



## A LEGAL ANALYSIS OF OUTSOURCING AND CASUALIZATION OF WORKERS AND THE ROLE OF THE TRADE UNIONS IN REDUCING CASUALIZATION IN NIGERIA\*

### Abstract

The article examines the causes and implication of outsourcing and casualization in Nigeria. This article reviews the literature, the Constitution of the Federal Republic of Nigeria, 1999 and other statutes such as the Labour Act and the Trade Union Act. The article also discusses the practices with regards to casualization and outsourcing in other jurisdictions with the view of learning some relevant lessons. The article found that the plight of the casual and outsourced employees is precarious and that Nigerian laws offer little protection for this specie of worker. Further, the article argued that the trade unions must be at the fore to fight against all forms of Non-Standard Work Arrangements, as their strength is gradually and continually being reduced due to these precarious work arrangements. The article concludes that the extant laws must be amended and reformed in order to reduce the number and the impact of casual and outsourced employment.

**Keywords:** Casualization, outsourcing, non-standard work arrangements, union, employee (worker) and workplace.

### 1. Introduction

Non-Standard Work Arrangements (NSWA) or what the International Labour Organization (ILO) described as precarious work<sup>1</sup> is generally used to describe work arrangements which do not fall within the traditional definition of employment. ILO stated further that precarious work leads to precarious lives and precarious societies.<sup>2</sup> The term -NSWA- may also refer to fixed contract, casual work, outsourced work, contract work, on-call work, part-time, and temporary work. Casual employment and outsourced labour have been increasing globally and especially in Nigeria in recent years.<sup>3</sup> Professionals with high skills are not precluded from the precariousness of outsourced or casual employment.<sup>4</sup> The prominence of NSWA is observed in both the public and private sectors and in extreme cases some Nigerian organizations are operating with as much as 98 percent of their workforce on casual labour.<sup>5</sup> Multinational companies (MNCs) which enjoy extraordinary tax

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<sup>1</sup> ILO *A Trade Union Agenda on Precarious Work at the ILO From Precarious Work to Decent Work Outcome Document to the Workers' Symposium on Policies and Regulations to Combat Precarious Employment* (ILO Report 2012) 1-2.

<sup>2</sup> *Ibid*, 53.

<sup>3</sup> Princewill Lekara Bayo, 'The Negative Effects of Labour Casualization In Nigeria: A Conceptual Review' [2019] 7(2) *International Journal of Innovative Social Sciences & Humanities Research*, 69; Miebaka D Tamunomiebi and Karibo B Bagshaw, 'Managing Casualization and Redundancy of Workers: Its Effect and Implication to Sustainable Development in Nigeria Business Environment'[2018] 4(1) *Hard International Journal of Economics and Business Management* 72; Adebimpe Adetutu Adenugba, and Jubril Olayiwola Jawando, 'Assessing the Patterns of Temporary Employment in the Food Processing Industry in Lagos, Nigeria' [2014] 50(6) *Journal of Asian and African Studies*, 732-749; Ifedapo Adeleye, 'The Impact of Outsourcing on Business Performance: Insights for Employers [2011] 3(1) *Human Resource Management Journal* 26-44; Tinuke M Fapohunda, 'Employment Casualization and Degradation of Work in Nigeria' [2012] 3(9) *International Journal of Business and Social Science* 257; Oyesola Animashaun, 'Casualization and Casual Employment in Nigeria: Beyond Contract' [2007] 1 (4) *Labour Law Review* 14-34; Adriana Vanden Heuvel and Mark Woode, 'Casualisation and Outsourcing: Trends and Implications for Work- Related Training' National Institute of Labour Studies Flinders University of South Australia 1999, 1.

<sup>4</sup> Olivia Mason and Nick Megoran, 'Precarity and Dehumanisation in Higher Education' (2021) 14(1) *Learning and Teaching* 35-59; Adeleye (n3) 26-44.

<sup>5</sup> Philip A Oyadiran, Daniel Dare, Aisha Ahmad Faskari and Tosin Success Ademeso 'Casualization and Labour Utilization: A Global Perspective' [2018] 6(2) *International Journal of Advanced Studies in Economics and Public Sector Management* 245; Emeka Okafor, 'Non-Standard Employment Relations and Implications for Decent Work Deficit in Nigeria' [2012] 6(3)



incentives and duty waivers used to be the Nigerian workers' haven, where every worker hitherto dreamt of working, have gone outsourcing thereby declaring fat profits annually on the sweat of the casual workers.<sup>6</sup> The Oil and Gas industry consisting of MNCs such as Shell, ExxonMobil, TotalFinaElf, Chevron; and the NNPC Limited (formerly Nigeria National Petroleum Corporation)- a fully owned federal government enterprise- are pre-eminent in the utilization of casual and outsourced workers.<sup>7</sup>

Casual work is increasingly becoming the norm of a global economy as statutory, private and public companies undergo restructuring, privatization, concentration on core activities and modifications in work organization and technology.<sup>8</sup> These factors certainly affect traditional employment relations and the exercise of freedom of association and collective bargaining rights inherent therein.<sup>9</sup> Proponents of continued use and extension of casual work and outsourcing such as Campbell and Burgess argued that the disadvantages of the scheme for individual workers could be tackled through the welfare system and not through the intervention in the sphere of employment by the government.<sup>10</sup> The article posits that in a country like Nigeria, casual labour may be justified in organizations with seasonal demand but in sectors where demand for the organization's products and services is high throughout the year there is little justification, given that most of these companies overwork the remaining few staff and declare huge profits at the end of the accounting period. Moreover, as there is no welfare system in Nigeria, it is the few gainfully employed who carry the burden of the unemployed and under-employed persons like the casuals and outsourced workers.

COVID-19 which is both an economic and health catastrophe which has led to COVID-19 induced loss of job has led to the extension of NSWA.<sup>11</sup> The hitherto high unemployment situation in Nigeria became worse with the advent of COVID-19. For instance, between 2021 and 2022, Standard Chartered Bank closed 30 percent of its branches in Nigeria.<sup>12</sup> Similarly, in 2020, the management of Access Bank donated ₦1 billion and other materials like ambulances, medical equipment and consumables to the Federal Government of Nigeria, as its COVID-19 related Corporate Social Responsibility. Access Bank's management however decided to downsize staff by 75 percent shortly thereafter.<sup>13</sup> The author suggests that the donations to the Federal Government of Nigeria and state governments' COVID-19 relief effort by Nigerian corporations may not be

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*An International Multidisciplinary Journal*, 93-108; Arne Kalleberg, 'Precarious Work, Insecure Workers: Employment Relations in Transition'(2009)74(1) *American Sociological Review* 1-22; Susan Houseman, Arne Kalleberg, and George Erickcek, 'The Role of Temporary Agency Work in Tight Labour Markets' [2003] 57(1) *Industrial and Labour Relations Review* 105-127; Julian Teicher, Bernadine Gramberg and Peter Holland, P 'Trade Union Responses to Outsourcing in a Neo-liberal Environment: A Case Study Analysis of the Australian Public Sector' [2006] 12(2) *Asia Pacific Business Review* 243-256; Andrea Baumann and Jennifer Blythe, 'Nursing Human Resources: Human Cost versus Human Capital in the Restructured Health Care System'[2003] 3(1) *Health Perspective* 27-34.

<sup>6</sup> Akido Agenro 'Outsourcing: The Source of Modern Day Slavery' *The Guardian* (Lagos, 21 June 2017) <<https://guardian.ng/opinion/outsourcing-the-source-of-modern-day-slavery/>>accessed on 12 April 2023.

<sup>7</sup> Joan Omone Iteboje 'The Growth of Agency Labour in the Nigerian Oil Industry and its Challenges for Trade Union Organisation' (PhD Thesis, University of Salford 2018) 24.

<sup>8</sup> Razaq Bamidele and Micheal Babatunde, 'Casual Employment and the Globalized Market: A Case of Selected Countries' [2017] 2(1) *Uyo Journal of Sustainable Development* 18-34.

<sup>9</sup> Rasak Bamidele, Modupe Ake, Festus Femi Asamu & Rasaq O Ganiyu 'Casual Work Arrangements (CWAs) and Its Effect on Right to Freedom of Association in Nigeria' [2019] 7(1) *International Journal of Innovative Legal & Political Studies* 1.

<sup>10</sup> Iain Campbell and John Burgess 'Casual Employment in Australia and Temporary Working Europe: Developing and Cross Cultural Comparison' [2001] 15(1) *Work, Employment and Society* 177-184.

<sup>11</sup> OECD 'The rise of domestic outsourcing and its implications for low-pay occupations' <<https://www.oecdilibrary.org/sites/937ad5bcen/index.html?itemId=/content/component/937ad5bc-en#chapter-d1e24700>> accessed on 12 January 2023.

<sup>12</sup> N Chukwu, 'Standard Chartered Bank's 50% Branches Closure: Losses, Lessons, Future of Banking' *Nigerian Tribune* (Ibadan January 18 2022) 12.

<sup>13</sup> Etim Etim 'Access Bank: The Bigger it grows, the Kinder it Becomes' *This Day* (Lagos 5 May 2021) <<https://www.thisdaylive.com.>>accessed 4 March 2023.



altruistic after all as the donations are tax deductible by virtue of sections 25 and 27 of the Companies Income Tax Act.<sup>14</sup> Casual and outsourced jobs are thus characterized by abysmal low wages; absence of medical care and allowances; reduced job security or lack of skill and age related increment, gratuity and other severance benefits. Other detriments of being a casual include lack of leave and leave allowance; lack of representation and freedom of association; no death benefit or accident insurance at work; and no negotiation or collective bargaining agreement.<sup>15</sup>

## 2. Casualization, Outsourcing and Related Terms

Industrial adjuncts known by different names such as casuals, outsourced staff are subject to varied definitions due to the different definitions adopted in the different jurisdictions. Casualization of employment may be considered as an appropriate strategy for cost reduction, it is often temporary and characterized by uncertain wages, long hours, and a lack of job security. Casualization is any employment characterized by a lack of stability of tenure, uncertainty, restriction of employees from leave entitlements and the adoption of all manners of unfair labour practices.<sup>16</sup> A casual employee is defined by a Nigerian court as a worker engaged for a period of less than 6 months and who is paid at the end of each day.<sup>17</sup> This definition is however defective as there are casual workers who has been on the same status for more than ten years.<sup>18</sup> The term- casualization- is used interchangeably with contingent, atypical, flexible and alternative work arrangements and includes temporary work, part-time work, subcontracting, outsourcing, labour hire, zero-hour employment, dependent self-employment and disguised employment relationships.<sup>19</sup> The different types of NSWA are depicted graphically in Figure I below. The figure equates casualization with outsourcing and vice versa showing that casualization is just a subset of outsourcing. Thus, casualization is tactical outsourcing. Similarly, strategic or business process outsourcing refers to IT and operations outsourcing and offshoring.

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<sup>14</sup> Chapter C21 LFN 2004.

<sup>15</sup> Animashaun (n3).

<sup>16</sup> Ibid.

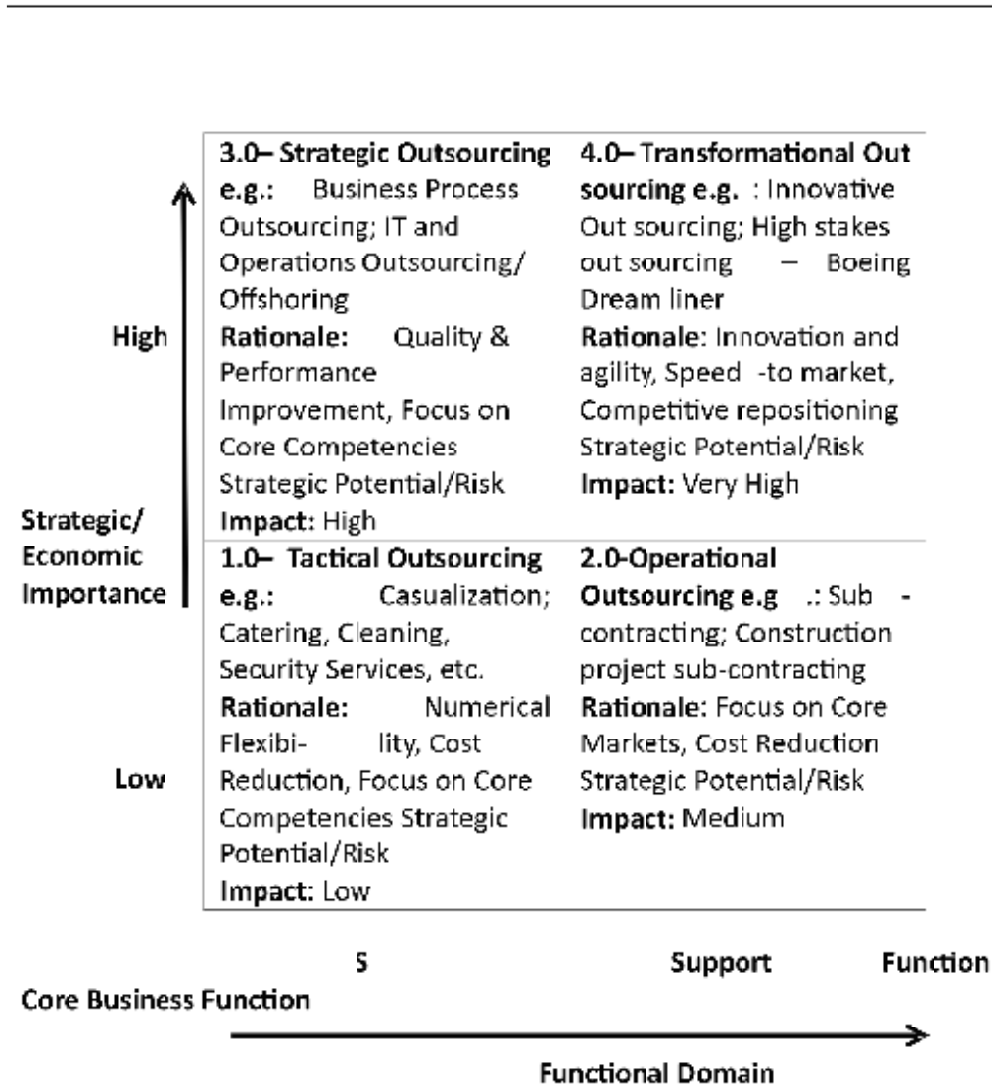
<sup>17</sup> *Owena Mass Transportation Co. Ltd v Okonogbo* (2018) LPELR-45221 (CA).

<sup>18</sup> Animashaun (n3).

<sup>19</sup> Gogo George Otuturu 'Casualization of Labour: Implications of the Triangular Employment Relationship in Nigeria' [2021] 12 *Beijing Law Review* 679; Elmarie Fourie, 'Nonstandard Workers: The South African Context' [2008] 11 *International Law and Regulation by the European Union Journal/ Potchefstroomse Elektroniese Regsblad*, 109. <<https://doi.org/10.4314/pej.v11i4.42242>> accessed on 2 March 2022; ILO, *Nonstandard Employment around the World: Understanding Challenges, Shaping Prospects* (2016) 20-32.



Figure 1 – Strategies for Outsourcing



Source: Adapted from J Baron and D Kreps, (When and How to Outsource Activities: A Diagnostic) ‘Strategic Human Resources: Frameworks for General Managers’ (New York: Wiley & Sons, 1999) 461.

Operational outsourcing includes sub-contracting and construction project sub-contracting while transformational or innovative outsourcing refers to high-stake outsourcing such as outsourcing of innovative high level technology projects such as the Boeing Dreamliner. For Forde and Slater, agency work can be viewed as either a bridge to secure employment or a trap in which workers are caught.<sup>20</sup> Outsourcing is a management strategy by which a company assigns an experienced and efficient service provider to perform their non-core functions, by doing so they can

<sup>20</sup> Chris Forde and Gary Slater, ‘Agency Working in Britain: Character, Consequences and Regulation’ G. [2005] 43(2) *British Journal of Industrial Relations* 249–271.



save time and money.<sup>21</sup> Gilley and Rasheed consider outsourcing as acquiring services by external means and adjusting this acquisition to the organizational needs.<sup>22</sup> The outsourcing contract of employment is a tripartite arrangement consisting of the labour contractor who essentially employs a worker and supplies the worker as a sort of merchandise to the secondary employer (the company requiring the services of the casual worker). The labour contractor's item of trade is the worker who is supplied to the secondary employer at a fee unknown to the worker. In some cases, the worker may not even know the primary employer. Thus, the terms of employment are never negotiated as the employee or worker is faced with -a take it or leave it situation. The implication is that the labour contractor exploits the worker by negotiating for his/her pay at a price for which he must make a profit.<sup>23</sup> NSWA consists of employees categorized as peripheral workers. These categories of workers lack the opportunity for training, career progression and social security benefits, and are classified as secondary employees in most instances.<sup>24</sup> The work conditions of casual workers are usually not at par with permanent employees, which are fundamentally responsible for workplace diseases, industrial accidents, and many psychological problems encountered by this category of employees. Again, the nonchalant attitude of the organization (employer) in both the development and well-being of casual workers engenders several workplace problems. This leads to the question what are the causes of casualization and outsourcing of employment? The cause of casualization and outsourcing is mainly traced to the desire of the employer to cut cost thus reducing labour cost by withholding certain benefits from casual staff which are mandated by the law or convention for permanent staff. There are other causes which are stated hereunder.

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<sup>21</sup> Linda K Stroh and Deborah Treehuboff, 'Outsourcing HR functions: When—and When not— to go Outside' [2003] 10(1) *Journal of Leadership and Organizational Studies* 24; Biswajit Nag, 'Business Process Outsourcing: Impact and Implications' (2004) 5 *Bulletin on Asia Pacific Perspectives* 121.

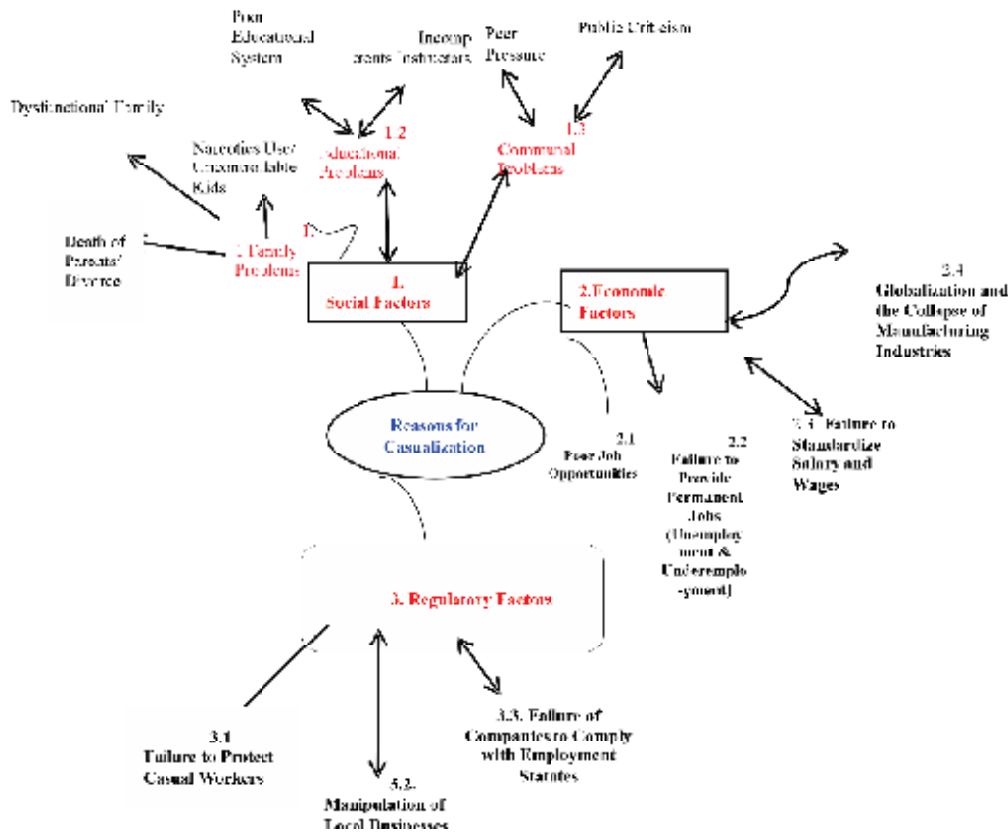
<sup>22</sup> K Matthew Gilley and Abdul Rasheed, 'Making More By Doing Less: An Analysis of Outsourcing and its Effects on Firm Performance' [2000] 26 (4) *Journal of Management* 763-790

<sup>23</sup> Bamidele, et al. (n9) 2.

<sup>24</sup> Nele De Cuyper, Jeroen De Jong, Hans De Witte, Kerstin Isaksson, Thomas Rigotti and Rene Schalk, 'Literature Review of Theory and Research on the Psychological Impact of Temporary Employment: Towards a Conceptual Model' [2008] 10(1) *International Journal of Management Reviews* 25-51.



FIGURE II Causes of Casualization



Source: Adapted by the author to suit the Nigerian Situation from Mollo & Emuze, (2018) (n 25 below).

The causes of outsourcing and casual employment could be attributed to in a large part to globalization and unemployment.<sup>25</sup> Other causes include social, economic and regulatory factors as depicted in figure II above. Social factors include poor and outdated educational system which in turn produces unemployable recruits. Other social factors include dysfunctional family structures and the use of drugs which may affect the development of the workers’ potential, hence rendering them uneducated and suitable for daily paid jobs and other forms of NSWA. Similarly, there are regulatory factors, whereby the law is silent or failed to protect against casualization and other forms of NSWA or where the extant laws are not enforced. In Nigeria, there is a dearth of law protecting the workers against NSWA. However, the few provisions that could have been used to protect the casual workers such as the provisions of section 7 of the Labour Act is unenforceable due to the poor drafting, the lack of manpower in the Ministry of Employment to enforce the provision and widespread corruption of the officials. Section 7 of the Labour Act provides that an employee must be given a letter of employment within 90 days of engagement. The Labour Act is however defective

<sup>25</sup> Lesiba Mollo and Fidelis Emuze ‘Casualisation of Work in Construction, and the Plight of Workers in Bloemfontein’ (2018) <<https://www.researchgate.net/publication/324389294>> accessed on 3 March 2023.



because it restricted those qualified as workers to junior staff in clerical and manual work only.<sup>26</sup> Therefore, common law principles are used to deal with employment issues concerning majority of employees in Nigeria.

The practice of casualization and all forms NSWA affect trade union membership, its mobilizing capacity and check off dues from the large number of workers in the system that cannot be unionized. Section 1(1) of the Nigerian Trade Union Act<sup>27</sup> defined a trade union as: “any combination of workers or employers, whether temporary or permanent, the purpose of which is to regulate the terms and conditions of employment of workers, whether the combination would or would not, apart from this Act, be an unlawful combination by reason of any of its purposes in restraint of trade, and whether its purposes do or do not include the benefits for its members.” Trade unions in recent times has been described as weak institutions dwindling in relevance, and decreasing in numerical strength for ensuring improved working life for the working people, thus the trade unions must devise survival strategies in order to remain relevant. The impotence of the central trade unions such as the Nigeria Labour Congress and Trade Union is revealed by its debilitating silence during the recent abuse of the citizenry by the absence of and the high price of fuel and the Naira redesign which caused undue hardship, thereby crippling the economy.<sup>28</sup> Thus, the survival strategies in this context is for the trade union movement to be active and responsive to the perturbing and escalating trend of anti-people and anti-labour practices orchestrated by the government and corporations. It includes strategies marshalled against the snag of atypical work arrangements, as it is evident within the global labour market and the Nigerian labour market in particular. Issues relating to the significantly increased practice of employment casualization are not new. In fact, it is a common household name in Nigeria’s employment relations environment and has since been relegating the relevance of the trade unions to the background.

### 3. Instances of the Plight of Casuals and Outsourced Employees

This article argues that the employment and recruitment industry has facilitated the commodification of labour power, thereby driving wages, human dignity and union membership down. The predicament of casuals and outsourced workers in Nigeria is unenviable as depicted by the following instances. In November 18, 2007, for instance, the Nigerian military’s Joint Task Force (JTF) attacked (outsourced) contract workers demonstrating peacefully at the Nigeria Liquefied Natural Gas (NLNG) Bonny Island Terminal. The JTF fired tear gas directly at the contract workers, attacking them with batons.<sup>29</sup> According to the International Federation of Chemical, Energy, Mine and General Workers (ICEM) the incident “blinded one worker in his right eye and injured 28 others.”<sup>30</sup> Similarly, a 2007 study of 8,000 contract workers hired by 45 ExxonMobil contractors throughout Nigeria found physicians, nurses, pharmacists, and engineers working for years as “temporary contract staff” at the state-run Nigerian National Petroleum Corporation/ ExxonMobil joint projects. Many earned wages so low that they could barely support themselves or their families.<sup>31</sup> The precariousness of the life of a casual worker is better imagined in the decided case of *Ifere v Truffods Nig. Ltd.*<sup>32</sup> The respondent company hired the appellant as a casual worker in 1992

<sup>26</sup> Section 91 Labour Act, Cap L1 LFN 2004; *Evans Brothers (Nig.) Publishing Ltd. v Falaiye* (2003) 13 NWLR (pt. 838) 564.

<sup>27</sup> Chapter T14 LFN 2004.

<sup>28</sup> Editorial ‘The Economy and Naira Redesign Policy’ *The Sun* (Lagos, 14 February 2023) <<https://sunnewsonline.com/the-economy-and-naira-redesign-policy/>> accessed 4 April 2023 Muawiya Shuaibu ‘2023: Fuel scarcity, naira redesign, other factors that may affect elections’ *Daily Trust* (4 February 2023) <<https://dailytrust.com/2023-fuel-scarcity-naira-redesign-other-factors-that-may-affect-elections/>> accessed 4 April 2023.

<sup>29</sup> USAID ‘The Degradation of Work Oil and Casualization of Labor in the Niger Delta’ (Solidarity Centre 2010) 4.

<sup>30</sup> *Ibid* 4.

<sup>31</sup> USAID (n29) 18.

<sup>32</sup> 2008 WLR 30.



to work on a plastic molding machine. He had an accident on the job and the five fingers of his right hand were severed. He was paid ₦ 6, 109.64 through an insurance company as his compensation under the provisions of the Workmen Compensation Act. His request for more money was turned down. He filed a suit claiming ₦1 Million special damages. His claim failed at the High Court but, he was eventually awarded ₦300,000 by the Court of Appeal. The position of casual workers has improved however with the enactment of the Employees Compensation Act, 2010.<sup>33</sup>

In a similar case, a casual worker in Flour Mills Nigeria Plc. while at work bagging fertilizer started coughing and vomiting blood; he was rushed to a nearby private clinic where he eventually died.<sup>34</sup> The deceased and his colleagues were working under intense inhuman condition that is, crowded rooms without ventilation and protective gadgets such as nose guards, helmets, hand gloves, boots and so on.<sup>35</sup> Apart from this, these casual workers were denied access to the company's clinic and canteen. Second, casual workers were laid off and re-absorbed every three months, their old ID cards recovered and re-issued new ID cards.<sup>36</sup> The management of the company invited the police to disperse the casual staff who were peacefully protesting the death of their colleagues and the sub-human condition under which they work. The police injured many of the protesters/casual workers, detained five of them and charged them to court for disturbing public peace.<sup>37</sup> It is instructive that the National Industrial Court (NIC) in another case involving Flour Mills decided against the company on this issue of casualization. In *Toluhi Idowu Augustine v Flour Mills Nig. Plc.*<sup>38</sup> the NIC decided that offering a staff a year temporary contract to a staff and renewing it for another year for a period of three years amount to unfair labour practice. The court found for the claimant and awarded ₦1million as damages and other costs. The NIC availed itself of the provisions of section 254(C)(1)(f) of the Constitution of the Federal Republic of Nigeria, 1999 as a means of protecting casual and outsourced employees. Section 254(C)(1)(f) of the Constitution of the Federal Republic of Nigeria, 1999 provides that the NIC could entertain matters relating to or connected with unfair labour practice or international best practices in employment and industrial relation matters to grant limited relief to casual and outsourced employees.<sup>39</sup>

In addition, the question of whether casual or outsourced workers are eligible to be members of trade unions was answered in the affirmative in a decided case. In *Patovilki Industrial Planners Limited v National Union of Hotels and Personal Services Workers*,<sup>40</sup> the NIC in determining the right of both permanent and temporary or casual workers to form a trade union, made reference to section 1(1) of the Trade Union Act.<sup>41</sup> The NIC thus held that a relevant trade union can unionize workers who are casual or daily paid workers. However, this decision is more of a theoretical exercise; the impact is yet to be felt in the Nigerian industrial relations system, because employers usually relieve leaders and key members of such organizations of their appointment summarily under one pretext or another. The unionized outsourced workers are thus replaced by more compliant staff from the source company.

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<sup>33</sup> *Abel v Trevi Foundation Nigeria Limited*, Suit No: NIC/PHC/55/2013, Digest of Judgments of National Industrial Court (2014) 288-289.

<sup>34</sup> Animashaun (n3) 27.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> NICN/JOS/23/2017.

<sup>39</sup> This is an amendment of the CFRN, 1999 vide the Third Alteration, 2010 to the Constitution of the Federal Republic of Nigeria, 1999.

<sup>40</sup> Suit No. NIC/12/89.

<sup>41</sup> Cap T 14 LFN 2004.



#### 4. Legal Regimes and Non-Standard Work Arrangements

There are international conventions and Nigerian statutes which frown at NSW. Article 3 of the ILO Convention<sup>42</sup> states that all fee-charging employment agencies conducted with a view to profit shall be abolished within a limited period of time determined by a competent authority. Article 1 of the same ILO Convention defines fee-charging employment agencies to mean any agency or organization which acts as an intermediary for the purpose of procuring employment for workers or supplying workers for an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either or both the employer or worker. It is important to note that Nigeria did not ratify this convention or the Private Employment Agencies Convention of 1997 (No. 181). Closely associated with the above is the ILO Convention concerning freedom of association and protection of the rights to organize. Article 5 states that –workers’ organizations shall have the right to establish and join federations and confederations and any such organization; federation and confederation shall have the right to affiliate with international organizations of workers. By virtue of Article 11, it is imperative for member countries to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize. Article 23(4) of the Universal Declaration of Human Rights (UDHR, 1948) recognizes the right to freedom of association and provides that, everyone has the right to freedom of peaceful assembly and association article, which is in line with the ILO standards on the freedom of a person to join or form an organization of one’s choosing to protect his or her interest in the workplace.<sup>43</sup>

Similarly, section 40 of the Constitution of the Federal Republic of Nigeria, (CFRN) 1999 recognizes the freedom of association. However, the freedom of association and protection, and the right to organize themselves with regards to casual workers in Nigeria is suspect. Nevertheless, any employer who violates the provisions of section 24 of the Trade Union Act is guilty of an offence; this Act provides that all employers must compulsorily recognise registered trade unions operating in their sectors. In addition, Article 1 of the ILO Convention No. 98 concerning the application of the principles of the right to organize and bargain collectively,<sup>44</sup> provides that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment, must not be precluded from joining a union or compelled to relinquish trade union membership, or face prejudice or discrimination by reason of union membership or participation in union activities. Razaq et al., observed that individuals who retired, especially from the operations or personnel departments of the secondary employers usually set up labour contracting companies to serve the companies where they were hitherto employed.<sup>45</sup> The impact of this is that such ex-employees turned labour contractors are well versed with the mores of the secondary company, and may have dissuaded the new recruits from joining trade unions, ab initio.

Casualization of labour or other NSW is industry-wide and usually a means of reducing the cost of doing business, a mechanism for destroying workers’ union and their ability to negotiate on behalf of the workers. NSW in Nigeria is synonymous with cheap labour and maximisation of profits. The continued engagement of casual labourers seems to be at variance with provisions of section 17(a) of the CFRN, 1999 which guarantees “equal pay for equal work.” Section 17 of the CFRN, 1999 frowns on discrimination on account of sex, age or any other ground whatsoever and so the discrimination in pay between permanent and casual employees should not exist.

Section 7(1) of the Labour Act,<sup>46</sup> provides that all employee must be given a letter of appointment not later than three months after engagement stating the nature of his work, the salary,

<sup>42</sup> The ILO Convention Concerning Fee-Charging Employment Agencies which came into force on the 8th of July 1951.

<sup>43</sup> See also Article 10 of the African Charter which guarantees the freedom of association for workers in Nigeria. This Charter has been ratified and it is an integral part of Nigerian law by virtue of section 12 (1) of the CFRN, 1999.

<sup>44</sup> Came into force on 18<sup>th</sup> July 1951.

<sup>45</sup> Bamidele, et al., (n9) 3.

<sup>46</sup> Cap L1 LFN 2004.



conditions related to hours of work, holidays and holiday pay, among other provisions. Similarly, section 91(1) of the Labour Act defines a worker as any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written and whether it is a contract of service or a contract personally to execute any work or labour, but does not include (a) any person employed otherwise than for the purpose of the employer's business; or (b) persons exercising administrative, executive, technical or professional functions as public officers or otherwise; or (c) members of the employer's family; or (d) representatives, agents, and commercial travelers in so far as their work is carried outside the permanent workplace of the employer's establishment; or (e) any person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, repaired or adapted for sale in his own home or on other premises not under the control or management of the person who gave out the article or material; or (f) any person employed in a vessel or aircraft to which the laws regulating merchant shipping or civil aviation apply. This definition seems inadequate in defining who a worker actually is, thus recourse has to be made to case law and the definition offered by jurists since majority of workers are unprotected under the Labour Act. However, section 73 of the Employees' Compensation Act (ECA) of 2010 defines an employee as a person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary, apprenticeship or casual basis. This includes a domestic servant who is not a member of the family of the employer including any person employed in the Federal, State, Local Governments, and any of the government agencies and in the formal and informal sectors of the economy.<sup>47</sup> However, it seems that the ECA, 2010 definition of employee is for employees' related claims in cases of diseases, injury and death.

The term employee or worker refers to anyone who is employed under a contract of employment in consideration for wage or salary.<sup>48</sup> Over the years, jurists have attempted to define who an employee or a worker is for the purpose of establishing the vicarious liability of a worker, thereby leading to the demarcation of contract of employment from contract for employment.<sup>49</sup> Thus, in a bid to determine who is a worker in law, various tests have been developed to determine whether or not a person is an employee.<sup>50</sup> These tests are: first, the control test which states that, a worker is anyone that is subject to the control of the employer in the course of the employer-employee relationship particularly with the way and manner he performs his duties. Second, the organization or integration test ascertains whether the function of the employee is integrated to the business of the organization.<sup>51</sup> Third, there is the multiple test principle, whereby a multiplicity of factors such as control, integration, mode of payment and other tests are employed in determining whether a person is a worker or an independent contractor.<sup>52</sup>

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<sup>47</sup> Section 73, ECA, 2010

<sup>48</sup> Chima Kanu Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Lagos, Concept Publications Ltd., 2011) 56.

<sup>49</sup> Agomo (n 48 above) 56 – 57; see also *Shena Security Co. Ltd v Afropak (Nig.) Ltd.* (2008) 6 CLRN 7.

<sup>50</sup> Oladosu Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (2<sup>nd</sup> ed., Lagos, Folio Publishers Limited 2009) 15; Egerton E Uvieghara, *Labour Law in Nigeria* (Lagos, Malthouse Press Ltd., 2001) 4.

<sup>51</sup> Agomo (n 48 above) 63; Roger W Rideout, *Rideout's Principles of Labour Law* (4<sup>th</sup> ed., London, Macmillan, 1983) 5; S.N. Gbenedio, 'The Legal Meaning of a Worker' (2007) 5 *Igbenedion University Law Journal* 149-150; *Stevenson Jordan & Harrison Limited v Macdonald & Evans* (1952) 1 TLR 101 at 111; *Okwoli & 13 ors. v National Maritime Authority* (unreported suit No. FHC/LJ/CS/365/2001); *Construction Industry Training Board v Labour Force* (1970) 3 All E.R. 220; *Global Plant Ltd. v Secretary of State for Health and Social Security* (1971) 3 All E.R. 385; *Cassidy v Minister of Health* (1951) 1 All E.R. 574; *Gold v. Essex County Council* (1942) 2 All. E.R. 237; *Collins v Hertfordshire County Council* (1947) 1 All E.R. 633; *Agent v Minister of Social Security* (1968) 3 All E.R. 208.

<sup>52</sup> *Astra Emir, Selwyn's Law of Employment* (27<sup>th</sup> ed., London, Butterworths 2022); *Ready Mixed Concrete (South East) Limited v Minister of Pensions* (1968) 1 All E.R 433; (1968) 2 QB 497 *Milway (Southern) Ltd. v Willshire* (1978) IRLR 322; *Massey v Crown Life Insurance* (1978) 1 RLR 31; *Shitta-Bey v Federal Civil Service Commission* (1981) 1 SC 40.



## 5. Non-Standard Work Arrangements, Trade Unions and Enforcement Mechanism

Against the above mentioned background, the outbreak of COVID-19, the processes of digitalization and outsourcing threaten to provoke further casualization and fragmentation. Then why should trade unions care? Apart from the dwindling membership, check-off and strength of the unions, casual or outsourced workers experience vulnerability, invisibility, lack of agency and no control over one's decisions. Outsourced workers are at a higher hazard, they are under different salary regime, benefit scheme and no trade union representation they are not, technically speaking, company's/ the organization's workers.<sup>53</sup> Outsourced or other workers in similarly vulnerable position have been used to break strike action.<sup>54</sup>

In Nigeria, trade union provides services which include personal financial assistance, interest free loans, education sponsorship, end of year bonus, health counselling, and crèches to their members.<sup>55</sup> A fundamental benefit that the trade unions offer their members is the power of solidarity, which helps to strengthen the processes of negotiation, bargaining and indeed capacity for increased self-esteem which has a positive impact on productivity and output. Other key benefits generally include insurance, cooperatives, transport and special rates in transport and health.<sup>56</sup> Moreover, trade unions serve as a control against tyrannical government or obnoxious policies. However, the biggest threat to the successful implementation of these programmes is the dwindling membership of the union due to the policy on labour market liberalization which has led to loss of jobs especially in the formal sector. Dwindling membership and a high cost of living have impacted negatively on the ability of the unions to provide an effective and sustainable practice of benefits such as medical, housing and training programmes.<sup>57</sup> Indeed many of the union members who had acquired rich capacity over the years that could be useful to the younger generation have since lost their jobs due to this liberalization policy. In both the public and the private sectors, the practice of casual labour comes with a lot of job uncertainty, lower income and mostly workers who are not unionised and this edges them away from the possibility of being part of the provision of services such as cooperatives and financial assistance.<sup>58</sup>

The precarious situation of the Nigerian economy in general has made workers and the unions vulnerable to unfair labour practices from employers. The fear of dismissal in a saturated labour market has made workers more tolerant of the excesses of management. Other untoward practices which impinge on casual and outsourced workers in the banking sector for instance, include unrealistic work targets and working far in excess of 8 hours per day without any pecuniary benefit. Other unfair labour practices engaged in especially by the new generation banks in Nigeria include arbitrary fixing of wages without collective bargaining, non-payment of redundancy and severance benefits, casualization, contract employment, and outsourcing. The fact that these unfair labour practices go on in spite of union presence in some of these banks is an indication that the balance of power within the world of work is in favour of employers.<sup>59</sup>

Similarly, the issue of violation of expatriate quota and the employment of illegal alien by companies is another issue. Almost all the companies in Nigeria, including the multi-national oil companies circumvent this law. It is a bit difficult to enforce the non-employment of illegal alien by

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<sup>53</sup> Mariya Ivancheva 'The Casualization, Digitalization and Outsourcing of Academic Labour: A Wake-Up Call for Trade Unions' <<http://www.researchgate.net/3405>> accessed on March 20, 2023.

<sup>54</sup> Ibid.

<sup>55</sup> Hauwa Mustapha and Baba Aye, 'Trade Union Services and Benefits in Nigeria' in Trywell Kalusopa, Kwabena Nyarko Otoo and Hilma Shindondola-Mote (eds), *Trade Union Services and Benefits in Africa* (ALRN 2012) 259.

<sup>56</sup> Ibid 310.

<sup>57</sup> Ibid 318.

<sup>58</sup> Ibid 318.

<sup>59</sup> Funmi Adewumi and Adebimpe Adenugba, *The State of Workers' Rights in Nigeria: An Examination of the Banking, Oil and Gas and Telecommunication Sectors* (1st edn, Friedrich-Ebert-Stiftung 2010) 51.



Nigerian companies because of the following reasons. First, the porous nature of Nigerian borders. The second reason is the compromised nature of the immigration system and the laxity in the issuance of work and residential permits by the immigration officers to ‘expatriates.’ The third reason is the non-implementation of the clause which provides for expatriates to be supported by two Nigerians to understudy him and later takeover in the shortest possible time due to corruption and allied issues.<sup>60</sup> Expatriate workers, even those hired on temporary basis are better protected and enjoy higher pay than Nigerian workers with comparable skills and qualifications.<sup>61</sup>

The Ministry of Employment, Labour and Productivity charged with the mandate of enforcing the few extant and puerile laws lack the capacity to carry out its mandate. There is shortage of personnel and necessary equipment such as functional vehicles to carry out inspection services nation-wide. For example, the Factory Inspectorate was made up of only 47 staff and no official vehicle was attached to the department.<sup>62</sup> Closely related to the above is the apparent lack of the political will on the part of government to protect its worker-citizens through the enforcement of legislation meant for that purpose. This is demonstrated by the Federal Ministry of Labour’s reluctance to act with dispatch despite the strong anti-union posture in the oil and telecommunications sectors which may partly be due to the federal government’s interest in attracting foreign investment in these sectors. The prevailing reality in respect of workers’ right is not because the unions did not try, however, the unions need to promote inclusiveness and internal democracy in order to endear themselves more to workers.<sup>63</sup>

Furthermore, most of the Nigerian labour laws are suspended in the Export Processing Zones (EPZs). The Nigeria Export Processing Zones Act<sup>64</sup> (NEPZA) provides that disputes between employers and employees should be handled by the zones’ managing authorities and not through collective bargaining between employers and workers trade unions. The NEPZA also prohibits union activities, strikes and lockouts for a period of ten years after a company begins its activities in a given Zone.<sup>65</sup> In addition, the NEPZA does not prohibit casualization and other forms of NSW. In summary, NSW is a major threat to union existence and its prevalence in Nigeria is due to inadequate legislations, lack of enforcement of current legislations and government policy on employment and the attraction of foreign direct investments.

## 6. Non-Standard Work Arrangements in Selected Jurisdictions

The article looks at the law and practice with regards to NSW in other jurisdictions including Ghana and France with the aim of extracting some valuable lessons. Ghana, like Nigeria, is a developing country and a former British colony in the West African sub-region, but smaller than Nigeria in population, land mass and Gross Domestic Product (GDP). Ghana harmonized its several statutes on labour law into one Act -known as the Labour Act.<sup>66</sup> The provisions of the Labour Act cover all employers and employees except those in essential services such as the Armed Forces, Police Service, Prisons Service and Security Agencies. Part X49 of the Labour Act regulates the employment of casual and temporary workers in Ghana. It defines these two concepts and prescribes the remuneration that should accrue to them as well as the procedure to follow in the event of a breach of any of the provisions of the Act by the employer. A casual worker is defined under the Act as a worker engaged in a seasonal or intermittent work for a continuous period of less than six months

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<sup>60</sup> Adewumi and Adenugba (n59) 52.

<sup>61</sup> USAID (n29) 23.

<sup>62</sup> USAID (n29) 62.

<sup>63</sup> USAID (n 29) 71.

<sup>64</sup> Cap N107 LFN 2004.

<sup>65</sup> Section 63, Nigeria Export Processing Zones Act.

<sup>66</sup> Act No. 651 of 2003.



and whose remuneration is calculated on a daily basis.<sup>67</sup> The Act also provides that the contract of a casual worker need not be in writing,<sup>68</sup> and the casual worker must be given equal pay for work of equal value with permanent staff.<sup>69</sup> However, a temporary worker is defined as someone who works continuously for 6 months per year, but if the employee works for a continuous period of more than 6 months for the same employer such an employee shall be treated as a permanent worker.<sup>70</sup> In the event that an employer breaches these provisions, the temporary or casual worker may present a written complaint to the Commission for determination and its decision shall be binding on both parties.<sup>71</sup> Part XI of the Labour Act provides for freedom of association of both employers and employees and the right to form or join an association or union respectively.<sup>72</sup> In contradistinction with the Nigerian Trade Unions Act which provides that a minimum of 50 workers are required to form a trade union, the Ghanaian Labour Act provides that two or more workers employed in the same undertaking may form a union.<sup>73</sup> Notwithstanding these provisions, the plight of casual and other NSWA workers under the Ghanaian law are not different from their Nigerian counterparts.<sup>74</sup> Many of these categories of workers have been in employment for many years without their status being regularized as permanent employees as provided by the law.<sup>75</sup> Most of those engaged in NSWA in Ghana rarely complain because the need to remain in employment and earn a living supersedes the need to make a complaint to the Commission for fear of losing the job completely.<sup>76</sup>

France's legislation is perhaps more restrictive, as temporary workers can only be used to (i) replace absent employees; (ii) meet the needs of a temporary increase of activity; and (iii) fill intrinsically time-limited posts. The duration of temporary work is also limited to 18-24 months, after which the contract must become permanent.<sup>77</sup> This is an improvement compared to most other European countries, such as in Poland, Romania and Italy where the limit is set between 24-36 months.<sup>78</sup> Similarly, in most European Union (EU) countries, the legal framework of the outsourced employment relationships is between the agency workers and employment agency, and the job relations is between the agency worker and organization.<sup>79</sup> However, in the United Kingdom, due to the ambiguity of the legislation, the agency worker has, through case law, been refused the status of employee. Likewise, in some EU nations, including those that have currently reformed their labour laws especially as it concerned NSWA (such as the Netherlands), the official legal employer is the employment agency. Although, in France, this shared responsibility is not explicit, there is a strong protective regulation in place, and health and safety responsibilities are borne by the organization

<sup>67</sup> Section 77 of Ghana Labour Act (GLA) 2003.

<sup>68</sup> Section 74 (1) GLA.

<sup>69</sup> Section 74 (2) (a) GLA.

<sup>70</sup> Section 75 (1 GLA)).

<sup>71</sup> Sections 138,139, and 152 GLA.

<sup>72</sup> Section 79 (1) GLA.

<sup>73</sup> Contrast section 3 (1)(a) of the Trade Unions Act Cap T14 LFN 2004 (Nigeria) and section 80 of Labour Act, 2003 (Ghana).

<sup>74</sup> Chineze Sophia Ibekwe, *Casualisation in Nigeria: A Cross-National Comparison 2016 NAUJILJ* 87.

<sup>75</sup> Ibekwe (n 74) 87; J Barrientos *et al*, 'Social Protection for Migrant Labour in the Ghanaian Pineapple Sector', Working Paper T-30, September 2009, 5 and 31.

<sup>76</sup> Ibekwe (n72).

<sup>77</sup> Article 2, Law No. 72-1, 1972; see also Luc Cortebeek, *A Trade Union Agenda on Precarious Work at the ILO From Precarious Work to Decent Work Outcome Document to the Workers' Symposium on Policies and Regulations to combat Precarious Employment (ILO 2012) 52*; Paul Brook and Christina Purcell 'The Rise of the Temporary Employment Industry in France' [2020] 41(1) *Economic and Industrial Democracy* 121-144.

<sup>78</sup> Cortebeek (n 77); See also (Croatia) Labour Act 2009, Articles 29(5) and 30(1); (Brazil) Labour Code, Article 455; (Chile) Labour Code, Article 63; ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations: Protection against Unjustified Dismissal. Report III (Part 4B), International Labour Conference, 82nd Session, Geneva, 1995, para. 52. <<http://www.ilo.org/ilolex/english/>> accessed 3 March 2023.

<sup>79</sup> Adeleye (n3) 26 - 44.



(secondary employer). However, where there is ambiguity over responsibilities, as in the United Kingdom, the risk leans towards the shoulders of the employment firm.

## 7. Conclusion

The field of industrial relations recognize that flexible work arrangements work best, and are of benefits to both parties (employers and workers) when it runs alongside a fair and effective framework of employment rights. It is argued, that effective enforcement mechanisms underpin a well-functioning labour market by upholding the employment rights of workers and protecting organizations from operating on an uneven playing field. For example, for effective enforcement of the extant labour laws, there is a need for the Nigerian authority to create an office akin to a director of labour market enforcement saddled with setting the strategic direction of the enforcement bodies. This enforcement policy is what is particularly lacking in most of the developing nations including Nigeria.<sup>80</sup>

## 8. Recommendations

In a bid to reduce NSWA and improve the prospect of the trade unions the following measures are recommended. The unions must engage the NSWA oriented employers in litigation and showcase their activities in the public realm. The costs of litigation and negative publicity generated may also serve as a deterrent to such employers. In addition to litigation, advocacy on workers' rights should be taken as a major plank of the work of the NGOs. The trade union movement and the civil society organizations should liaise with their counterparts in other parts of the world to campaign against those foreign companies who violate the rights of their workers in Nigeria. Consumer boycott campaigns and social labeling should be considered.<sup>81</sup> Second, the trade unions should put their houses in order. Many of the trade union leaders' activities have been greatly marred with inconsistencies, corruption and rivalry amongst rank-and-file members, plagued with intra and inter union rivalry and poor handling of the collective bargaining process. Third, the unions should sensitize the government to reform the Labour Act especially Section 7 to criminalize casualization, introduce timeous conditions and provide stiffer penalties for any employer that indulges in casualization of work or outsourcing of employment. The French Labour Law may be used as a model. Fourthly, the federal government should be incentivized to strengthen the Labour Inspectorate Division of the Federal Ministry of Labour and Employment to ensure regular visits to corporate entities to ascertain their compliance with employment regulations in the labour laws. Legal frameworks must also be updated to ensure that precarious workers benefit from at least the same protection as all other workers. For instance, President Obasanjo's regime promoted neo-liberal policies and generous incentives which included the lowering of labour standard to attract Foreign Direct Investment. The Obasanjo's administration created an enabling business environment by entering into both bilateral and multilateral contracts on investment security, by creating the Nigerian Investment Promotion Commission (NIPC), and giving incentives such as prohibiting the activities of labour for ten years in Export Processing Zones. Such laws should be amended as recommended.

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<sup>80</sup> USAID (n 29) 18.

<sup>81</sup> Adewumi and Adenugba (n59) 73.