

# Non-Payment of Salaries: The Implication on the Legal, Economic and Social Rights of Workers in Nigeria

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## Abstract

Since the coming to power of the present administration in Nigeria on 29<sup>th</sup> May, 2015, salaries of civil servants in not less than twenty-seven out of thirty-six States of the country and the Federal Government are in arrears for several months. The state governments that have failed and/or refused to pay workers' salaries have gone cap in hand asking for bailout funds from the Federal Government to no avail. In the alternative, some have opted to down size the workforce or even embark on downward review of the national minimum wage payable to workers. In this article, we canvassed that, the failure of the Governors and the Federal Government of Nigeria to pay workers' salaries had occasioned severe deprivation, mental and physical health challenges to most Nigerian civil servants and indeed any worker at that. This situation has reduced the lives of the workers in their employ to a bare life, or life not worth living, thus taking away their human dignity, due to their failure to pay the workers their salaries. These are human rights abuse. As a general rule, the duty to pay workers' salaries and wages is derived from the terms of the contract of service expressly or impliedly or by statute. This duty which is implied at common law is applicable to every contract of employment. It is protected in Part I sections 15 and 17 of the Nigeria Labour Act and equally entrenched in various international human rights instruments to which Nigeria is a signatory.

**Keywords:** contract of service, non-payment of salaries, human right abuse, Nigeria constitution.

## 1. Introduction

An important question that agitates the minds of an average worker in Nigeria that begs legal answer is: When the payment of salaries due to a worker is delayed and/or unpaid and the worker incurred extra expense as a result of the delay who bears the interests accruable on such expense, especially if the worker obtains loan to meet his/her socio-economic needs? This paper examines the legal and socio-economic effects of non-payment of salaries to workers generally, but more especially the government employees who constitute a substantial size of the workforce in the economy. It is considered an abuse of the rights of workers to enjoy a decent living. The paper seeks to curb the trend by proffering practical solutions even sanctions on the part of employers of labour who are in breach of their contractual obligations to the workers. This common phenomenon has made nonsense the legal responsibility attached to contractual relationships in contract of service which demands urgent solution if only to save the lives of many workers and their families whose rights and dignity as humans are being eroded by employers of labour that damned the socio-economic consequences of their actions.

## 2. Scope of Human Rights

In modern times, certain debates have arisen over the content and scope of human rights and the priorities claimed amongst them. From these debates has arisen the notion of three generation of rights.<sup>1</sup> The first generation of rights consists of civil and political rights, while the second generation consists of economic, social and cultural rights and the third is termed rights to development, environmental protection and self determination otherwise known as collective or solidarity rights.

This paper therefore seeks to concern itself with the 2<sup>nd</sup> generation rights which are economic, social, cultural and development rights, which forms the plank of freeing mankind from the shackles of poverty, exploitation and other forms of deprivation.

## 3. The Economic, Social, Cultural and Development Rights

These species of human rights are distinct from civil and political rights. They are contained in the Universal Declaration of Human Rights and further outlined in the International Covenant on Economic, Social and Cultural Rights. These rights include right to work, right to choice of employment, right to own property, right to adequate standard of living, right to access to education, right to form a family, right to respect and protection of family, right to social security, right to medical assistance, right to adequate nutrition, right to social welfare

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<sup>1</sup>Ladan, M.T., "Should all Category of Human Rights be Justiciable? Article in Law, Human Rights and the Administration of Justice in Nigeria, Essays in Honour of CJN M.I. Uwais" Ladan ed. (2000), published by Dept. of Public Law, Ahmadu Bello University, Zaria, p. 69; Dakas, C.J.D., "A Panoramic Survey of the Jurisprudence of Indian and Nigerian Courts on the Justiciability of Fundamental Objectives and Directive Principles of State Policy" in Epiphany Azinge and Bolaji Owasanoye (eds.) *Justiciability and Constitutionalism: An Economic Analysis of Law* (Lagos: NIAL Press, 2010) pp. 262-323.

benefits, right to enjoyment of scientific advancement, right to protection of wealth, right to protection of morals. The UN has enjoined all member nations, Nigeria inclusive to be bound in terms of recognizing and making all the above rights justiciable.<sup>1</sup> Nigeria is a signatory to the international convention for economic, social and cultural rights and by her ratification, these rights are deemed to be legal right and enforceable in Nigeria.

These rights as can be gleaned from various forms of protection relates to the conditions necessary to meet basic human needs and by the instrumentality of the law reduce global deprivation.

#### ***Universal Declaration of Human Rights of 1948***

*Article 22 provides for Right to Social Security:* which is an empowerment rights that unemployed people have recourse to so that they can be protected against poverty.

*Article 23 provides for right to work, free choice of employment, just and favourable remuneration and trade rights:* This protection is about decent job for workers and their rights to better remuneration and collective bargaining, bearing in mind that when these rights of workers are protected, they will be able to contribute towards wealth creation. Failure to pay workers' salaries therefore completely deny them of this right.

*Article 24 provides for Rights to leisure:* This right could be read to mean that employee and any person that so desire can benefit from the opportunity to enjoy leave or other holiday with all the intended emoluments.

*Article 25 provides for right to good standard of living, adequate physical and mental health and wellbeing of the family, including food, clothing, and housing:* This is poverty alleviation and empowerment rights, in that, all men should be protected against poverty and that health care should be available to all.

*Article 26 provides for Right to Education:* This article makes right to education a necessity, for an educated citizenry is an asset to the socio-economic and political, social, scientific and cultural advancement of the nation. It is to be noted that these 2<sup>nd</sup> generation rights are the most critical if not central towards the empowerment of mankind. In fact, the civil and political rights cannot be enjoyed without the advancement of the social, economic and cultural rights. This view finds support in paragraph 13 of the proclamation of the International Conference on Human Rights in Tehran, Iran, thus:

Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights/liberties without the enjoyment of economic, social and cultural rights is impossible.<sup>2</sup>

Justice P.N. Bhagwata of the Indian Supreme Court succinctly gave merit to the above position, when he rightly observed:

It is indeed questionable how human freedoms and dignity can be promoted and protected at all without realization, that in view of the chronic widespread of poverty and disparities in the third world, social economic rights should be thought of as being priority...<sup>3</sup>

#### ***International Covenant on Economic, Social and Cultural Rights, 1976***

The covenant provides for the protection of specific rights which are aimed at adequate standard of living. Thus, a just and favourable condition of work is ensured. This will include fair wages, equal remuneration for equal work, a decent living for effective labour actualisation. The covenant confer some rights on workers, and these are rights to form trade unions and the right to strike, and it gave the widest possible protection and assistance to the unemployed in terms of social security. It gave freedom to intending couples as against forced marriages and emphasised the right of everyone to an adequate standard of living which means adequate food, clothing and housing. This right frees everyone against hunger and promotes also equitable distribution of world food supplies.<sup>4</sup>

Therefore, it is the duty of all member states to give effect to all these protections. They are to do this by adopting "all appropriate means".<sup>5</sup>

#### ***The African Charter on Human and Peoples' Rights, 1986***

Nigeria has domesticated the African Charter the import of this is that the Nigerian domestic courts can assume jurisdictions in order to entertain any issues involving the rights entrenched in the charter. The African Commission on Human and People's Rights as an enforcement machinery of the African charter can also give a decision regarding any complaint against any state by an individual over lack of promotion of these rights. In the case of *Social and Economic Rights Action (SERAC) and the Centre for Economic and Social Rights v. Nigeria*,<sup>6</sup> the decision of the African Commission on Human and People's Rights in the Ogoni case represent a giant stride towards the protection and promotion of economic, social and cultural rights of Nigerians. This was predicated on the findings of the African Commission that the Nigerian government's failure to protect the Ogoni people

<sup>1</sup> Preamble to the Universal Declaration of Human Rights (1948).

<sup>2</sup> First World Conference on Human Rights in Tehran Proclamation quoted in Development of Human Rights Jurisprudence, Commonwealth Secretariat, 1988, p 62.

<sup>3</sup> *Mineral Mills v. Union of India* (1980) AIR SC. 1789 at 1843.

<sup>4</sup> Article 11 of the International Covenant on Economic, Social and Cultural Rights. 1976.

<sup>5</sup> Ibid.

<sup>6</sup> *African Journal of Legal Studies* (2005) Vol. 1 No. 1, 129-146.

from the activities of oil companies operating in the Niger-Delta is contrary to international human rights law and is in fact a step backward since Nigeria had earlier adopted legislation to fulfil its obligation towards the progressive realisation of these rights.

This case, established strong precedent for the judicial enforcement of economic, social and cultural rights not only in Nigeria but within the international community. Perhaps more importantly is that the case demonstrates that these rights are justiciable as against the non-justiciability positions of some countries including Nigeria regarding the category of rights.

Article 20 of the African Charter recognizes the right to self-determination and the right of oppressed people to resort to force in their quest for freedom and their right to ensure assistance. These provisions no doubt gives unfettered freedom to people to organize themselves into a free union through a kind of social compact that will empower them to be free in such union.<sup>1</sup>

#### ***The Nigerian Constitution and its Relationship with the Economic, Social and Cultural Rights***

The 1999 Constitution in its Chapter II did encapsulate the economic, social and cultural and even environmental rights that other international treaties have laid down. It termed them as “fundamental objectives and directive principles of state policy”. These are the policies that are expected to be pursued in the efforts of the nation to realise the national ideals. The Constitution makes provisions for the realisation of the political, economic, social, educational and environmental objectives and also national ethics, which shall be on the virtues of discipline, integrity, patriotism, which are deemed to be obligations in the part of the people.

Section 40 of the Constitution provides for freedom of assembly with other persons, and in particular, every person may form or belong to any political party, trade union or any other association for the protection of his interest.

However, Chapter II, Section 17(3)(a) of the Constitution on Fundamental Objectives and Directive Principles of State Policy provides:

The State shall direct its policy towards ensuring that— all citizens, without discrimination on any ground whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunities to secure suitable employment.

Section 13 of the Constitution also provides:

It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.

Unfortunately, the same Constitution by virtue of section 6(6)(c) expressly makes the provisions of Chapter II non-justiciable. Again, judicial pronouncements from Nigerian courts in certain cases have shown that the provisions of Chapter II are not justiciable. In *Okogie v. Attorney-General of Lagos*<sup>2</sup> the Court of Appeal held that “the arbiter for any breach of the objectives and directive principle of state policy is the legislature itself or the electorate.” This is a problem for Nigeria, because most national constitutions in the world are now making these rights justiciable. It is of note that these laws have changed in most of the jurisdictions we copied them from. The people have embraced new orientation, and their legal system refashioned to suit the prevailing circumstances of the time. In the Indian case of *Panacy v. State of West Bengal*,<sup>3</sup> the Indian Supreme Court declared its preparedness to exercise judicial review of executive or legislative acts to ensure that the Directive Principles are taken into account as relevant consideration.

Therefore, the Nigerian position is quite anomalous since virtually most countries of Western Europe and America have incorporated these rights into their justiciability clause.<sup>4</sup> In fact, this paper calls for some of these rights to be made justiciable, especially those which qualify for immediate realization. For example, Article 7 of the International Covenant on Economic, Social and Cultural Rights on the right to just and favourable conditions of work and payment of adequate remuneration as at when due. This can be realised by placing them under Chapter IV of the Constitution.

Since economic, social and cultural rights are not enforceable under the Nigerian Constitution, the question may then be asked, what alternative platform exist for Nigerians to exploit in their quest to have these rights fully protected?

#### **4. Terms and Conditions of Service in a Contract of Employment**

In a contract of employment, the conditions of service are usually spelt out. The contents of these conditions will most likely include the amount of wages, the working hours, holidays, security at work and of employment; they

<sup>1</sup> Cf: ILO Convention No. 87 of 1949 on freedom of association.

<sup>2</sup> (1987) 1 NCLR 105.

<sup>3</sup> (1988) LRC (Const.) 241.

<sup>4</sup> Yusuf D., “A Critique of the Economic, Social, Cultural and Development Rights and their Implications on Poverty Alleviation in Nigeria” *Ahmadu Bello University, Zaria Journal of Private & Comparative Law* Vols, 4 & 5 (2010-2011) 40.

will also include the method by which the contract is to be brought to an end. Sometimes, some terms are implied in a contract of service; such as the employer's duty with regard to safety and health conditions at work.<sup>1</sup> Suffice it to say here that this implied terms form an important and integral part of the conditions of service. However, in contracts under the Labour Act, the law gives an employer terms of his contract.<sup>2</sup>

In a contract of employment, the duty to pay remuneration attached to the job is as important as the duty to do the work the employee was employed to do. Remuneration comprises salaries, wages and allowances or commission which forms part of the terms of a contract of service. Section 15 of the Labour Act<sup>3</sup> provides for payment of wages thus:

Wages shall become due and payable at the end of each period for which the contract is expressed to subsist, that is to say, daily, weekly or at such other period as may be agreed upon: Provided that, where the period is more than one month, the wages shall become due and payable at intervals not exceeding one month.

Wages are primarily fixed between employer and individual worker. But where no rate is agreed, the rate is impliedly deemed to be what is current in similar trade in the area. In *Peters of Oron v. Symmons*,<sup>4</sup> the plaintiff was a carpenter who had been employed by the Nigerian Timber and Construction Co. Ltd. at their branch in Calabar. The plaintiff's employment was terminated for want of further work but he was thereafter referred to the manager of the Oron branch of the company, one Mr. Symmons, the defendant, who entered into an oral agreement with the plaintiff for a fresh employment but without specifying the rate of wages. The question for the court to decide was whether the agreement reached at Oron implied employment at the rate of pay which the plaintiff had been receiving at Calabar or whether it implied employment at the lower rate then prevailing at Oron. The court resolved the issue by saying that in the absence of any specific stipulation by the parties as to the rate of wages, the agreement must rest on the implied term that a wage corresponding to that prevailing in similar employment at the time in the area was intended.<sup>5</sup>

Legislation has rarely been brought in for the fixing of wages.<sup>6</sup> However, it has to be acknowledged that "although the wage clause, like any other clause, is in law a matter for bargaining between the individual employer and workman, in practice a large number of wage rates are fixed by agreement between employers' associations and trade unions or groups of trade unions".<sup>7</sup> This is known as collective bargain, which often culminates into collective agreement.<sup>8</sup> Legislation has been used to tie up loose ends of the agreement as well as protect the worker from exploitation. In Nigeria, the principal statute is the Labour Act 1974,<sup>9</sup> which places various restrictions on the payment of wages to workers.

In all cases, a worker is entitled to his wages that are earned;<sup>10</sup> this right is automatically implied into the contract of employment. Even when the work is uncompleted, the worker may still be entitled, at least, to a reasonable payment for the work done on the doctrine of *quantum meruit*. Thus in *Ekpe v. Midwest Development Corporation*,<sup>11</sup> the plaintiff was employed by the defendant corporation at their Ikpoba factory on a salary of ₦50 per month. It was established that the contract was one for unspecified duration and the plaintiff was held entitled to his wages on the amount of work already done.<sup>12</sup> However, if the agreed terms are that no payment

<sup>1</sup> See generally, Employees Compensation Act, 2010 which repeals the Workmen's Compensation Act Cap W6 LFN, 2004; Factories Act Cap F1 LFN 2004.

<sup>2</sup> Labour Act, s. 7; English Contract of Employment Act 1972, s. 4(1).

<sup>3</sup> Cap L1 Laws of the Federation of Nigeria, 2004; see also section 17 which provides for duty of employer to provide work.

<sup>4</sup> (1924) 5 N.L.R. 79; *Economic Export Ltd. v. Jimoh Odutola* (1958) W.N.L.R. 239. Dock Labour (Registration and Control) Rules 1967, r. 8(1) provided that "it shall be an implied condition of the contract between a dock worker available for work and a registered employer that the rate of remuneration and conditions of service shall be in accordance with any local or national collective agreement..."

<sup>5</sup> It was, however, decided in *U.A.C. Ltd. v. Johnson* (1935) 2 N.L.R. 38, that the onus is always on him who seeks to take advantage of a trade custom to prove its existence.

<sup>6</sup> But see ss. 1 & 2(1), National Minimum Wage Act 2000, Cap N61, Laws of the Federation of Nigeria (LFN), 2004 that fixed ₦7,500 as minimum wage for Nigerian workers; the Act was amended in 2011 with an upward review of ₦18,000 by the National Assembly.

<sup>7</sup> Cooper and Wood, *Outlines of Industrial Law*, 5<sup>th</sup> ed., p. 103; Emiola, A., *Nigerian Labour Law* 4<sup>th</sup> ed. (Ogbomosho: Emiola Publishers Ltd., 2008) p. 100.

<sup>8</sup> S. 91 of the Labour Act, Cap. L1, Laws of the Federation of Nigeria, 2004.

<sup>9</sup> Cap. L1, Laws of the Federation of Nigeria, 2004.

<sup>10</sup> (2003) 10 NWLR (Pt. 829) 487, SC. Labour Act, ss. 15 and 17; National Dock Labour Act, 1969, s. 13.

<sup>11</sup> (1967) N.M.L.R. 407; *Sketch Publishing Co. v. Awobokun* (1974) 2 W.A.C.A. 230 at 241, 245.

<sup>12</sup> In a similar situation the English Court of Appeal in *Powell v. Braun* (1954) 1 All E.R. 484; (1954) 1 W.L.R. 401, was prepared to quantify an agreed bonus. Cf. *Odufunade v. Rossek* (1962) 1 All N.L.R. 98, where the Supreme Court decided that a contract to pay a commission agent a percentage of the amount paid by the clients introduced by the agent is a contract to pay such commission upon the completion of the contract of sale. See *George Erabor v. Incar Nigeria Ltd.* (1975) 4 S.C. 1; *Laverack v. Woods* (1966) 3 All E.R. 683; (1966) 3 W.L.R. 706; *British Bank Ltd. v. Novimex Ltd.* (1949) 1 All E.R. 155.

shall be made unless the job is completed then the worker would be presumed to have waived his right to payment on a *quantum meruit* basis.<sup>1</sup> The employer is deemed to have discharged the duty to provide work<sup>2</sup> for the servant if he pays him his agreed wages in lieu of such work.<sup>3</sup> But where “fringe benefits” are an essential part of the contract, payment of the bare wages will not be considered adequate.<sup>4</sup>

It is a criminal offence for an employer to infringe the wages protection provisions of the Act. An employer who gives remuneration to his workers or makes deductions from their wages or withholds any payment in ways other than those authorized by the Act, or operates a “shop on any place of employment” without the necessary approval of the minister in writing,<sup>5</sup> is “liable on conviction to a fine of eight hundred naira or for a second or subsequent offence to a fine of one thousand five hundred naira.”<sup>6</sup>

We have seen that as a general rule, the rights and obligations of parties to an employment is derived from the terms of the contract of service expressly or impliedly or by statute.<sup>7</sup> Some obligations are derived from other aspects of labour relations, particularly collective bargains<sup>8</sup> and statutory regulation.<sup>9</sup> But the problem always is determining precisely the term of a particular contract as these may be scattered along the line of the aforesaid aspects and so not be discernible in precise and express form. A whole lot or few terms of the contract still could be implied as applying to certain contracts. The rights and duties of the parties to a contract of employment derive from these sources and most notably, much of common law duties that form the nucleus, are implied. These have become rules of law presumably applicable to every such contract but generally variable by express contractual provisions or stipulation. Some of these duties and obligations apply both to the employee and employer respectively.

Precisely, the duties of the employee have been superfluously classified into:<sup>10</sup> duty to obey orders, fidelity, disclosure, careful service, secrecy, obligation to indemnify the master against wrongful acts of the servant and liability to account.

Conversely, the employer owes certain duties to the employee. Some of the duties are always left to be implied. These have been categorized into:<sup>11</sup> the duty to pay remuneration, to provide work, to provide testimonial or reference and duty of care.<sup>12</sup>

For our purpose, our attention is focused on the duty to pay remuneration by the employer. It is an implied duty of the employer of labour to pay to the worker wages and salaries agreed for the service rendered. The right to receive salary or wages is determined by the letter of appointment.<sup>13</sup> However, where the contract of employment does not expressly provide for remuneration, amount payable will depend upon the value of service rendered. Thus, it is usually said that an employer owes the employee duty to pay wages or salary in accordance with the terms of the contract express or implied.<sup>14</sup> In *Browning v. Crumlin Valley Collieries Ltd.*<sup>15</sup> Greer J. said that an employer is under a duty to pay wages or salary to his employee where the terms of the contract say so. Once the duty to pay wages or salary exists, the employer is, at common law, to continue to pay such remuneration to a worker who is ready and willing to work, whether or not work is provided for the employee.<sup>16</sup> Thus, in *Chemical and Non-Metallic Products Senior Staff Association v. Benue Cement Co. Plc.*,<sup>17</sup> the National Industrial Court (NIC) stated that the law regards the issue of payment of salaries as sacred. It is so sacrosanct that the employee is entitled to wages even during temporary incapacitation period once he is willing to work. In *Underwater Engineering Co. Ltd. v. Dubefon*,<sup>18</sup> the plaintiff/respondent was employed by the appellant as Chief Driver. Following allegations of theft of the appellant company’s property the respondent was arrested and arraigned before a magistrate’s court and for that did not work between May 1982 and 12<sup>th</sup> October, 1982. After

<sup>1</sup> *Odufunade v. Rossek* (1962) 1 All N.L.R. 98; *George Erabor v. Incar Nigeria Ltd.* (1975) 4 S.C. 1.

<sup>2</sup> Labour Act, s. 17.

<sup>3</sup> *Collier v. Sunday Referee Publishing Co. Ltd.* (1940) 2 K.B. 647; (1940) 4 All E.R. 234.

<sup>4</sup> In *Soyombo v. Vivian Young & Bond (Nigeria) Ltd.* (1966) LD/77/66 decided on 26 September 1966, Adedipe J. conceded that the plaintiff could succeed in the claim for ‘*ex gratia*’ payment; see Emiola, *op. cit.*, p. 102.

<sup>5</sup> Labour Act, s. 6(1) & (2).

<sup>6</sup> *Ibid.*, s. 21(1).

<sup>7</sup> See generally Uvieghara, E.E., *Labour Law in Nigeria* (Malthouse Press Ltd., Lagos, 2001) p. 21.

<sup>8</sup> Uvieghara, *ibid.*, pp. 29-32; see also Trade Disputes Act, Cap. T8, Laws of the Federation of Nigeria, 2004.

<sup>9</sup> See for instance, the Factories Act, Cap F1, and the Labour Act, Cap L1, Laws of the Federation of Nigeria, 2004.

<sup>10</sup> Agomo, C.K., *Nigerian Employment and Labour Relations Law and Practice* (Concept Publications Ltd., Lagos, 2011) pp. 119-121; *Cf.* Cronin, J.B., and Grime, R., *Introduction to Industrial Law* (Butterworth Publications, London, 1970) P. 125.

<sup>11</sup> Agomo, *ibid.*, pp. 130-135.

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

<sup>13</sup> *Jeremiah v. Ziregbe & Anor.* [1996] 7 NWLR 347 at 356.

<sup>14</sup> Agomo, *ibid.*, p. 130.

<sup>15</sup> [1926] 1 K.B. 522; see also *Way v. Latilla* [1937] 3 All E.R. 759.

<sup>16</sup> *Devonald v. Rosser & Sons* (1906) 2 K.B. 728.

<sup>17</sup> [2006] 5 NWLR (Part 14) 1.

<sup>18</sup> [1996] 6 NWLR (Part 400) 156.

his acquittal and discharge, on 12<sup>th</sup> October 1982 when the respondent asked to know the fate of his employment, he was orally informed that his services were no longer required. It was held that the employee was entitled to his salary from May till October when he was told that his services were no longer required as his employment subsisted till then. The Court further observed that the employee's salary became due and his right to it vested at the end of each month, hence the employer cannot dismiss or terminate his employee's employment with retrospective effect with a view to denying him his vested right to his salary.

The case can equally serve as authority to state that absence from duty as a result of arrest, detention and prosecution may not be a breach, since it cannot be said that the employee voluntarily absented himself from duty.

It would appear to be settled also that the worker is entitled to the agreed wages for the periods of temporary incapacitation due to illness. Scott, L.J. in *Marrison v. Bell*<sup>1</sup> said: "under a contract of service, irrespective of the question of the length of notice provided by the contract, wages continue through sickness... until the contract is terminated..." This statement apparently represents a principle of common law, which appears not to be general proposition. The question of entitlement to wages in cases of temporary incapacitation through sickness or other causes will depend on the terms of employment. And while it may be implied, the right to and the obligation to pay wages may be cut down by express or implied term, or by statute.<sup>2</sup> But barring any such term to the contrary, the right, in our opinion, ought to be implied from the considered principles.

It remains arguable, for instance, whether an employee who stopped work temporarily for a short period in furtherance of a trade dispute, is entitled to his wages. That such employee may not be entitled to wages as of right is enshrined in the principle of "no work no pay" contained in section 43 of the Trade Disputes Act.<sup>3</sup> It is not doubtful however that, in the event of a successful industrial action over the dispute the workers could enforce the payment by extra-legal action.

As stated earlier, the overriding consideration in determining the extent of rights and obligation imposed in contract of employment are the terms agreed upon by the parties to the employment contract expressly or by implication or statute.

## 5. Remedies in Breach of Contract of Service

All contracts are made to be performed. The requirement of law that parties to a contract must signify an intention to be bound by its terms is to leave no one in doubt as to the duty of every party to perform his own part of the bargain. In the case of contract of service, the intention is fulfilled by the employer's promise to provide work and pay the agreed wages, and conversely, the employee's promise to work for the employer. The attitude of the courts has crystallized into the principle enunciated by Lord Macmillan in *Beresford v. Royal Insurance Co. Ltd.*<sup>4</sup> to wit: "It is undeniably a principle of public policy", he said, "that persons who enter into contractual engagements should be required to fulfil them".

However, in the course of human affairs, many of those who enter into contractual engagements do, in fact, fail or refuse to fulfil them. That is, they commit a breach<sup>5</sup> of the contract. A breach of contract is:

a breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party. It also entitled him to treat the contract as discharged if the other party renounces the contract, or makes its performance impossible, or totally or substantially fails to perform his promises. An anticipatory breach of contract is one which is made before the time for performance has arrived.<sup>6</sup>

This attitude of breach of contract has become the norm or a recurring decimal on the part of employers of labour in Nigeria most especially the government and government agencies. This has resulted in incessant strike actions by the workers in Nigeria.<sup>7</sup> While the strike lasts, the state often sustains the loss of national revenue in

<sup>1</sup> (1939) 1 All E.R. 745 at 748, but contrast Mackinnon, L.J. in *O'Grady v. Msaper Ltd.* (1940) 3 All E.R. 527.

<sup>2</sup> See Labour Act, s. 16, which provides that a worker shall be entitled to be paid wages up to twelve working days in any one calendar year during absence from work caused by temporary illness certified by a registered medical practitioner.

<sup>3</sup> Cap T8, Laws of the Federation of Nigeria, 2004; See *ASSBIFI v. NEABIA (for All Companies)* (1989-90) NCLR 196 at 197, 206.

<sup>4</sup> (1938) A.C. 586 at 604; (1938) 2 All E.R. 602 at 610. See *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905) A.C. 239, per Lord Lindley at p. 253: "Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect".

<sup>5</sup> Roger Bird defines 'breach' as "the invasion of right, or the violation of a duty" *Osborn's Concise Law Dictionary*, 7<sup>th</sup> ed. (Sweet & Maxwell, 1983) 56.

<sup>6</sup> Roger Bird, *ibid.*, p. 56.

<sup>7</sup> Abugu, J.E.O., "Nearly Always, A Strike or Lockout is Unlawful in Nigeria" *The Gravitas Review of Business & Property Law*, March 2015 Vol. 6 No. 1, p. 38; Fashoyin, T., *Industrial Relations in Nigeria*, 2<sup>nd</sup> ed. (Longman Nigeria Ltd., 1992) 83.

the form of tax or profit.<sup>1</sup> This, coupled with corruption in the form of embezzlement of public funds is a major cause of inability of government to pay workers' salaries.

Essentially, payment of salary is an issue that goes to the heart of the employment relationship. Immense efforts have been made so far by some countries of the world in protecting the interest of a worker. For instance, in England, failure to pay wages or salary that are agreed and due to the employee is regarded as fundamental breach of the contract of employment. An employee may resign and claim constructive dismissal.<sup>2</sup> This fundamental or repudiatory breach is an act of the employer that goes to the root of the employment conditions. This breach shows that the employer is no longer willing to be bound by one or more of the essential terms of the contract, and then the employee is entitled to treat himself as discharged from any further performance. One of these fundamental terms of a contract of employment is that of payment of salary, if breached without reasonable excuse entitles the employee to treat himself as discharged and consequently could sue for constructive dismissal and claim *damages*.<sup>3</sup> We canvass that courts in Nigeria and those of other jurisdictions having similar circumstances should adopt the same measure whenever they are called upon to so do. More importantly, we equally canvass for the enactment of comparable statutory provisions as in England.<sup>4</sup>

## 6. Socio-Economic Effects of Non-payment of Salaries

It would be recalled that rights advocacy group known as Socio-Economic Rights and Accountability Project (SERAP), in June 2016 dragged some state governments and the Federal Government of Nigeria to the International Criminal Court (ICC) under the aegis of the International Labour Organization (ILO), requesting its Governing Body to, *suo motu*, and in its own capacity:

Establish without delay a Commission of Inquiry to examine systematic and egregious non-observance of Convention No. 29 on Forced Labour and other international standards on the right of workers to timely payment of salaries.<sup>5</sup>

The complaint dated June 19, 2016 and signed by SERAP Executive Director, Adetokunbo Mumuni, was addressed to Guy Ryder, Director General, ILO.<sup>6</sup> The complaint was copied to the UN Committee on Economic, Social and Cultural Rights. The complaint reads in part:

SERAP is seriously concerned that several state governments and the Federal Government of Nigeria are failing and/or refusing to pay workers' salaries and pensioners' entitlements, amounting to billions of dollars in arrears. The state governments that have failed and/or refused to pay workers' salaries and pensioners' entitlements include: Osun, Rivers, Oyo, Ekiti, Kwara, Kogi, Ondo, Plateau, Benue, Bauchi and Bayelsa states...

The workers' salaries in these states and others not specifically listed are in upward arrears of 10-12 months. As a matter of fact, salaries are in arrears in not less than 27 out of 36 states and in many of Federal Government agencies.

SERAP is contending, and rightly, that the failure and/or refusal of state governments and Federal Government to pay workers' salaries and allowances and pensioners' entitlements is a clear violation of the right to work recognised by various International Labour Organization instruments<sup>7</sup> to which Nigeria is a state party.

We posit that the right to work is essential for realising other human rights and forms an inseparable and inherent part of human dignity. Failure of states to pay workers' salaries is tantamount to penalising them, and as the International Labour Organization has ruled, amounts to forced labour.<sup>8</sup> This, in our view, amounts to economic exploitation,<sup>9</sup> especially as no interest is usually paid on delayed salaries when it is eventually paid by which time the money value has depreciated due to inflationary trends. It is important to restate here that the

<sup>1</sup> Emiola, A., "The Legal Approach to Industrial Relations in Nigeria" (1998) 2 *Calabar Law Journal*, 35. See also section 43(1) of the Trade Disputes Act (supra), which emphasizes "no work no pay" and break in continuity of employment. The workers in some establishments have read this to mean "no pay no work" as well. The effect remain circuitous.

<sup>2</sup> Brian Willey, *Employment Law in Context: An Introduction for Human Rights Professionals* (Pearson Education Ltd., London, 2009) 66.

<sup>3</sup> Emphasis supplied.

<sup>4</sup> See sections 13-27 of the Employment Rights Act, 1996 (England).

<sup>5</sup> "SERAP sues Aregbesola, Fayose, nine Govs for Unpaid Salaries" *The Punch*, Friday, July 8, 2016, p. 10, also available at [www.punchng.com](http://www.punchng.com); see also *Premium Times*, Saturday, July 2, 2016.

<sup>6</sup> The organization brought the complaint pursuant to Articles 26-34 of the International Labour Organization's Constitution.

<sup>7</sup> Article 7 of the International Covenant on Economic, Social and Cultural Rights, 1966 which provides: "The states parties to the present covenant recognizes the right of every one to the enjoyment of just and favourable conditions of work, which ensure in particular: (a) remuneration which provides all workers as minimum with: (i) fair wages and equal remuneration for work of equal value without distinction of any kind...; (ii) a decent living for themselves and their families in accordance with the provisions of the present covenant".

<sup>8</sup> Article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966, which is domesticated under S. 34(1)(c) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

<sup>9</sup> S. 17(1) (d) of the Nigerian Constitution.

failure to pay workers' salaries amounts to a fundamental breach of the obligation to ensure the absence of forced labour<sup>1</sup> and economic exploitation,<sup>2</sup> and guarantee workers' remuneration so as to provide an income allowing workers to support themselves and their families.<sup>3</sup>

The right to work contributes to the survival of the individual and to that of his/her family, and to his/her development and recognition within the community. Therefore, by failing to pay workers' salaries the governments in Nigeria have violated a fundamental duty owed to the workers. It is our view that these rights are enforceable not only under the contract, but also by the various international human rights instruments. It is submitted that there is absolutely no justification why state governments or the Federal Government in Nigeria should not pay workers' salaries. In fact international law provides that workers' salaries must be paid even in times of severe resource constraints, as disadvantaged and marginalised individuals and groups must be protected by the adoption of targeted programmes to ensure that they "live in dignity".<sup>4</sup>

It is also contended that the failure of the state governments and Federal Government in Nigeria to pay workers' salaries is as a result of mismanagement of resources and corruption which under the Covenant amounts to "deliberate retrogression" in the protection of the right to work. While ordinary Nigerian workers and pensioners are routinely denied their salaries and entitlements, it is common knowledge that politicians continue to receive their salaries and allowances and live in affluence. This also clearly amounts to discrimination against workers on the grounds of national or social origin, or civil, political, or other status, as it has the effect of impairing or nullifying exercise of the right to work on the basis of equality and justice.<sup>5</sup> The failure to pay workers' salaries also violates Nigeria's obligations to respect, protect and fulfil the right to work including requiring state governments and Federal Government in Nigeria to refrain from interfering directly or indirectly with the enjoyment of that right and to adopt appropriate economic and budgetary measures to ensure timely payment of workers' salaries and pensioners' entitlements. Again, it is contended that the failure of state governments and Federal Government in Nigeria to pay workers' salaries show that they are unwilling to use the maximum of their available resources through misallocation of public funds, for the realisation of the right to work in violation of their obligations under Article 6.<sup>6</sup>

Nigeria's justice system has proven highly inadequate to enforce the right of workers to timely remuneration and freedom from economic exploitation. This is because, as earlier mentioned, the constitutional provision that provides for such right, which is Chapter II, especially section 17(3)(a) of the Constitution of the Federal Republic of Nigeria, 1999 on Fundamental Objectives and Directive Principles of State Policy, is made non-justiciable. It is on account of this inadequacy on the part of the judiciary that SERAP resorted to the ICC for possible remedy. The Nigerian governments have taken no effective and proactive measures to address the salary crisis, and have in fact significantly downplayed it.

All of these have impacted heavily on the socio-economic wellbeing of the workers, resulting in broken families, moral and material neglect of wives and children. It is a common knowledge that some workers are unable to provide the basic necessities of life, some of them and their dependants are dying due to their inability to foot health bills. Their children are dropping out of schools thereby becoming deviants to the society. Little wonder therefore, that among the youths, incidence of terrorism, cyber crime, prostitution and armed robbery is on the increase.

The difficulty is that, hitherto there is no legal forum for the enforcement of the right of workers for delayed or non-payment of salaries and wages in Nigeria. However, it is now trite, that the African Charter on Human and People's Rights has been ratified by Nigeria as expressed earlier and by implication has been transformed into a Nigerian municipal law.<sup>7</sup> In the words of Ejiwunmi JSC:

Bearing in mind the above observation, i.e. African charter on human and people's rights having been passed into our municipal laws, our domestic courts certainly have jurisdiction to construe or apply the treaty. It follows then that anyone who feels that his rights as guaranteed and protected by the charter have been violated could well resort to its provisions to obtain redress in our domestic courts.

<sup>1</sup> *Supra*, s. 34(1) (c).

<sup>2</sup> Article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966.

<sup>3</sup> *Supra*, Article 7 (a) (ii).

<sup>4</sup> Article 7 (1)(k) of the Rome Statute of the ICC which criminalized all forms of inhuman acts intended to cause great suffering or serious injury in body or to mental or physical health.

<sup>5</sup> Chapter II, section 17(1) and (3)(a) of the Constitution of the Federal Republic of Nigeria, 1999 on Fundamental Objectives and Directive Principles of State Policy, which provides that "the State social order is founded on ideals of Freedom, Equality and Justice"; and that "the State shall direct its policy towards ensuring that— all citizens without discrimination on any ground whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunities to secure suitable employment". See also *Attorney-General of Ondo State v. Attorney-General of the Federation* (2002) 9 NWLR (Pt. 772) 222 at 382 *per* Uwaifo JSC.

<sup>6</sup> International Covenant on Economic, Social and Cultural Rights, 1966.

<sup>7</sup> See African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap A9 LFN, 2004.



It is settled that the African Charter as a municipal law has come to stay despite the fact that economic, social and cultural rights under the 1999 Constitution are not enforceable and cannot be subsequently enjoyed by Nigerian workers with regard to nonpayment of salaries and allowances. The nature of the African Charter as a special genus of law have provided alternative framework in terms of human rights protection to Nigerian workers and indeed all Nigerians. In fact, in the case of *Constitutional Rights Projects v. The President*<sup>1</sup> Justice Onalaja of the Lagos High Court stated: “the provisions of the African Charter on Human and People’s Rights cannot be ousted by any domestic law”.

The importance of all these is that Nigerians can now agitate for the effective implementation of these socio-economic rights and seek for redress at the relevant courts if the governments continue to neglect, refuse or fail to protect these rights.

The world summit for social development which took place in Copenhagen in 1995, adopted the Copenhagen Declaration and programme of action which underlined the urgent need to address profound problems, especially poverty, unemployment and social exclusion which affect every nation. The Declaration further stresses that “people are at the centre of our concern for sustainable development and... they are entitled to a healthy and productive life in harmony with the environment.”<sup>2</sup> Thus, Nigeria must adopt this framework to actualise the philosophy that human person is the central subject of development and to actualise all these developmental rights, is to enable him attain the highest form of civilisation, because citizens are the most distinctive elements in any polity or democracy. Therefore, their fundamental rights must be protected before they can be in a position to render their human resources for effective democratisation and overall development of their nation.

## 7. Conclusion

From the analysis so far, it is the contention of the writer that other than the terms of a contract of employment, a legislative step should be taken by the law-makers in Nigeria to protect the rights of workers generally whether in the public or private sectors of the economy. To that end, the Labour Act should be amended to compel employers of labour to:

End discrimination and unequal treatment of workers in terms of timely payment of salaries of all workers whether or not they belong to the high-ranking government officials.

Create conditions favourable to the enjoyment of the right to work, as well as with remuneration that enable workers and their families to enjoy an adequate standard of living as required by international law.

Adopt and implement a national employment strategy and plan of action based on and addressing the salary crisis in Nigeria and ensure that all workers can live in dignity.

Ensure that any worker or pensioner who is a victim of a violation of the right to work have access to effective judicial or other appropriate remedies. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or a guarantee of non-repetition. To this end, employers of labour should: (i) be compelled to pay interests at the current bank rates on delayed salaries, allowances and commission payable to a worker; and (ii) a defaulting employer should be made to pay a fine of five million naira (\$1,319) on conviction each month that salaries of workers are delayed or unpaid for up to three consecutive months.

The Trade Unions should be more proactive in protecting the welfare of its members. In this vein, they should at the earliest opportunity prevail on the National Industrial Court of Nigeria (NICA) to make pronouncements with respect to delayed or non-payment of workers’ salaries and allowances relying on the various laws enunciated in this paper.

The above recommendations notwithstanding, it is the employer’s prerogative who is desirous of reorganising or laying off workers as a consequence to so do, provided always that he complies dutifully to the accepted mode of severance as well as payment of terminal benefits that accrued to the workers.

Since it is the province of the judiciary to advance the cause of human rights, courts in Nigeria should embrace judicial activism, i.e. using the law or statutes to achieve results by expanding their scope. The judge must therefore be innovative in interpreting the law and by so doing he shall be able to dispense justice. Why this is necessary is because there are social and economic tensions due to worsening poverty and deteriorating living conditions and this is a worrisome tendency in Nigeria today. The enforcement of economic, social and cultural rights by the courts in Nigeria can address this poverty syndrome. The courts therefore should be able to assist those demanding for opportunities for better livelihood and social justice. After all, most of the salary earners belong to the low and middle strata of the society and the courts should be the last hope of the common man.

All of the above measures should serve as a deterrent against the frequency or occurrence with which salaries are delayed in all sectors of the economy especially on the part of government establishments.

<sup>1</sup> Unreported Lagos High Court Suit No. M/M/102/93 of May 1993.

<sup>2</sup> Janusz S. *Human Rights: New Dimension and Challenges*, Ashgate Publishers England, 1998 p. 3-4.