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Is the National Industrial Court (NIC) Still a Special Court? A Review of the Extra Luggage of Ancillary Jurisdiction of the NIC as a Disservice to Labour Justice

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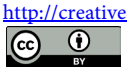

Abstract

The legal struggle surrounding the identity and the constitutional status of the National Industrial Court (NIC) including the extent and scope of its jurisdiction has not been an easy combat since the creation of the court in 2006. Fortunately, the court has survived these questions which include whether the NIC is a superior court (not being a creation of the Constitution at the beginning) and whether it is the final court over certain appeals. At the moment, one of the most potent arguments is the philosophical postulation as to whether the NIC is properly vested with jurisdiction to hear and determine labour issues from extraneous occasions like discrimination, sexual harassment, child's abuse and human trafficking having regard to the primary function of the court as a specialised court on industrial disputes with exclusive jurisdiction over labour matters. It is observed that the extended jurisdiction of the NIC is an extra luggage and not in the best interest of quick justice delivery in industrial matters in Nigeria given that the judicial divisions of the court are few and far between and the fact that the judges are appointed based on the special knowledge and experience on industrial relations and employment conditions. It is recommended that if the objective of establishing the NIC still remains the effective and efficient justice delivery in industrial relations, then there is no need to overburden the court with these extraneous non-labour matters having regard to the complexity and peculiarity of the procedure required in the hearing of some of these non-labour cases and more particularly as these other cases have been consigned to the regular courts.

Keywords

National Industrial Court, Jurisdiction, Labour Justice, Industrial Relations

1. Introduction

The need for a special court for the adjudication of matters relating to industrial disputes in Nigeria appears to have been borne out of two reasons: one, to ensure that matters relating to industrial disputes are handled by a court established for that purpose. This reason is justified by the fact that industrial matters are dynamic and sensitive requiring both the knowledge of industrial law and every day human experience (Umukoro, 2007). It is for this reason that Section 254B(4)A of the Constitution of the Federal Republic of Nigeria (Third Alteration, 2010) provides that a person shall not be eligible to hold the office of a Judge of the National Industrial Court unless the person is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has considerable knowledge and experience in the law and practice or industrial relations and employment conditions in Nigeria. The second reason is to ensure that labour disputes are expeditiously dealt with. It has been rightly observed that "there is a general lack of efficiency and effectiveness in the Nigerian Judiciary as a whole to deal with complex and time-consuming proceeding" (The Global Programme against Corruption, 2004). This has led to the establishment of more courts including special courts at different times to deal with the need to reduce the court dockets and respond to the demand for judicial expertise for some category of dispute. Court specialisation is thus, "an important reform initiative to advance the development of a successful judicial system" (Gramckow & Walsh, 2013). The Supreme Court of Nigeria has stated that "specialized courts of limited and exclusive jurisdiction are seen as fulfilling a growing need for expertise in increasingly complex areas of law" (Skye Bank v. Iwu, 2017). Informality, simplicity, flexibility and speed in the judicial resolution of cases by special courts have always been cited as the major concerns for the establishment of specialised court. Others are efficiency and effectiveness of the judicial system, uniformity and consistency in the application of the law, adequate technical expertise, improved case management and elimination of court forum shopping (Zimmer, 2009). While it may be said that the establishment of the NIC has brought to an end the era of forum shopping over industrial cases (Adejumo, 2008) and has revolutionised its procedure for hearing of cases (Ibu & Longpoe, 2020), it cannot be said with equal force that the NIC has met its primary objectives of quick justice delivery. It cannot also be said with all assurance at the moment that the establishment of the NIC has promoted ease of access to labour justice for some reasons which include limited judicial divisions of the court. The judicial divisions of the NIC are few and far between, given that the court sits only at the moment in 23 states and the Federal Capital Territory out of 36 states in Nigeria (National Industrial Court: Judicial Divisions), a situation which on its own requires the creation of additional divisions (Eze, 2019). It is therefore, worrisome that the Constitution has further compounded the court's docket with additional jurisdiction over matters which are hitherto confined to regular courts, thereby technically initiating a fresh issue of jurisdictional con-

flict and the issue of the impropriety of a specialized court to be vested with too wide a jurisdiction.

This paper therefore examines the constitutional challenges and complications created by Section 254C(1)(g) and (i) of the Third Alteration, to wit: the extension of the jurisdiction of the NIC to include cases of sexual harassment, discrimination, human trafficking, child abuse and child labour arising from labour dispute as well as fundamental rights issues and the challenges inherent in the application of the said provisions including the propriety of considering the issue of fundamental rights violation in determining a substantive labour dispute. The jurisdiction of a court is the root of the authority and power of the court. It is trite law that for a court to competently and legally adjudicate on any matter, such matter must squarely fall within the scope of its jurisdiction (7-Up Bottling Co. v Abiola & Sons 2001), (Rufai v Olugbeja 1995), (Madukolu v Nkemdili 1962), (Ndiaeyo v Ogunmaya, 1977), (National Bank of Nigeria Ltd v shoyoye, 1977) etc.

2. Brief History of the Evolution of the NIC

Before now, government was not the largest employer of labour in Nigeria and as such there was little or no need for government intervention in trade disputes between employers and their employees. According to Agumo the initial policy of non-intervention by the Federal Government of Nigeria was "modeled on the non-interventionist and voluntary system of the British Government on labour matter" (Adejumo, 2008). The story began to change when the Trade Dispute (Arbitration and Inquiry) Ordinance 1941 was enacted. This Ordinance was later amended in 1958 (Trade Dispute (Arbitration and Inquiry) Ordinance, 1958). The 1941 Ordinance gave the Minister of Labour the power to intervene by means of formal inquiry and arbitration where negotiation had broken down. The power of the Minister to intervene was however limited. The minister under the Act could only intervene where the parties to the dispute consented to it. The Minister could not appoint a conciliator or arbitrator if the parties decided otherwise. This Ordinance which existed for more than 2 decades even in its amended state started failing to represent the interest of the Federal Government.

In 1968, in the wake of the civil war, the Federal Military Government brought in certain sweeping changes by promulgating the Trade Dispute (Emergency Provisions) Decree No. 21 of 1968 and the Trade Disputes (Emergency Provision) (Amendment No. 2) Decree No. 53 of 1969. The 1968 Decree suspended the Trade Dispute (Arbitration and Inquiry) Ordinance 1958 and introduced the compulsory powers of the Minister to intervene in the settlement of trade disputes without the consent of the parties. The Decree of 1969 gave the Minister far reaching powers to decide on all issue of trade dispute and exercise his discretion as to the sort of action to adopt. As rightly identified by Ekanem and Ekanem the Decree of 1969 banned strikes and lock-outs imposing as punish-

ment imprisonment without option of fine and stringent duties on the employer and employees to report strikes and lock-outs within 14 hours to the Inspector General of Police (Ekanem & Ekanem, 2017). The decree also established the Industrial Arbitration Tribunal for settlement of Industrial disputes.

It is worthy of note that the current Trade Dispute Act (TDA) in section 17 also provides for initiation of trade disputes at the Industrial Arbitration Panel (IAP) before same can be referred to the NIC. But in the recent case between the Federal Government of Nigeria (FGN) and Academic Staff Unions of Universities (ASUU), the NIC appears to have attached no importance to this serious provision when it granted an interlocutory injunction restraining ASUU from continuing with its strike action even though such was filed directly to the NIC without first being entertained by the IAP (FGN v ASUU, 2022). The NIC also appeared to have acted in the said case as if trade unions can be, in the real sense, punished for criminal offences. It has been noted that attaching criminal liability to trade unions is a challenge to the courts (Umukoro, 2022).

3. The Emergence of the NIC

Apart from the reasons advanced above for the constitution of special courts to deal with industrial matters, the Court of Appeal has said that "the mischief aimed at by the amendment to the Act, is to avoid the proliferation of trade union cases in several High Courts in Nigeria and to ensure their litigation at the National Industrial Court" (Madu v Nigeria Union of Pensioners, 2001). It is imperative to note that the NIC has played a very positive role in dealing with the dispute between employers and employees in Nigeria. The Court has removed from the dockets of the regular court all industrial matters and has not only reduced the regular court's dockets, it has also accounted for higher speed in industrial litigations in Nigeria, especially in high profile labour dispute. The recent case of Federal Government of Nigeria v Academic Staff Union of Universities (FGN v ASUU) which was referred to the NIC on the 8th October, 2022 and a ruling delivered on the 12 September, 2022 is a live example of the benefit of the speed of the Court. Besides, the establishment of the NIC has put a stop to injunctive orders "flying in the sky like kites" from various regular courts. According to Fabiyi, JCA:

> It should be noted that the spate of injunctive orders by courts both interim and interlocutory became a source of worry to government. To avoid injunctive orders which could unleash a mis-hap akin to a catastrophe which may be caused by the avalanche, the whirlwind and the tomado roaring forth in a triple alliance, the Government wants the cases filed by unions…to go before a serene atmosphere at the National Industrial Court where injunctive orders will not freely fly in the sky like, kites. I strongly feel that there is sense behind the law (Madu v Nigeria Union of Pensioners, 2001)

The NIC was initially established by the Trade Disputes Decree No.7 of 1976

which was later re-enacted as the TDA. Section 15 of this Decree also gave the NIC as at then exclusive jurisdiction while section 15(2) of the Decree forbade appeals from lying to any other body or person for determination. Section 20 of the TDA established the old NIC and clothed it with jurisdiction and powers with respect to the settlement of trade disputes, the interpretation of collective agreements and matters connected therewith.

The NIC under the TDA was established at a time when the present Federal High Court was referred to as Federal Revenue Court established by the Federal Revenue Court Decree No. 13 of 1973 with jurisdiction to hear and determine only revenue matters. In 1979, a new Constitution emerged which by section 228 established the Federal High Court. In 1992 the TDA was amended. The amendment introduced a very controversial provision into labour law in Nigeria. Section 1A of the 1992 Decree provides:

> 1) Subject to the provision of subsection (3) of section 20 of this Act, no person shall commence an action, the subject matter of a trade dispute or any inter or intra dispute in a court of law and accordingly, any action which prior to the commencement of this section is pending in any court shall abate and be null and void.
>
> 2) Notwithstanding the provision of the Constitution of the Federal Republic of Nigeria 1979, any interim or interlocutory order, judgment or decision made by any court than the national industrial court established under this act, in respect prior to the commencement of this section shall cease to have effect.

From the foregoing, the jurisdiction of the NIC was exclusive from the very beginning of its establishment with a very limited jurisdiction until the enactment of the National Industrial Court Act (NICA) 2006. Under the TDA the NIC only had jurisdiction to make award for the purpose of settling trade disputes and to determine questions as to the interpretation of 1) any collective agreement 2) any award made by an arbitration tribunal or by the court and 3) the terms of settlement of any trade disputes as recorded in any memorandum under the TDA. In fact the court under the TDA could not deliver judgment freely (Iyam & Ugwu, 2010). It is noteworthy that the NIC under the TDA could only hear and determine issues which are purely trade disputes. By section 81(6) of the Labour Act trade dispute is "any dispute or difference between employers and workers (or between workers and other workers) connected with: 1) the employment or non-employment; or 2) the terms of the employment; or 3) the conditions of labour, of any person" (Labour Act, 2004).

4. Expansion of the NIC Jurisdiction under the NICA

The current NIC was initially established by Section 1(1) of the NICA. The NICA also provides that the court shall be a superior court of record. Section 7 of the NICA provides that the court shall have and exercise exclusive jurisdiction

in civil causes and matters:

1) Relating to

a) Labour, including trade unions and industrial relations and

b) Environment and conditions of work, health, safety and welfare of labour, and matters incidental thereto; and

2) Relating to the grant of any order to restrain any person or body from taking part in any strike, lockout or any industrial action, or any conduct in contemplation or in furtherance of a strike, lockout or any industrial action;

3) Relating to the determination of any question as to the interpretation of;

a) Any collective agreement;

b) Any award made by an arbitral tribunal in respect of a labour dispute or any organizational dispute;

c) The terms of settlement of any labour dispute, organisational dispute as may be recorded in any memorandum of settlement;

d) Any trade union constitution and

e) Any award of judgment of the court.

Section 11 of the NICA, in order to strengthen the exclusivity of the jurisdiction of the NIC, stipulates that:

> In so far as jurisdiction is conferred upon the court in respect of the causes or matters mentioned in the foregoing provisions of this part of this Act, the Federal High Court, the High Court of the state, the High Court of the Federal Capital Territory, Abuja or any other court shall, to the extent that exclusive jurisdiction is so conferred upon the court, cease to have jurisdiction in relation to such causes and matter.

The import of Sections 7 and 11 of the NICA is that no other court in Nigeria including the Federal High Court whose jurisdiction is by the Constitution exclusive shall have jurisdiction to entertain any matter in respect of which jurisdiction has been vested on the NIC. The NICA extends the jurisdiction of the NIC to labour, environmental and condition of work, health, safety, welfare of labour and matters incidental thereto. The word "labour" for instance which is not in any way defined in the NICA encompasses all issues involved in a contract of employment which includes issues of breach of terms and condition of employment, dismissal, suspension, disciplining of employee and all matters relating thereto. These were matters which hitherto were within the jurisdiction of the State and the Federal High Court depending whether they fall within Section 251(1) or 272 of the 1999 Constitution. This enlargement of the exclusive jurisdiction of the NIC brought about certain controversies, particularly that the NIC could not divest the regular courts over the items enumerated thereon since the NIC was a creation of an Act of the National Assembly while the High Courts are creation of the Constitution. The Court of Appeal took time to explain this position when it held that: "The conferment of exclusive jurisdiction over trade dispute matters on the National Industrial Court under the Trade Dispute Act, is unconstitutional being in conflict with the provisions of sections 1(1) (3),

6(6)(b), 251, 272 and 315 of the Constitution of the Federal Republic of Nigeria, 1999. The combine effect of the sections is that the State High Court has concurrent jurisdiction in trade dispute matters with the National Industrial Court or other courts established under the Trade Dispute Act, (as amended)…" (A.G. Oyo State v Nigerian Labour Congress, 2003).

The question then was how could an Act of the National Assembly divest the High Court of a state which is a creation of the Constitution of its jurisdiction in trade and industrial matters? The issue was finally laid to rest when the court in *A.G. Oyo State v Nigerian Labour Congress* stated that Section 272 of the Constitution was the only lawful and constitutional curtailment on the jurisdiction of a State High Court. Section 272 of the 1999 Constitution provides:

> Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a state shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty liability, privilege, interest, obligation or claim is in issue…

Section 251(1) of the same Constitution, on the other hand, commences with the following provisions:

> Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters…

Very remarkably, the State High Courts under the Constitution of the Federal Republic of Nigeria 1999 (as amended) has a very wide jurisdiction subject only to the items over which jurisdiction is conferred on the Federal High Court. Thus, it was very difficult to imagine how any of the two courts could be divested of jurisdiction without constitutional amendment. In fact, the Supreme Court finally drove in the last nail when it stated that the National Industrial Court Act 2006 could not elevate the NIC to the status of a superior court of record and make it of equal status with the High Courts without any amendment of Section 6(5) of the Constitution (National Union of Electricity Enterprises v. Bureau of Public Enterprises, 2010). The court held further that the jurisdiction of the State High Court can only be restricted by the provisions of the 1999 Constitution and not as is being urged by any Act of the National Assembly otherwise specifically conferring exclusive jurisdiction to a court or whatever to override the jurisdiction of the State High. Thus, expansion of the jurisdiction of the NIC by the NICA to include all labour matters could not divest the State High Court of its jurisdiction in respect of matters relating to the termination of contract of employment, suspension, unfair dismissal, etc which had been within the jurisdiction of the State High courts (Ekanem & Ekanem, 2017).

On the part of the Federal High Court, the matters listed under the jurisdic-

tion of the NIC have always been shrugged off the list of items over which the Federal High Court could exercise jurisdiction so there was little or no argument on the constitutionality of the jurisdiction of the NIC vis a-vis the jurisdiction of the Federal High Court. But this is not the same with the State High Court whose jurisdiction is not enumerated. For instance, it was not difficult for the court to hold that the termination of the employee's contract of employment was not a trade dispute over which the NIC under the TDA had exclusive jurisdiction and as such was in the realm of matters within the jurisdiction of the regular court i.e. the State High Court (Apena v National Union of Printing Publishing and Paper Products, 2003). It was argued then that if Section 251(1) of the Constitution clothed the Federal High Court with exclusive jurisdiction over matter which are within its jurisdiction then Sections 7 and 11 of the NICA were inconsistent with the provisions of Sections 251(1) and 272(1) of the Constitution and as such were null and void to the extent of the inconsistency (Umukoro, 2007). Some judges and legal writers did not seem to agree with this postulation. Abuza, argues that "the proper forum for the resolution of trade dispute or trade dispute litigation is the NIC" (Abuza, 2004). He also emphases that the decision of the Supreme Court in the case of Udoh v Orthopedic Hospital Management Board (1993) is to the effect that the mischief meant to be cured by the Trade Disputes (Amendment) Decree of 1992 is to avoid the multiplication of trade union cases in several High Courts and constitute a special court for them (Abuza, 2004). Kanyip on the other hand argues that the non-existence of the phrase "unlimited" in Section 272 of the 1999 Constitution presupposes that the State High Courts do not enjoy unlimited jurisdiction and as such the NIC and the State High Courts can enjoy concurrent jurisdiction in relation to trade disputes" (Kanyip, 2002). The prevailing argument was that: to the extent that the jurisdiction of the Federal High Court was exclusive, no other enactment could derogate from such jurisdiction and confer the same on any other court including the NIC without an amendment to the Constitution. It was in line with this that the Supreme Court of Nigeria held that the list of superior courts of records does not include the National Industrial Court and until the Constitution is amended it remains a subordinate court to the High Court (National Union of Electricity Employees v Bureau of Public Enterprise, 2010). This decision immediately led to the amendment of the Constitution in 2010 with the result as what is now known as the Third Alteration.

5. The NIC under the Third Alteration

The Third Alteration amended the provisions of the Constitution on the establishment of the National Industrial Court. First and foremost, the Third Alteration attempts to resolve the issues relating to whether or not the NIC is a superior court of record and whether it could validly divest the regular courts of their jurisdiction over labour matters. As some scholars observe, the NIC "evolved through a tempestuous route and has steadily, surely and successfully overcome,

to an appreciable extent, its hitherto jurisdictional travails" (Akeredolu & Eyongndi, 2019). In emphasising the impact of the Third Alteration, the Supreme Court shortly after the amendment in 2010 announced with relief that:

> Section 254C of the 1999 Constitution as amended by the Third Alteration Act, 2010 expanded the jurisdiction of the National Industrial Court by vesting it with exclusive jurisdiction over all labour and employment matters. In the instant case, by virtue of the new provision, the trial court's jurisdiction completely migrated to the National Industrial Court, which forthwith has exclusive jurisdiction in all matters as enumerated…" (NUT Niger State v. COSST Niger State, 2012).

The Third Alteration does not only define the status of the NIC and reinforces its exclusive jurisdiction, it also expands it with addition of subject matters arising from labour dispute thereby beginning a new struggle over the jurisdiction of the Court. According to Oamen and Abdulhakeem, "although the Third Alteration has commendably put to rest the constitutionality concern of the NIC, it has however, on the other side of the sheet, deepened the existing jurisprudential contention as to the exclusive nature of the jurisdiction of the NIC" (Oamen & Abdulhakeem, 2013). In essence, while reinforcing the jurisdiction of the NIC, the Third Alteration by section 254C unguardedly expands the scope of the jurisdiction of the court by vesting the same with matters which ordinarily are not labour issues. Section 254C(1) of the Third Alteration provides that "notwithstanding the provisions of Sections 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters…" This includes jurisdiction to interpret and apply fundamental rights provisions in the Constitution and to hear and determine civil causes and matters relating to or connected with any dispute arising from discrimination, sexual harassment, human trafficking, child's labour and child's abuse at work place (Third Alteration Act, 2010). It is commendable that the law makers have been able to successfully close up some of the gaps in the law as touching the jurisdiction and status of the NIC, however they have ended up opening more wounds by assigning additional and extraneous jurisdiction which can be conveniently termed as excess luggage. In other to appreciate the challenges inherent in this extra workload assigned to the NIC, it is imperative to examine each of the items within the parameters of the law creating them.

5.1. Interpretation and Application of Fundamental Rights' Provision

Section 254C(1)(d) of the Third Alteration provides, amongst other things, for jurisdiction over matters relating to any dispute over the *interpretation and application* of the fundamental rights provisions of the Constitution as it "relates to

any employment, labour, industrial relations, trade unionism, employer's association or any other matter which the Court has jurisdiction to hear and determine…" At this point, it becomes imperative to ask some pertinent questions in furtherance of the argument that the extended jurisdiction of the NIC is unnecessarily a disservice to labour justice. These questions are as follows: What does the Constitution contemplate by the phrase *interpretation and application*? What is the relevance of interpretation of the fundamental rights provisions in industrial claim if the NIC cannot enforce the affected fundamental rights? Besides, how is the NIC expected to *apply* fundamental rights provisions in labour dispute if it does not have jurisdiction to determine the substantive fundamental right claim? These questions constitute the meats of this research and have not been sufficiently addressed by scholars and even the courts.

The NIC in Ejieke Maduka v Microsoft Nigeria Limited while interpreting the meaning of CEDAW General Recommendation 19, stated that sexual harassment is a form of discrimination based on gender and that it has the effect of cancelling equality of opportunity and treatment at the work place (Ejieke Maduka v Microsoft Nigeria Limited, 2012). The court relied on some foreign case including the Canadian case of Janzen v Platy Enterprises Ltd. where it was held that sexual harassment was a form of sexual discrimination banned by the human rights statutes in all jurisdictions in Canada as well as the case of Vishaka v State of Rajasthan (1997) where the Supreme Court of India stated that: "Gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognized basic human right." In Ejieke Maduka v Microsoft Nigeria Limited, an employee of Microsoft Nigeria brought an action against the Country Manager of Microsoft Nigeria, Microsoft Corporation and her immediate line manager claiming that she had been consistently sexually harassed by the Country Manager and when she put up objections and warnings, her employment was terminated instead of calling the manager to order. She relied on General Recommendation No. 19 on violence against women of the UN Committee on the Elimination of Discrimination against Women (CEDAW) for the definition of sexual harassment. She claimed that the termination of her employment amounted to "acts of retaliation and gender discrimination, which in itself is an infringement of her fundamental right to freedom from inhumane treatment and freedom from discrimination as guaranteed under the 1999 Constitution, the African Charter on Human and Peoples Rights and other International Conventions against gender discrimination. The defendants' counsel contention was that the remedy open to the claimant was to initiate proceedings for the enforcement of his fundamental rights or to seek enforcement procedure. The NIC disagreed and stated while emphasising the provisions of section 254C(1)(d) aforementioned that "as far as the claimant's claim relates to a labour dispute and the alleged breach of fundamental right is related or connected to an employment matter or is procedural and an intrinsic part of a substantive claim, this court can hear it as an *ingredient of a labour issue* and as

long as the suit clothes the court with jurisdiction." The court cited other authorities like Geofery v SETRACO Nigeria Ltd. & Ors. and Anicha v Nigerian Army 7 Ors and concluded as follows:

> I find that the claimant's claim is not one of enforcement of fundamental right but a situation where she is complaining that in the course of her employment her fundamental rights to be free from discrimination was breached and this court is entitled to hear her.

In practical sense, the distinction between the phrase "interpretation and application" on one part and "enforcement" on the other part, is as technical as it is needless. The distinction is merely cosmetic. Generally, whenever the court's jurisdiction is invoked in relation to any action relating to fundamental rights, the court is invariably called upon to "interpret, apply and enforce" the said provisions. The judicial application of fact to law is not a mathematical rule with clear formula nor is it synonymous with filtration and separation of chemical elements in a science laboratory as the NIC seems to suggest. As a writer posits: "The inquiry and consideration of legal principles, case laws and marriage of same with the facts by the Judex, unfortunately dovetails to an enforcement of the said interpreted and applied provisions. Irrespective of the ingenuity employed in the denial of such reality, the unimpeachable truth is that whenever a court is constituted for the purposes of fundamental rights suit (labour or non-labour related), it embarks on an interpretation, application and enforcement of the provision of chapter 4 (Damiari, 2020).

The issue then is: what was the basis of the damages awarded the claimant in *Ejieke Maduka v Microsoft Nigeria Limited*? Was it on the basis of sexual harassment or wrongful termination? It is submitted that claimant's claim could have also succeeded once the facts of wrongful termination were proved and it is immaterial what constitutes the facts. Thus, the allusion to the interpretation and application of the fundamental rights provisions was highly unnecessary for the success of the claim, except the court is initiating some rule of law to the effect that once the issue of fundamental right violation is sustained, every termination as in Ejieke's case is wrongful or every labour claim is established. In the absence of that, the consideration of fundamental rights violation in determining the substantive labour dispute is an unnecessary excess luggage as the NIC is technically enforcing fundamental rights claim under the guise of interpretation and application.

Damiari observes that the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP) place limitation on the NIC. For instance, the FREP Rules are made for the High Courts. To that extent, it is incongruous for the NIC to rely on the FREP Rules. The NIC has never made that mistake. Furthermore, "the NIC is not specifically mentioned as a court for the purposes of enforcing any of the rights provided for in Chapter IV of the Constitution (Damiari, 2020). As a result, the NIC has always tried to demarcate the extent of its fundamental rights

jurisdiction. This it does merely on the basis of whether the claim is initiated under the NIC Rules or under the FREP Rules. In Grace v PENGASSAN, the NIC observed that 254C(1)(d) of the Constitution cannot be used as the basis of enforcing Fundamental Rights Claim in the NIC. In the opinion of the court "fundamental right issue can only be entertained when evaluating the procedure complained of, i.e. a substantive labour issue…but such a case must be initiated by writ of summons or more appropriately by a complaint where parties will exchange pleadings and adduce evidence on the propriety or otherwise of the claimant's claims" (Grace v PENGASSAN, 2011). This dichotomy, with due respect, does not respond to the issue of the legal difference between *interpretation and application* on one hand and *enforcement* on the other hand. From the opinion of the NIC above, it appears that the concern of the NIC is about how the action is begun i.e. by way of writ of summons with pleadings in line with the NIC Rules and not under the FREP Rules. In other words, even if the claimant is seeking for the enforcement of his fundamental right at the NIC, the court will assume jurisdiction as long as the claim is initiated by way of a writ of summons as against originating summons under the FREP Rules. This also means that once the procedure is in line with the rules of the NIC, the Court is necessarily *interpreting and applying* Chapter IV of the Constitution even if the NIC is determining the fundamental rights claim of the Claimant. This reasoning appears as arising from the struggle by the court to defend the provisions of the Third Alteration without necessarily giving thought to the legal conundrum created by the expansion of the jurisdiction of the Court. For most of the cases, including the NIC cases reviewed above, in which the NIC is called upon to intervene in industrial claims involving fundamental rights of the claimant, the court did more than *interpretation and application* of Chapter IV, the NIC enforced those rights.

5.2. Discrimination Arising from Labour Cause

Discrimination is a substantive wrong against which a fundament right claim may lie. In other words, it is one of the fundamental rights in Nigerian. The right against discrimination is copiously provided for under domestic and international law. The major protection is Section 42(1) of the Constitution which provides that "a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject..." Other instruments protective of the right against discrimination are The HIV and AIDS (Anti-Discrimination) Act 2011, The Discrimination against Persons with Disability (Prohibition) Act 2018, Special People's Law of Lagos State 2011 and Labour Act. The HIV and AIDS (Anti-Discrimination) Act protects the rights and the dignity of people living with and affected by HIV and

AIDS from any form of discrimination based on their health status.

Very significantly, while section 254C(1)(d) vests jurisdiction over matters concerning the interpretation and application of fundamental provisions Section 254C(1)(g) specifically confers jurisdiction over matters bordering on discrimination arising from labour cause. Even though freedom from discrimination is a fundamental right, it appears that where the claim relates to the issue of discrimination, the court's jurisdiction extends beyond *interpretation and application*.

First and foremost, the rules of court for fundamental rights claim are different from the rules of NIC. Secondly, section 46 of the same Constitution provides that any person who alleges that any of the provisions of the Chapter (i.e. Chapter IV) has been, is being or likely to be contravened in relation to the person may apply to a High Court in that State for redress. These provisions clearly vest jurisdiction over fundamental rights (whether interpretation, application or enforcement) on the High Courts which does not include the NIC. Some authors have argued that "section 46 of the Constitution must no longer be read in isolation but along with other provisions of the Constitution vesting special exclusive jurisdiction in the NIC in human rights cases relating to labour and employment matters" (Ishola, Adeleye, & Momodu, 2016a). It is submitted that this suggestion does not find full expression within the provisions of the said section 46. Section 254C(1)(d) relates to *interpretation and application* only while section 46 is all inclusive and vests the High Courts with power to redress the wrong. Whatever the term *application* means, it must be defined in line with section 254C(1)(d). That is, it is an *application* of the fundamental rights provisions to the connected labour cause which is the main claim before the NIC. The substantive claim must be an industrial claim, while the provisions of Chapter IV are to be interpreted and applied in the cause of determining the main labour claim.

This is not in the interest of the general objective for the creation of the NIC as a special court for labour disputes. For every head of claim there are ingredients that must be proved. If a woman was denied promotion unjustly because of her religion, what needs to be proved is not whether the loss of promotion was due to her religious alliance but whether she was qualified and was not promoted. As rightly observed "the Third Alteration Act does not lay to rest the argument that the NIC cannot effectively add this catalogue of non-industrial issues to its dockets and still remain a special court. "Thus, despite having all the powers of a High Court, the NIC is not specifically mentioned as a court for the purposes of enforcement of "any right to which the person who makes the application may be entitled under the Chapter IV" (Damiari, 2020).

It is submitted that it is a complete waste of time for a litigant to first of all have his right interpreted and applied in labour dispute by the NIC, then proceed thereafter to the High Courts for enforcement, if that is what is meant. This is not only clumsy and frustrating, it is unimaginable. Section 254C(1)(d) creates a scenario which is practically confusing. It is a conflicting situation (Oluwadunsin, 2018). Furthermore, it is worthy of note that the section vesting jurisdiction

on the NIC over cases of discrimination is specific and does not limit the power of the NIC to mere interpretation and application. This seems to suggest that the NIC can determine issues of discrimination where it arises from an industrial action while in other ancillary fundamental rights cases, it can only interpret and apply the relevant provisions of the Construction. This is constitutionally impracticable for the same reason that the NIC cannot apply the established rules for the enforcement of fundamental rights. As rightly observed, "this development would ordinarily be a commendable one. However, a critical look at its implications raises some concerns regarding the setback it stands to bring to the administration of human rights justice in the country. For instance, the court will, from time to time, have to grapple with the demarcation of its jurisdiction, and will constantly ensure that any human rights violation it deals with was truly committed in relation to a labour dispute/issue. This may engender delays in the administration of justice, something that the extant reforms seek to eradicate. "In addition to this, it is still doubtful whether the Fundamental Rights (Enforcement Procedure) Rules, 2009 would be applicable to human rights proceedings before the court" (Ishola, Adeleye, & Momodu, 2016b).

In attempting to explain the conundrum some scholars state that "what is material under the section is not the particular cause of action *per se*…but the 'circumstances' or 'relationship'…from which the cause of action arose. Hence, when a cause of action arises, the nature of the cause of action (e.g. defamation, breach of contract, false imprisonment, etc.) is immaterial in determining the jurisdiction of the NIC rather; the circumstance or relationship from which the cause of action arose from is where the jurisdiction is traceable and discoverable from" (Eyongndi & Onu, 2019).

5.3. Sexual Harassment, Human Trafficking and Child's Rights

It is worthy of note that the claim of sexual harassment, human trafficking, child labour and child abuse constitute distinct head of actions or crimes in different legislation. The offences of sexual harassment and Human Trafficking are in the realm of criminal offences under the Trafficking in Person (Prohibition) Enforcement and Administration Act (TIPPEAA), 2015, Child's Rights Act 2013, the Criminal Code Act, the Penal Code as well as the Violence Against Persons (Protection) Act (VAPPA) 2015. Section 13 makes it an offence for any person to recruit, transport, transfer, harbour, or receive another person by means of threat or use of force or other form of coercion, abduction, fraud, deception, abuse of power, position of vulnerability or giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation of that person. Section 17 of the same Act prohibits procuring or recruiting any person under 18 years for the purpose of pornography or pornographic performances while Section 14 makes importation and exportation of any person for the purpose of prostitution or other form of sexual exploitation criminal offence. Section 23 prohibits employment, transportation, recruitment, etc of children under 12 years as domestic workers. The

employment, transportation, harbouring or hiring out of children to do any work that is exploitative, injurious, harzadous to the physical, social and psychological development of the child is equally an offence under the Act (TIPPEAA, 2015). Section 23, no doubt, addresses the concerns of child's abuse and child's labour. Section 36 vests jurisdiction on the High Court. This includes the Federal High Court. The Act also creates different levels of punishment ranging from monetary fines to imprisonment (Kigbu & Hassan, 2015). Section 46 of the VAPPA, on the other hand, defines *sexual harassment* to include "unwanted conducted of sexual nature or other conduct based on sex or gender which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment and this include physical, verbal, or non-verbal conducts." The bottom line is that cases of human trafficking, sexual harassment, child labour and child's abuse are majorly criminal in nature. In other words, the person alleging must prove the allegation beyond reasonable doubt. The standard of proof is not the same with the standard required in proof of industrial claims which is purely civil. By implication the NIC must have to apply the Administration of Criminal Justice Act (ACJA) 2015 and relevant criminal procedure laws. There may have to be police investigation report and medical report in appropriate scenarios, including compliance with the ACJA and Evidence Act in the taking of confessional statement, if the defendant offers any. All these will have to be observed in an industrial claim at the NIC merely because these ancillary crimes arose from a labour cause even though there are competent courts with criminal jurisdiction and the requisite expertise in criminal procedure to handle the same.

What is more? In a desperate attempt to fortify the jurisdiction of the NIC, order 106 of the NIC Civil Procedure Rules 2016 provides for classes of sexual harassment to include physical conduct of a sexual nature, a verbal form of sexual harassment, and a non-verbal form of sexual harassment. The later includes unwelcome gestures, indecent exposures, and unwelcome display of sexually explicit pictures and objects. The Rules also describe another class which is *quid pro quo* harassment which is where an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence or influences the process of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favours.

Under the same rules, discrimination may be on ground of ancestry, religion, gender, marital status, family situation, genetic heritage, ethnic origin, political or ideological convictions, union affiliation, tribe, handicap or disability, health, pregnancy, etc. It is submitted that a rule of court should not attempt to create substantive rights or liability. Rules of Court are for the guidance and regulation of the conduct of cases and to govern procedures for the conduct of the court's business (Adewumi, 2013). They are not known for providing for substantive rights. The classification and elaboration of the term *sexual harassment* and *discrimination* via the rules of the NIC is very unhealthy and *ultra vires* the power

of the President of the NIC. It is a usurpation of the power of the legislatures to make laws.

Given that the NIC is a special court and that these extra items added to its jurisdiction constitute separate claims and or offences under different laws, it would have served the objectives of the NIC better if the drafters of the Constitution allowed the respective courts with jurisdiction to handle the same. The specialty of the NIC is as originally defined in Section 7 of the NICA 2006. That is, "labour, including trade unions and industrial relations and environment and conditions of work, health, safety and welfare of labour, and matters incidental thereto." It is submitted that labour dispute on its own is a broad head of claim in law. Besides, almost every other civil cause can arise from industrial dispute e.g. tenancy, tort, contract, etc and it is a disservice to labour justice to vest jurisdiction on the industrial courts to handle all ancillary cases. Such court is bound to drift in the muddy waters of confusion. This is the current state of the NIC. The following two cases demonstrate the extent of the confusion which the expanded jurisdiction of the NIC has introduced into the body of labour jurisprudence in Nigeria. The Court of Appeal has held that Section 254C of the 1999 Constitution does not reveal that its powers extend to entertaining a claim in tort. The court was of the view that "a claim in tort cannot be considered as being ancillary to a claim for wrongful dismissal when brought before a court which has its jurisdiction limited by statute" (Akpan v. University of Calabar, 2016). In Medical & Health Workers Union of Nigeria v. Ehigiegba, on the other hand, the same court held that by virtue of Section 254C (1)(a) of the Third Alteration, a defamation claim arising from a labour cause or matter regardless of the fact that it is a tort, comes within the exclusive original civil jurisdiction of the NIC and no other court (Medical & Health Workers Union of Nigeria v. Ehigiegba, 2017). This confusion was absent until the emergence of the Third Alteration in 2010.

6. Conclusion

The road leading to the re-definition of the National Industrial Court of Nigeria has not been a smooth one. Unfortunately, the NIC is yet to arrive as a court specifically established for the quick dispensation of industrial dispute as expected for the simple reason that while the court is yet to register its presence across the federation like every other court of first instance, its jurisdiction has been expanded strictly beyond labour causes, a scenario which makes it difficult to ascertain whether the NIC, in real sense, is still a special court. While the constitutional backing provided by the Third Alteration as regards the status of the NIC is commendable, the overload of ancillary jurisdiction is already constituting a major constraint to quick justice delivery in industrial cases as the court is already being bogged with cases bothering on torts, fundamental rights, etc, busting the court into the hearing of preliminary objections on the issue of jurisdiction all the time. The court may have tried to speed up high profile cases, but

the general cause list of the court is likely going to suffer from avoidable overload if the expanded jurisdiction is not revisited by the law makers soon.

The Third Alteration has brought more uncertainties into the jurisprudence of labour law as regards the jurisdiction of the NIC and sadly opened up the erstwhile closed widow of forum shopping, which was one of the reasons advanced (and a major selling point) for the agitation of a special court for labour causes in Nigeria. Nwocha describes this as a state of ambivalence (Nwocha, 2017). It is recommended therefore that the Constitution of the Federal Republic of Nigeria be further amended to relieve the NIC of its over-bloated ancillary jurisdiction while the government intensifies efforts in creating more judicial divisions of the Court across the country.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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