

**LEGAL REGIME ON CHILD LABOUR IN SOUTH AFRICA: LESSONS FOR NIGERIA\***

**Abstract**

*Child labour is universal phenomenon. This paper is aimed at appraising the legal regime on same in South Africa in order to draw lessons for Nigeria. The work adopted doctrinal research method, which in the main involves critical interrogation of relevant legislation in the Republic of South Africa viz-a-viz Nigeria. It is found that the Nigerian Constitution permits girl-child marriage which is one of the worst forms of child labour in the globe. The paper recommended that the Nigerian Constitution should be altered in order to in no uncertain terms define a child as a person who has not attained the age of eighteen years. Again, the Nigerian Child's Rights Act should apply to all the states of the federation and the Federal Capital Territory, Abuja so as to guarantee equal legal protection to all Nigerian children irrespective of each child's state of origin, residence, sex, status and religion. In conclusion, Nigerian legislation has not granted adequate and equal legal protection to Nigerian children viz-a-viz the situation in the Republic of South Africa.*

**Keywords:** Legal Regime, Child Labour, South Africa, Nigeria, Lessons

**1. Introduction**

Child labour is variegated. It is a situation of children being engaged as bus conductors, beggars,<sup>1</sup> domestic servants, child trafficking, slavery, child prostitution and pornography.<sup>2</sup> Child labour also includes use of children in film industry in pornographic performances in form of playing roles of sexual nature, indecent exposure 'either of the child's body or of other adults around the child or child pornography.'<sup>3</sup> This makes entertainment industry the centre of paedophiles and avenue for sexual exploitation of children.<sup>4</sup> Child labour especially trafficking for sexual exploitation is a hidden crime which victims do not necessarily view themselves as such and even when they do, they hardly make official report to relevant agencies for fear of further ill treatment.<sup>5</sup> The orphaned, the fatherless children and those in the large family are the most vulnerable.<sup>6</sup> Generally, poverty is the primary force behind child labour syndrome<sup>7</sup> as an impoverished child will likely willingly and consciously engage in child labour as a means of survival.<sup>8</sup> However, child labour contributes to poverty rather than ameliorate it<sup>9</sup> because it recycles poverty in the family. Also, unemployment, corruption, illiteracy, communal crisis, harmful cultural practices and under-development further increase the rate of child labour in the society.<sup>10</sup>

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<sup>1</sup> ILO, A Rapid Assessment of Bonded Labour in Domestic Work and Begging in Pakistan, Geneva, March 2004, cited in UN General Assembly, A Report of the Special Rapporteur of the Human Rights Council on the Sale of Children, Child Prostitution and Child Pornography, A/71/261, August 1, 2016, p. 11, where ILO defined begging as a series of activities by which individuals ask a stranger for money on ground of being poor or needing charitable donations for health, domestic or religious purposes.

<sup>2</sup> M. O. Edeko, 'Policy and Legislative Responses to Child Labour in Nigeria' {2011}, *BIU Law Journal*, (1) (1) 266-267.

<sup>3</sup> F. Bejide, 'The Use of Children in Film Industry in Nigeria: Legal Issues Arising' {2014} *University of Benin Law Journal*, (15), (1), p. 78.

<sup>4</sup> *Ibid*

<sup>5</sup> W. Jim & P. H. Davis, 'Human Trafficking, Sex Tourism and Child Exploitation on the Southern Border' {2011} *Journal of Applied Research on Children: Informing Policy for Children at Risk*, (2) (1) p. 1.

<sup>6</sup> J. Humphries, 'Child Labour: Lessons from the Historical Experience of Today's Industrial Economics' {2003} *The World Bank Economic View*, (17) (2), p. 18

<sup>7</sup> J. B. Bello 'Child Labour and the Vulnerability of the Nigerian Child: Challenges for the Future' {2013} *BIU Law Series* (1) (1) p.230

<sup>8</sup> A. N. Nwazuo & C. A. Igwe, 'Worst Forms of Child Labour in Nigeria: An Appraisal of International and Local Legal Regimes' {2016} *Beijing Law Review* (7), pp. 79-82

<sup>9</sup> P. A. Anyebe, 'Varying the Approach Towards Eradicating Child Labour in Nigeria: An International Solution to a National Problem' {2007} *Nigerian Journal of Labour Law and Industrial Relations*, (1) (1) pp. 148-149

<sup>10</sup> L. Akor, 'Trafficking of Women in Nigeria: Causes, Consequences and The Way Forward' {2010}, *Corvinus Journal of Sociology and Social Policy* (2) (2) p. 92

In South Africa, child labour is a consequence of socio-economic, traditional and political development in the country. Racial problem aggravated child labour situation of the blacks in South Africa.<sup>11</sup> Black and coloured children worked in plantation and factories that belonged to the white.<sup>12</sup> Upon the repeal of racial discrimination laws<sup>13</sup> and enactment of the Constitution as the supreme law, the latter provides for equality of citizens. It prohibits discrimination on any ground such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>14</sup> Child labour situation in the country is regulated under the Basic Condition of Employment Act<sup>15</sup> which is the local enactment of the International Labour Organization Convention.

Similarly, Nigeria is a heterogeneous and populous country. It has about three hundred and seventy four ethnic formations.<sup>16</sup> It gained independence and attained Republican status in 1960 and 1963 respectively. It has been described as a rich country with poor citizens<sup>17</sup> given its abundant human and material resources on one hand, and excruciating poverty of her citizens on the other hand. Like South Africa, Nigeria is a party to various international legal instruments for the protection of children. Few of these instruments are: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime 2000,<sup>18</sup> United Nations Convention on the Rights of the Child,<sup>19</sup> The African Charter on the Rights and Welfare of the Child 1990,<sup>20</sup> The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,<sup>21</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000,<sup>22</sup> Protocol against Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime.<sup>23</sup>

Child labour as a significant universal phenomenon is a crime as well as violation of the constitutional rights of a child. Within the legal regime of South African, a child is a person who has not attained the age of 18 years<sup>24</sup> while child labour means work by a child which is exploitative, hazardous or otherwise inappropriate for a person of that age, and places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development.<sup>25</sup> The Constitution of the Republic of South Africa entrenches bill of rights<sup>26</sup> and further provides for the rights of the child.<sup>27</sup> The bill of rights is the foundation of democracy in the Republic.

<sup>11</sup>D. Norman and B. Brett' Educational Aspirations, Child Labour Imperatives and Structural Inequality in South Africa Agricultural Sector: Research Article' [2008] *Perspective in Education*, (26), 32

<sup>12</sup> *Ibid.*

<sup>13</sup>The Population Registration Act, 1950 which provided for four compulsory racial categories-white, mixed race, Asian, and black; The Lands Act that set aside eight seven percent of property for whites; The Group Areas Act which provided for where people could live on the basis of race; The Separate Amenities Act which granted power to municipal officials to bar blacks from parks, swimming pools, toilets among others were repealed during the presidency of F. W. de Klerk. See C. S. Wren 'South Africa Scraps Law Defining People by Race' *The New York Times*. <<https://www.nytimes.com/1991/06/18/world/South/Africa>>. Accessed 16/04/2020.

<sup>14</sup> Constitution of the Republic of South Africa 1996, s 9 (3)

<sup>15</sup> N0 75 of 1997

<sup>16</sup>I. A. Umezulike, 'An Overview of Communal Conflict in Nigeria: Our Skeptical Views and Suggestions' *Nigerian Bar Journal*, vol.1, N0 2, 2003, p. 151.

<sup>17</sup> J. B. Bello, *op. cit.*, (n7) p. 236

<sup>18</sup> South Africa signed the Protocol on 14/12/2000 and ratified it on 20/02/2004. Nigeria signed it on 13/12/2000 and ratified it on 28/6/2001.

<sup>19</sup>South Africa signed the Convention in 1993 and ratified it on 16/06/1995. It is the first treaty to be ratified by the country. Nigeria ratified the Convention on 19/4/1991.

<sup>20</sup> South Africa signed it on 10/10/1997, ratified on 07/01/2000 and deposited on 21/01/2000 while Nigeria ratified it on 23/7/2001.

<sup>21</sup>This Protocol was adopted on 25/05/2000 and it became effective on 18/01/2002. South Africa acceded to it on 30/06/2003 and has not ratified it. However Nigeria signed it on 18/9/2000 and ratified it on 27/9/2010.

<sup>22</sup>It was adopted in New York on 25/05/2000 and became effective on 12/02/2002. South Africa signed it on 8/02/2002 and ratified it on 24/09/2009. Nigeria signed it on 8/9/2000 and ratified it on 25/9/2012.

<sup>23</sup>Adopted in New York on November 15, 2000 via UN Resolution A/RES/55/25 at the fifth-fifth session of the General Assembly of the UN and made effective on January 28, 2004. South Africa signed the Protocol on 20/02/2000 and ratified it on 20/02/2004 though with reservation on compulsory jurisdiction of International Court of Justice via article 20 (2) of the Protocol. Nigeria signed it on 13/12/2000 and ratified it on 27/09/2001.

<sup>24</sup>CRSA, 1996 s 28 (3); BCEA, 1997, s 1, Children's Act, No 38, 2005, s 1, Prevention and Combating of Trafficking in Person Act 2015, s1, Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007, s1,

<sup>25</sup> CA 2005, s 1

<sup>26</sup> CRSA, 1996 chapter 2, ss 7 - 39

<sup>27</sup> *Ibid.* s 28

It enshrines the human rights of all persons in the country on the basis of dignity, equality and freedom.<sup>28</sup> The state is under constitutional obligation to respect, protect, promote and fulfil the rights in the bill.<sup>29</sup> Hence, the bill binds the legislature, the executive, the judiciary and all organs of the state.<sup>30</sup> The Constitution in terms of the bill of rights provides for equality before the law and equal protection and benefit of the law to all persons.<sup>31</sup> It unconditionally guarantees human dignity<sup>32</sup> and rights to life for everyone.<sup>33</sup> Rights to dignity and life are non-derogable rights under the constitution even during the existence of state of emergency.<sup>34</sup> The guaranteed freedom and security of persons includes freedom from all forms of violence from either public or private sources and freedom from torture in any way and from cruel, inhuman or degrading punishment.<sup>35</sup> Bodily and psychological integrity is protected. The rights to make decisions on reproduction, security and control of one's body are guaranteed legal rights of persons concerned.<sup>36</sup> Subjection to slavery, servitude and forced labour are unconstitutional.<sup>37</sup>

The constitution provides for right to privacy,<sup>38</sup> peaceful and unarmed assembly,<sup>39</sup> unarmful environment,<sup>40</sup> adequate housing<sup>41</sup> and property.<sup>42</sup> Others include freedom of opinion,<sup>43</sup> expression,<sup>44</sup> association,<sup>45</sup> movement and residence<sup>46</sup> which encompasses right to a passport. Importantly, section 27 provides for healthcare, food, water and social security to citizens if they are unable to support themselves and their dependents. The enjoyment of all rights and freedom as mentioned above is to everyone, both adult and children.

This work examines the legal regime on child labour in South Africa with the aim of drawing lessons for Nigeria. The paper is divided into various subheads to wit: introduction, the constitutional rights of the child, prohibition of child labour under the South African Basic Condition of Employment Act, lessons for Nigeria and conclusion.

## 2. Constitutional Rights of a Child in South Africa

The South African Constitution provides for certain rights which are peculiar and reserved for children. Every child has the right to basic nutrition, shelter, basic healthcare service and social services; right to be protected from maltreatment, neglect, abuse or degradation and to be protected from exploitative labour practices.<sup>47</sup> A child has the constitutional rights not be exposed or permitted to work or provide services that are inappropriate for his age or place the child's well-being, education, physical or mental health, spiritual, moral or social development at risk.<sup>48</sup> It is the right of a child to have family or parental care and where the child is removed from his family environment; he is entitled to appropriate alternative care in his new environment.<sup>49</sup> But the Constitution does not provide adequate protection to a child in time of armed conflict. Section 28 (1) (i)<sup>50</sup> provides that every child has a right not to be directly engaged in armed conflict and to be protected in times of armed conflict. It is argued that the constitution does not prohibit indirect use of children in armed conflict and this is dangerous. In fact and save where a child is 15 years and younger, the right not to engage a child directly in armed conflict and to protect him in times of armed conflict may be derogated from during state of emergency.<sup>51</sup> It is necessary to point out the Constitution affirms the universal principle that in every matter concerning a child, the child's best interest shall

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<sup>28</sup> *Ibid.* s 7 (1)

<sup>29</sup> *Ibid.* s 7(2)

<sup>30</sup> *Ibid.* s 8 (1)

<sup>31</sup> *Ibid.* s 9 (1) (2)

<sup>32</sup> *Ibid.* s 11

<sup>33</sup> *Ibid.* s 10

<sup>34</sup> *Ibid.* s 37 (5) (c)

<sup>35</sup> *Ibid.* s 12 (1) (c) (d) (e)

<sup>36</sup> *Ibid.* s 12 (2)

<sup>37</sup> *Ibid.* s 13

<sup>38</sup> *Ibid.* s 14

<sup>39</sup> *Ibid.* s 17

<sup>40</sup> *Ibid.* s 24

<sup>41</sup> *Ibid.* s 26

<sup>42</sup> *Ibid.* s 25

<sup>43</sup> *Ibid.* s 15

<sup>44</sup> *Ibid.* s 16

<sup>45</sup> *Ibid.* s 18

<sup>46</sup> *Ibid.* s 21

<sup>47</sup> *Ibid.* s 28 (1) (c) (d) (e)

<sup>48</sup> *Ibid.* s 28 (1) (f) (i) (ii)

<sup>49</sup> *Ibid.* s 28 (1) (b)

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* s 37 (5) (c)

be of paramount importance.<sup>52</sup> Section 36<sup>53</sup> limits the rights in the Bill of Right only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In invoking the limitation, certain constitutionally entrenched relevant factors are considered to *wit*: the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.<sup>54</sup> However, some constitutional rights of a child are sacrosanct that the State cannot legitimately derogate from even during state of emergency.<sup>55</sup> Such right include child's right to be protected from maltreatment, neglect, abuse, degradation, exploitative labour<sup>56</sup> practices etc. it is contended that these non-derogable rights as enumerated above do not make much meaning to a child who may constitutionally be used directly or indirectly in armed conflict. No doubt, maltreatment, abuse, degradation, exploitative labour practices are likely incidences of involvement in armed conflict.

### 3. Prohibition of Child Labour under the Basic Condition of Employment Act, 1997

The Republic of South Africa Basic Condition of Employment Act, 1997 prohibits employment of children and force labour.<sup>57</sup> The Act Prohibits employment of a child who is under 15 years of age or under the minimum school leaving age as may be provided in any other law<sup>58</sup> if such other law stipulates age bracket above 15.<sup>59</sup> It is an offence to employ a child in any employment that is inappropriate for his age or that places the well-being, education, physical or mental health or spiritual, moral or social development of the child at risk.<sup>60</sup> The punishment upon conviction is maximum term of 3 years imprisonment.<sup>61</sup> But a child who is 15 years and above and who is no longer subject to compulsory schooling under any law may be engaged in employment provided the employment does not pose any risk to his well-being and subject to any regulation as the Minister may make on the advice of the Commission.<sup>62</sup> The Act provides for medical examination of children in employment in line with Regulations which the Minister is empowered to make after consulting the Commission.<sup>63</sup> The confidentiality of the report of the medical examination is protected by law and may not be disclosed except on the order of court or with the consent of the party concerned.<sup>64</sup> All forms of forced labour are prohibits.<sup>65</sup> It is an offence to demand or impose force labour for anyone's benefit; or to assist an employer to employ a child or discriminates against a person who refuses to permit a child to be employed in breach of the employment Act.<sup>66</sup> The Acts provides for a situation where the age of an employee may be in issue in any proceeding. In such event, the burden is on the employer or any person who alleges that the employment was in compliance with the provisions of the Act to prove that after investigation, he reasonably believed that the employee was not below the age permitted by law.<sup>67</sup>

### 4. Lessons for Nigeria

Nigeria unlike South Africa does not have clear and unambiguous constitutional definition of a child. Under the South African constitutional framework<sup>68</sup> which other laws<sup>69</sup> of the country adopted, a child is any person who has not attained the age of eighteen years. The Nigerian Constitution on the other hand defines 'full age' to mean age of eighteen years and above and further provides that 'any woman who is married shall be deemed to be of

<sup>52</sup> *Ibid.* s 28 (2)

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

<sup>54</sup> *Ibid.* s 36 (1) (a) (b) (c) (d) (e)

<sup>55</sup> *Ibid.* s 37 (5) (c)

<sup>56</sup> *Ibid.*

<sup>57</sup> Republic of South Africa Basic Condition of Employment Act No. 75, 1997, Chapter Six (hereinafter referred to as "BCEA 1997").

<sup>58</sup> South African Schools Act, No 84, 1996, section 3 (1) requires parents and guardians to send their children and wards to school until the last school day of the year when the child reaches the age of 15 or he reaches the ninth grade, whichever is the first.

<sup>59</sup> BCEA, s 43 (1) (a) (b)

<sup>60</sup> *Ibid.* s 43 (2) (a) (b) (3)

<sup>61</sup> *Ibid.* s 93 (2)

<sup>62</sup> *Ibid.* s 44 (1); The Commission refers to the Employment Conditions Commission established under s, 59 (1) of the Act

<sup>63</sup> BCEA, s 45

<sup>64</sup> *Ibid.* s 90 (3)

<sup>65</sup> CRSA 1996, ss 13 and 23; BCEA 1997, s 48 (1)

<sup>66</sup> BCEA 1997, ss 46 (a) (b) 48

<sup>67</sup> *Ibid.* s 47

<sup>68</sup> CRSA, 1996 s 28 (3)

<sup>69</sup> BCEA, 1997, s 1, Children's Act, No 38, 2005, s 1, Prevention and Combating of Trafficking in Person Act 2015, s1, Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 2007, s1.

full age.<sup>70</sup> Woman is neither defined in the Constitution nor in the Interpretation Act.<sup>71</sup> The Labour Act, however, defines a woman as any member of the female sex whatever her age and status.<sup>72</sup> Impliedly, a twelve year old girl child is a woman under the Nigerian law and is deemed to be of full age (adult) if married. That is to say, being married is a criterion of full age (adulthood) in Nigeria. Consequently, the Nigerian Constitution discriminately permits girl-child marriage. Importantly though oddly enough, given the supremacy of the Constitution,<sup>73</sup> the criminalization of child marriage and its attempt under the Child's Rights Act<sup>74</sup> is void in relation to a girl child though validly protective of the boy child. In any case, the Child's Rights Act is only applicable to the Federal Capital Territory, Abuja while Child's Rights Law applies to states that have passed same into law.

Again, Nigeria as a federation does not have a common and nationally applicable law that protects all Nigerian children notwithstanding their state of origin, residence, status and religion. In South Africa on the other hand, the Constitution prescribes certain rights that are peculiar and reserved for all children in and of the Republic irrespective of Province of residence, social status, race, sex and religion. Examples, rights to basic nutrition, shelter, basic healthcare service, protection from maltreatment and exploitative labour practices, constitutional rights to education, physical, spiritual and mental health among others.<sup>75</sup> Nigeria needs to learn from the South African position wherein all children have equal rights and enjoy equal legal protection. On this score, it is argued that the Nigerian Child's Rights Act ought to have nationwide application. This is anchored on the fact that the National Assembly has the constitutional competence to establish and regulate authorities to enforce chapter two of the Constitution for the federation or any part thereof.<sup>76</sup> Section 17<sup>77</sup> is part of chapter two of the Constitution and it mandates the State to direct its policy towards ensuring that children are protected against any exploitation whatsoever and against moral and material neglect. In *AG Ondo State v AGF*<sup>78</sup> the Supreme Court upheld the nationwide application of the Corrupt Practices and Other Related Offences Act, 2000 on the ground that the National Assembly has the constitutional powers to establish federal agencies for the purpose of promoting and enforcing the observance of chapter two of the constitution. By analogy, the same status and treatment should be accorded to the Child's Rights Act.

Finally, the Nigerian Labour Act criminalizes forced or compulsory labour with punishment of fine of not more than one thousand naira only or imprisonment for a term not exceeding two years or both.<sup>79</sup> The prescribed punishment is the maximum that any court may impose notwithstanding the degree of exploitation, even if a child is the victim. In fact, the punishment is very ridiculous in the face of the gravity of the offence and economic reality of the time.

## 5. Conclusion

This work has x-rayed the South African legal frame work for the protection of children against child labour. It has further juxtaposed same with the Nigerian situation. Obvious in the work is the fact that the giant of Africa has not provided safe environment for her future generation and leaders. Hence, in Nigeria, child labour is evident and rampant with its negative socio-economic, security and legal impacts. Various factors such as poverty, corruption, bad leadership, illiteracy, crisis etc account for this ugly development. As children represent lineage continuity and intergenerational survival, they deserve special and specific legal instrument to ensure their protection. The South African position provides a signpost for the reformation of the Nigerian child's situation. Granted that child labour is global issue, Nigeria must as a matter of urgency and emergency, evolve legislative mechanisms to provide national law that would protect Nigerian children all over the country especially at the post corona virus era when the rate of poverty in the globe may skyrocket. Above all, the economy should be revived, diversified and improved upon in order to lift most Nigerians from the poverty line and enhance their standard of living

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<sup>70</sup> Constitution of the Federal Republic of Nigeria, 1999 (As Amended), s 29 (4) (a) (b)

<sup>71</sup> Cap I23, Laws of the Federation of Nigeria, 2010

<sup>72</sup> Labour Act, Cap. L1, Laws of the Federation of Nigeria, 2010, s 91

<sup>73</sup> CFRN, 1999 (As Amended), s 1 (3)

<sup>74</sup> Child's Rights Act, Cap C50, Laws of the Federation of Nigeria, 2010, s 21

<sup>75</sup> CRSA, 1996, s 28

<sup>76</sup> CFRN, 1999 (As Amended), 2<sup>nd</sup> schedule, part 1, item 60 (a)

<sup>77</sup> *Ibid.* s 17 (1) (3) (f) (g) (h)

<sup>78</sup> (2000)9 NWLR (pt. 772) 222

<sup>79</sup> Labour Act, Cap. L1, Laws of the Federation of Nigeria, 2010, s 73 (1)