nigeria Labour Congress (NLC) stated that about 45% of workers in Nigeria are operating as casual workers, including workers in major economy sectors like the downstream oil and gas and banking. See, ‘45 Percent of Nigerian Workers are Casual Workers’, *The Nation*, 18.07.2018: <https://thenationonline.ng/45-percent-of-nigerian-workers-are-casual-workers/> (accessed 30.01.2022). In 2021, it was reported that more than 42% of bank workers in Nigeria were contract staff and they can work for years without a raise, promotion, benefits or security. See Ope Adetayo, ‘No Career Path, No Raise for Nigeria’s Contract Bank Workers’, *Aljazeera*, 01.07.2021: <https://www.aljazeera.com/economy/2021/7/1/no-career-path-no-raise-for-nigerias-contract-bank-workers> (accessed 02.02.2022).
 52. It was recently reported that the House of Representatives condemned the continued casualisation of workers which it perceived as a violation of **section 7(1) LA** provision that no worker should be engaged on probation or temporary employment for more than three months. See ‘Reps Condemn Continuous Casualisation of Workers’, *Vanguard*, 09.06.2021: <https://www.vanguardngr.com/2021/06/reps-condemn-continuous-casualisation-of-workers/> (accessed 19.04.2022). The NLC is reported on different occasions intervening, campaigning and taking series of actions CE. See Gloria Ehiaghe, ‘Fresh Push Against Casualisation in Workplace’, *The Guardian*, 17.07.2018: <https://guardian.ng/appointments/fresh-push-against-casualisation-in-workplace/>; ‘NLC Demands Reversal of Mass Sack of Workers by Kaduna Govt’, *Vanguard*, 09.04.2021: <https://www.vanguardngr.com/2021/04/nlc-demands-reversal-of-mass-sack-of-workers-by-kaduna-govt/>; ‘No More Casual Staff’ — NLC Pickets MTN Offices In Bayelsa, Others’, *Sahara Reporters*, 09.07.2018: <http://saharareporters.com/2018/07/09/E2%80%98no-more-casual-staff%E2%80%99-%E2%80%94-nlc-pickets-mtn-offices-bayelsa-others> (all accessed 19.04.2022).
 53. For instance, CE or NSWA schedule may be preferred by: part time workers/students; nursing mothers; ill people still willing to work for a few hours daily/weekly; or those who have unusual family exigencies and cannot cope with the stringent demands of permanent employment, especially to avoid the constant fear of losing their jobs.

Taking the innovative approach in Australia for instance, the **FWA** engendered acceptance of CE as a category of employment and extensive statutory protection were afforded casual employees. In like manner, Nigeria could establish eligibility threshold for casual employees and prescribe criteria for employers to be permitted to engage casual employees; with exemptions and restrictions in terms of sector and number of years in operation, for any business to engage casual employees.

This will be helpful to start-ups, who can also utilise a suite of tools (such as sweat equity) to engender long term employee commitment, as alternative to intensive cash labour spend. Also, conversion to permanent employment should be mandated after a not-too-long period of casual work, unless otherwise preferred by the employee.

There is need to amend otiose Nigerian labour legislation to match up with current trends and demands. CE and its variants ought to be flexible work arrangements that is not 'slavish' in any way; regulatory requirements should provide directly for CE and other forms of NSWA with specific regulatory demands, qualifications and restrictions. Some

existing statutory provisions should be firmly enforced in favour of casual workers and case law principles may be adapted in the reformed legislations.

For example, the CoA stated in **Owena's case (supra)** that given the pitfalls and disadvantages of CE, "employee must be informed...from the onset that he/she is being employed as casual employee to make an informed decision..." Laudably, the NIC in **Patovilki Industrial Planners Ltd v. National Union of Hotels and Personal Services Workers**⁵⁴ validated the position that both permanent and temporary or casual workers have right to form and join a trade union, pursuant to **section 1 Trade Unions Act**.⁵⁵

Further, making every category of work qualify as "decent work" (within the context of ILO's **Decent Work Agenda (DWA)**)⁵⁶ should be prioritised. The **DWA** acknowledges that contract forms and work structure vary and thus: "the goal is not to make all work standard, but rather to make all work decent."⁵⁷

Whilst fine-tuning the regulatory frameworks, we have to evaluate the prevailing economic, social and institutional deficiencies enabling CE to thrive negatively. First, increasing poverty and unemployment rate would constitute major obstacle to

achieving **DWA** goals. Workers who are desperate for survival will definitely be constrained to trade their employment rights and entitlements. In fact, if CE is prohibited and criminalised today, the likelihood is high that the already troublesome number of unemployed population will skyrocket, leading to higher rate of poverty.⁵⁸

On this note, as we think about employees who must earn a decent wage, so must we think about entrepreneurs whose risk taking is necessary to create jobs for the teeming labour market. In the absence of institutional support, and considering that failure of their businesses could result in bankruptcy, it is prudent for them to consider options to managing their labour costs, especially in their start-up phase when businesses typically run the highest risk of failure.

Conclusively, the years ahead will undoubtedly bring more new changes but the dependence on work for individual's livelihood and national economic sustenance will not change. It is therefore incumbent on government and stakeholders in the labour market to pay attention to all work arrangements (both standard and non-standard) and focus on eliminating the intrinsic challenges that trigger negative labour practices.

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54. Unreported Suit No. NIC/12/89, judgment of Friday, 6th July 1990, (Atilade, President).

55. Cap. T14, LFN 2004.

56. See 'Decent Work', ILO: <https://www.ilo.org/global/topics/decent-work/lang-en/index.htm> (accessed 02.02.2022) where 'Decent Work' is defined in as "work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men." In this definition, no mention is made of how many hours of work qualifies a work as decent. Note that the term "fair income" in the definition is quite relative and depends on the perception of individual worker.

57. See 'Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects', p. 3, at footnote 12 supra. See also Sam Erugo (supra), at p. 496.

58. See the estimated unemployment and underemployment rate by NBS via its *Labour Force Survey* (at footnote 26 supra).