

EVALUATING THE SCOPE OF ESSENTIAL SERVICES UNDER EXTANT LABOUR REGULATIONS IN NIGERIA

CHRISTY HWYERE-YASHIM

Abstract

This article primarily interrogates the notion of essential services under domestic labour regulations as well as international labour standards which reflects the jurisprudence of the International Labour Organization (ILO). It also espouses the intervention of the National Industrial Court of Nigeria which widened the scope of essential services in line with international labour standards and global best practices. This was pursuant to a decision reached by the Court on 4th February 2014. Aside distinguishing essential services from non-essential services for the purpose of invocation of strikes and lockouts, this article interrogates the salient basis for compartmentalisation of the wide spectrum of services in the workplace. It also demonstrates how the compartmentalisation of services impacts on basic rights and guarantees in the workplace. In espousing the desirability for entrenching minimum service during strikes in ensuring continuous delivery of basic services and to cushion the adverse impact of strikes on the workplace, this article makes a case for the

review of domestic labour regulations in a manner that guarantees minimum service during industrial actions leading to withdrawal of services by workers engaged in the provision of essential services. In Nigeria, essential services encompass the public services of the federation and states of the federation, hospitals, educational institutes, and electricity service providers. The article found, inter alia, that the blueprint provided by the prescriptions of ILO on the notion of essential services represents the consensus of civilised States as well as global best practices on the discourse. Accordingly, it raises the exigencies for aligning domestic labour regulations on the notion of essential services in Nigeria with international labour standards in a manner that practically culminates in re-classification of the list of essential services by distilling truly essential services from the non-essential ones.

Key words: essential services, labour regulation, international labour standards

1. Introduction

In the workplace, there are wide spectrums of services provided by workers in both private and public sectors of the economy. These services, which are sometimes interrelated, are distinguishable from one another by their intrinsic nature and importance. This reality appears to have influenced labour regulations in different jurisdictions across the globe in creating the divide between essential services and non-essential services. Amongst states across the globe, diverse nomenclatures have been used in construing the concept of essential

services. In Albania and Rwanda, essential services are referred to as “indispensable services.”¹ In India and Bangladesh, it is referred to as “public utility services.”² The distinction drawn between the spectrum of services in the workplace may also be harnessed in determining the extent to which domestic labour regulations of states align with international labour standards and global best practices on array of issues in the workplace.

Interrogating the efficacy of domestic labour regulations through the periscope of international labour standards is significant for a number of reasons. First, international labour standards are designed in a robust, inclusive and participatory manner, using the notion of tripartism, to eradicate unfair labour practices and decent work deficits, and to promote social justice in the workplace of states across the globe. The notion of tripartism remains a focal point for ILO, and this is anchored on the fact that it allows for cooperation, dialogue and engagement among the representatives of governments, employers, and workers in the formulation of labour standards and policies. To this end, the Tripartite Consultation (International Labour Standards) Convention 1976 (No. 144) was adopted to give efficacy and impetus to *tripartism* at both

*Ph.D (in-view); LL.M(Jos); LL.B(Hons.); BL: Research Fellow, National Institute for Policy and Strategic Studies, and Doctoral Researcher, Graduate School of Environmental Studies, Department of Environmental Law and Politics, Nagoya University, Japan. Email:christyhwere@gmail.com, chwyere yashim@nipsskuru.gov.ng;

Corresponding Author
CHRISTY HWYERE-YASHIM
E-mail: christyhwere@gmail.com

¹ Albanian Code of Labour No 7961 of 1995, s 197/5(2); Rwanda Law No 13/2009 of 2009, s 1(5).

² Indian Industrial Disputes Act 1947, s 2(n)(i); Bangladesh Labour Act 2006, s 2(viii).

international and national spheres.³ On 3rd May 1994, Nigeria ratified the Tripartite Consultation (International Labour Standards) Convention 1976 (No. 144). This may have influenced ILO in treating the Federal Ministry of Labour, the Nigerian Employers' Consultative Association, and the Central Labour Organisations, comprising of the Nigerian Labour Congress and Trade Union Congress, as constituents of tripartism in Nigeria. Tripartism is a system of industrial relations involving interaction among the three key actors in industrial relations, viz., employers, employees and government. Tripartism is further supported by the obligation imposed on states to operate procedures that ensure effective consultations and interface within the representatives of government, employers and workers with respect to matters concerning the activities of ILO.⁴ The ambit of matters concerning the activities of ILO is broad and encompasses all forms of issues in the workplace.

Second, international labour standards have gained enormous acceptability and recognition by member states of ILO who are increasingly relying on international labour standards in gauging the efficacy of domestic labour regulations and practices on a wide spectrum of issues in the workplace.⁵ In other words, the quality of rights and guarantees accorded by domestic labour regulations are increasingly measured by reference to international labour standards.⁶ This has resulted in the emergence of consistent legal order for the governance of the workplace that is inspired by the need for aligning domestic labour regulations and practices with international labour standards and global best practices. This remains the surest route to attaining the notion of a globalised workplace. Third, international labour standards are in the nature of basic minimum prescriptions with threshold that may be exceeded by member states of ILO. This implies that member states of ILO are at liberty to either adopt international labour

standards as churned out by ILO or tinker around these international labour standards in providing more robust protection within their domestic jurisdictions. This operates in rendering international labour standards as providing some sorts of legislative blueprints for member states of ILO to rely on in modelling and remodelling domestic labour regulations and practices. As such, the adoption and ratification of international labour standards does not in any way preclude member states of ILO from according higher standard of protection. Unfortunately, this does not hold for all member states of ILO. This is against the backdrop of the fact that member states of ILO have not fully assimilated the prescriptions of international labour standards on the notion of essential services. In any case, diverse approaches have been adopted by member states of ILO on the notion of essential services. This results in diversities of contexts in which the concept has been deployed by states across the globe. This challenge is further exacerbated by the fact that the prerequisites prescribed by law for determining the essentiality of services are fraught with all manner of absurdities or inconsistencies.

In some states, the notion of essential services is used in determining the categories of workers legitimately entitled to the right to strike. This plays out largely in the imposition of substantial restriction or outright prohibition of the right to strike.⁷ For instance, section 65(d)(1) of the South African Labour Relations Act 2015 prohibits any person engaged in an essential service from taking part in a strike. In Botswana, the Minister in charge of labour may declare any other service as essential if its interruption for at least seven days endangers the life, safety or health of the whole or part of the population or harms the economy.⁸ In Albania, domestic labour regulation provides that strike cannot be declared in services of vital importance where the interruption of work would jeopardize the life, the personal security, or the health of a part or of the entire population.⁹

In some other states, the notion of essential services plays out in the contexts of imposition of minimum operational service as well as the use of replacement workers during strikes.¹⁰ Section 76(2) of the Tanzanian Employment and Labour Relations Act 2004 allows strikes or lockouts in essential services if there is a collective agreement providing for minimum services during a strike or lockout which has been approved by the Essential Services Committee. In Bulgaria, section 14(1) of the Law on the Settlement of Collective Disputes 1990 prescribes that during a strike, workers and employer are obliged to provide a written agreement on the conditions for carrying out activities whose non-performance or

³ The Tripartite Consultation (International Labour Standards) Convention 1976 (No. 144) was adopted on 21st June 1976. However, the instrument entered into force on 16th May 1978.

⁴ Tripartite Consultation (Activities of the International Labour Organization) Recommendation 1976 (No. 152), recom 2(1).

⁵ Chioma Kanu Agomo, *Nigerian Employment and Labour Relations: Law and Practice* (Concept Publications Limited 2011) xiii.

⁶ Ibid 49.

⁷ Kenyan Labour Relations Act 1947, s 78(1)(f).

⁸ Botswanan Trade Disputes Act 2011 (as amended), s 46(2).

⁹ Albanian Code of Labour No 7961 of 1995, s 197/5(1).

¹⁰ Korean Trade Union and Labour Relations Adjustment Act No 5310 of 1997, s 42-2.

interruption may cause danger for the lives and health of citizens in emergency or in need of urgent medical attention or hospitalization. Such written agreement must be concluded at least three days prior to the beginning of the strike.¹¹ In Nigeria, the construction of essential services is static, and does not take into cognisance the fact that a non-essential service may become essential service if strikes within such service last beyond certain time or extend beyond certain scope to endanger the life, personal safety or health of the whole or part of the population. This is a major departure from the prescriptions of ILO.¹² Given the diversity of usage, it becomes expedient to interrogate the exact meaning, nature, scope and salient nuances of the notion of essential services.

2. Meaning of Essential Services

Essential services are those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.¹³ Workers employed in essential services fall under the spectrum of sensitive sectors of the economy.¹⁴ While this construction of essential services is succinct, the omission of criteria which have to be established to determine the existence of clear and imminent threat to the life, personal safety or health of the whole or part of the population leaves so much to be desired. However, in the context of the construction, the term “interruption” must be viewed from the prism of industrial actions which include strikes and lockouts. Hence, the Trade

Disputes (Essential Services) Act 1976¹⁵ empowers the President of the Federal Republic of Nigeria to proscribe any trade union or association the members of which are employed in any essential service if such trade union or association has been engaged in industrial unrest or acts calculated to disrupt the smooth running of any essential service.¹⁶ Where the proscribed organisation is a trade union, such trade union is obliged to, not later than fourteen days from the date in which the proscriptive order was made, surrender its Certificate of Registration to the Registrar of Trade Unions who is expected to formally cancel the registration of such trade union.¹⁷ This is without prejudice to the fact that the Trade Disputes (Essential Services) Act 1976 creates an avalanche of offences with varying penalties for acts calculated to disrupt the economy.¹⁸

Again, the construction of essential services shows that certain services enjoyed some level of importance not necessarily because of the peculiar nature of the services, but due to the fact that the disruption of such services can be of harmful consequences.¹⁹ This explains why it is common for essential services to be legislated by government in a manner that imposes restrictions that guarantee the provision of such services without any form of interruption. This suggests that cessation of essential services poses acute danger or threat to the population. In other words, public interest lies in the uninterrupted operation of essential services. In *National Union of Electricity Employees & Anor. v Bureau of Public Enterprises*,²⁰ the Supreme Court of Nigeria demonstrated this in its reaction to a proposed strike by workers of the National Electricity Power Authority as follows:

...the 1st Defendant/Appellant is more or less the sole provider of electricity power, a crucial essential service to the whole nation. The chaos and total confusion talk less of the economic damage that would be inflicted on the people and the nation as a whole should the 1st Defendant/Appellant as the sole provider of electricity power proceeded on an industrial action/strike could only be imagined. Such an action if not checkmated timeously would bring the entire nation to its economic knees and standstill. To allow that stage of catastrophe to be reached would, with respect, amount to unpardonable naivety.

This decision reflects the general perception of essential services as well as the gravity of the adverse impact of the interruption of essential services on the populace. Such outcome remains inevitable where proper evaluation of a case is carried out having regard to its merits.

To a large extent, what constitutes essential services

¹¹ Bulgarian Law on the Settlement of Collective Disputes 1990, s 14(2).

¹² International Labour Organization, *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (6th edn, International Labour Office 2018) para 837, p 156.

¹³ Ibid para 866, p 164; OVC Okene 'The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law' [2007](15)(1) *African Journal of International and Comparative Law*, 33; South African Labour Relations Act of 2015, s 213.

¹⁴ Iguh Nwamaka Adaora, Ewulum Boniface Ebele and Ikpeata George Emenike 'The Employees' Right To Strike: A Mirage For Workers in the Essential Services Sector in Nigeria' [2021](2) *Idemili Bar Journal*, 29.

¹⁵ The Trade Disputes (Essential Services) Act 1976 is codified as Cap T9, Laws of the Federation 2004.

¹⁶ Ibid s 1(1).

¹⁷ Ibid s 1(2).

¹⁸ Ibid ss 2 and 4.

¹⁹ Gogo George Otuturu 'Trade Unions (Amendment) Act 2005 and the Right to Strike in Nigeria: An International Perspective' [2014](8) *Labour Law Review*, 36; GS Morris 'The Regulation of Industrial Action in Essential Services' [1983](12) *Industrial Law Journal*, 69.

²⁰ (2010) 7 NWLR (Pt 1194) 538 (SC).

depends on the particular circumstances prevailing in a country.²¹ Without prejudice to the fact that international labour standards also provide for the meaning and scope of essential services, states often defined and circumscribed the scope of essential services to address certain deficit in domestic labour practices. In jurisdictions where strikes become incessant and disruptive in a sector, such sector can be construed within the ambit through enactment of appropriate legislation or amendment of existing legislation. In South Africa, section 213 of the Labour Relations Act 2015 defines essential service as a service the interruption of which endangers the life, personal safety, or health of the whole or any part of the population, such as the Parliamentary service and the South African Police Services. This legislation established the Essential Services Committee and empowered it to advise on sectors that could be declared as essential services.²² The Essential Services Committee is also empowered to decide whether or not an employer and a registered trade union or trade unions representing employees in the essential service can conclude a collective agreement that provides for the maintenance of minimum services.²³ The point must be emphasised that the Essential Services Committee can only designate a service as essential service where it can be shown that the interruption of such service would present a clear and imminent threat that would “endanger the life, personal safety or health of the whole or any part of the population.”²⁴

In Malawi, courts of law are empowered to determine whether a service qualifies as essential service or not.²⁵ In a way, this position also holds for Nigeria since the judicial power of courts of law extends to questions involving the determination of civil rights and obligations of any person in relation to another person, authority or the government.²⁶ This constitutional prescription is a tacit recognition of the right to approach courts to litigate as well as the inherent power of courts to entertain grievances of all sorts. Furthermore, extant domestic labour regulations recognize two categories of essential services. The first relates to section 7(1)(a)-(c) of the Trade Disputes (Essential Services) Act 1976 which defines essential services as follows:

(a) the public service of the Federation or of a State which shall for the purposes of this Act include service, in a civil capacity, of persons employed in the armed forces of the Federation or any part thereof and also of persons employed in an industry or undertaking (corporate or unincorporate) which deals or is connected with the manufacture or production of materials for use in the armed forces of the Federation or any part thereof;

(b) any service established, provided or maintained by the Government of the Federation or of a State, by a local government council any municipal or statutory authority, or by private enterprise- (i) for, or in connection with, the supply of electricity, power or water, or of fuel of any kind; (ii) for, or in connection with, sound broadcasting or postal, telegraphic, cable, wireless or telephonic communications; (iii) for maintaining ports, harbours, docks or aerodromes, of for, or in connection with, transportation of person, goods or livestock by road, rail, sea, river or air; (iv) for, or in connection with, the burial of the-dead, hospitals, the treatment of the sick, the prevention of disease, or any of the following public health matters, namely, sanitation, road-cleansing and the disposal of night-soil and rubbish; (v) for dealing with outbreaks of fire; (vi) for or in connection with teaching or the provision of educational services at primary, secondary or tertiary institutions;

(c) service in any capacity in any of the following organisations-(i) the Central bank of Nigeria; (ii) the Nigerian Security Printing and Minting Company Limited; (iii) any body corporate licensed to carry on banking business under the Banks and Other Financial Institutions Act.

Apparently, irrespective of sector or industry, it appears that any service can be construed within the scope of essential services. The list of essential services highlighted above comprises an array of services the interruption of which does not in any way endanger the life, personal safety or health of the whole or part of the population. The inclusion of teaching within the ambit of essential services was reinstated by the abrogated Teaching (Essential Services) Decree No. 30 of 1993. Under this abrogated legislation, member of staff, whether teaching or non-teaching, employed in primary, secondary or tertiary educational institutions are treated as falling within the scope of teaching.²⁷ Beyond classifying teaching as an essential service, this abrogated legislation further provides that where a strike occurs and goes on for more than one week, the striking staff shall be

²¹ International Labour Organization (n 12) para 837, p 156.

²² South African Labour Relations Act of 2015, s 70(1).

²³ Ibid s 73.

²⁴ Ibid s 213.

²⁵ Malawi Labour Relations Act 1996, s 47(2).

²⁶ Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 6(6)(b), 46(1) and 272(1).

²⁷ Abrogated Teaching (Essential Services) Decree No. 30 of 1993, s 2.

deemed to have resigned their appointment. It further provides that a member of staff in the teaching service who embarks on strike for over one week shall be liable to vacate official accommodation that may have been provided.²⁸ Any official or member of an institution who embarks on strike is guilty of an offence triable in the Federal High Court and upon conviction is liable to a maximum of two years imprisonment.²⁹ This represents the idea of criminalization of strike designed to curb the rising rate of strikes in the workplace by deterring workers and workers' trade unions from declaring or engaging in strikes. While the idea of criminalisation of strikes depicts the rigidity of labour regulations and extremity of the intervention of states in industrial relations, the evidence of contemptuous attitude of trade unions to provisions of domestic labour regulations imposing penalties for engaging in strikes illustrates the resistance to notion of criminalization of strike in Nigeria. It therefore follows that a progressive approach to industrial relations does not lie in the imposition of sanctions for the exercise of the right to strike, but in speedy identification of pragmatic panaceas to conflicts in the workplace.

Furthermore, the definition of essential services in section 7(1)(a)-(c) of the Trade Disputes (Essential Services) Act 1976 shows that regardless of job description, the entire public services of the Federation and States of the Federation fall within the scope of essential services. Incidentally, the public services remain the major provider of formal employment in Nigeria. It seems this is intended to stifle trade unions' activities within the public services. Not all public services are in the nature of services the cessation of which would endanger the life, personal safety or health of the whole or part of the population. As such, the blanket categorisation of the entire public services of the Federation and States of the Federation as essential services remains undesirable. While there are civil servants whose jobs merit such placement, this should not be the case in respect of workers such as dust bin collectors employed by the Central Bank of Nigeria.³⁰ Whereas the Central Bank of Nigeria generally plays a

critical role in the governance of the economy, not every of its employee contributes to the attainment of this goal. This clearly demonstrates that the definition of essential services remains bogus, far-fetched, ludicrous and grotesque. In a way, this can be attributed to the politicisation of the notion of essential services by successive military regimes in Nigeria.³¹

Incidentally, the definition of essential services proffered by section 7(1)(a)-(c) of the Trade Disputes (Essential Services) Act 1976 is replicated in the second definition of essential services provided under section 48(1) of the Trade Disputes Act 1976 as follows:³²

1. *The public service of the Federation or of a State which shall for the purpose of this Act include service in a civil capacity, of persons employed in the armed forces of the Federation or any part thereof, and also, of persons employed in an industry or undertaking (corporate or incorporate) which deals or is connected with the manufacture or production of materials for use in the armed forces of the Federation or any part thereof.*

2. *Any service established, provided or maintained by the Government of the Federation or a State, by a local government council, or any municipal or statutory authority, or by private enterprise-(a) for, or in connection with, the supply of electricity, power or water, or of fuel of any kind; (b) for, or in connection with, sound broadcasting or postal, telegraphic, cable, wireless or telephonic communications; (c) for maintaining ports, harbours, docks or aerodromes, or for, or in connection with, transportation of persons, goods or livestock by road, rail, sea, river or air; (d) for, or in connection with, the burial of the dead, hospitals, the treatment of the sick, the prevention of disease, or any of the following public health matters, namely sanitation, road-cleansing and the disposal of night-soil and rubbish; (e) for dealing with outbreaks of fire.*

3. *Service in any capacity in any of the following organisations- (a) the Central Bank of Nigeria; (b) the Nigeria Security Printing and Minting Company Limited; (c) any body corporate licensed to carry on banking business under the Banks and other Financial Institutions Act.*

In the above definition, teaching is excluded from the ambit of essential services. However, the definition construed the entire public services of the Federation or of the State of the Federation as essential services in the same manner as the Trade Disputes Act 1976. This deficit makes it imperative to fine-tune and distil the categorisation of the public services by a more useful and

²⁸ Ibid s 2(3).

²⁹ Ibid s 2(4).

³⁰ OVC Okene 'Legal Constraints to Membership of a Trade Union in Nigeria' [2007](V)(III) *International Journal of Civil Society Law*, 37.

³¹ Ogbole Ogancha O 'Repositioning the Regime on Strike Towards the Guarantee of Minimum Service in the Nigerian Workplace' [2016](6)(1) *Human Right Review*, 197.

³² First Schedule, Trade Disputes Act 1976, Cap T8, Laws of the Federation of Nigeria 2004.

pragmatic model that takes cognisance of the particular type of service performed in order to determine its essentiality and to distil true essential services from the non-essential ones. Public services encompass statutory corporations or companies wholly or substantially owned by any of the tiers of government. Generally, the employment of public servants enjoys statutory flavour. This means that such employment enjoys a special status over and above the ordinary master and servant relationship, in that the terms and conditions of service are provided for and protected by statute. For an employment to enjoy statutory flavour in law, two vital ingredients must co-exist. First, the employer must be a body set up by statute, and second, the enabling statute must make express provisions regulating the employment of the staff of the category of the employee concerned especially in matters of discipline.³³ To this extent, such employment can only be terminated in the way and manner prescribed by the relevant statute.³⁴ Incidentally, the Trade Unions Act 1973 (as amended) adopts the definition of essential services in the Trade Disputes Act 1976.³⁵ However, construing a service as essential service has different implications under the Trade Disputes Act 1976, Trade Unions Act 1973 (as amended), and Trade Disputes (Essential Services) Act 1976.

Under the Trade Disputes Act 1976, the notion of essential services has a number of implications. First, it allows for direct reference of trade disputes to the National Industrial Court of Nigeria in certain special cases.³⁶ This power is exercisable where the Minister of Labour is in receipt of the Written Report of failed settlement of trade dispute by the Mediator mutually agreed upon and appointed by or on behalf of the parties with a view to the amicable settlement of the dispute; or where it appears to the Minister of Labour that the trade dispute is one to which workers employed in any essential service are a party; or where reference of the trade dispute to an arbitration tribunal would not be appropriate.³⁷ While this provision appears to vest in the Minister of

Labour discretion and some measure of latitude in determining whether a trade dispute is one to which workers employed in any essential service are a party, the unequivocal delineation of essential services under domestic labour regulations constitutes a check on the undue exercise of this ministerial power. Furthermore, section 41 of the Trade Disputes Act 1976 provides for fifteen days' notice to be given by workers in essential services before ceasing work, and section 42 of the Trade Disputes Act 1976 provides for fifteen days' notice to be given by workers before ceasing work in circumstances involving danger to persons or property. However, it is instructive to note that the Trade Disputes (Essential Services) Act 1976 suspends these provisions.³⁸ As such, the only implication for trade disputes arising in essential services relates to the powers of the Minister of Labour to directly refer such trade disputes to the National Industrial Court of Nigeria for adjudication under clearly delineated parameters. This procedural abridgment is necessitated by the recognition of the fact that the protraction of trade disputes in essential services can have atrocious impact on the workplace and the populace in general.

Under the Trade Unions Act 1973 (as amended), the implication of construing a service as essential service revolves around prohibition of persons, trade unions and employers in essential services from taking part in a strike or lockout or engaging in any conduct in contemplation or furtherance of a strike or lockout.³⁹ Compared with the prerequisites for strike and lockout spelt out in section 18(1)(a)-(f) of the Trade Disputes Act 2004, this prerequisite is novel, and formed part of the modifications introduced by the Trade Union (Amendment) Act 2005. Conducts in contemplation of strike includes pre-strike meetings, while acts in furtherance of strike include peaceful picketing often resorted to by striking workers in order to make an ongoing strike more effective. While peaceful picketing is lawful and exempted from criminal liability,⁴⁰ the right to picketing is precarious as a number of offences may be committed while engaging in it. This is particularly the case in a situation where picketing becomes disruptive, uncoordinated and or violent. Furthermore, the expression "trade unions" is used circumspectly in this context to mean combinations of either workers or employers properly constituted and recognised as trade unions by law.

Contrary to the erroneous position that a trade union is a combination of workers, a combination of employers satisfying the requisite requirements of law may also qualify as a trade union.⁴¹ Employers' trade unions in Nigeria include the Road Transport Employers

³³ *Idoniboye-Obu v NNPC* (2003) 1 SCNJ 87.

³⁴ *EP Iderima v Rivers State Civil Service Commission* (2005) 16 NWLR (Pt 951) 378; *Chief Tamunoemi Idoniboye-Obu v Nigerian National Petroleum Corporation* (2003) 2 NWLR (Pt 805) 589; *Bamgboye v UNILORIN* (1999) 10 NWLR (Pt 622) 290; *Olaniyan & Ors v University of Lagos & Anor* (1985) 2 NWLR (Pt 9) 599.

³⁵ Trade Unions Act of 1973, s 31(9)(b).

³⁶ Trade Disputes Act of 1976, s 17.

³⁷ *Ibid*.

³⁸ Trade Disputes (Essential Services) Act 1976, s 8(2).

³⁹ Trade Unions Act 1973 (as amended), s 31(6)(a).

⁴⁰ *Ibid* s 43(2).

⁴¹ *Ibid* s 1(1).

Association of Nigeria, Hotel and Personal Services Employers' Association of Nigeria, Indigenous Shipowners Association of Nigeria, and Performing Musicians Employers' Association of Nigeria. This makes "workers' trade unions" and "employers' trade unions" cognisable entities in law. A combination of both workers and employers cannot be registered as a trade union.⁴² This is to avoid conflicts that may arise from such combination since the interests of workers and employers are largely incongruous and discordant. In any case, the principal purpose for which a trade union is formed and carried on must be for regulating the terms and conditions of employment of workers.⁴³ Restricting the right to strike for workers in essential services is in tandem with international labour standards in so far as such restriction is accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage, and in which the awards once made are fully and promptly implemented.⁴⁴ The absence of such compensatory guarantees underscores the deficit of domestic labour regulations when juxtaposed with the prescriptions of international labour standards. Such outcome is most undesirable.

The implication of construing a service as essential service under the Trade Disputes (Essential Services) Act 1976 revolves around the special power conferred on the

Minister of Labour to refer certain trade disputes to Industrial Arbitration Panel for settlement.⁴⁵ This ministerial power is exercisable where a trade dispute exists or is apprehended, and it appears to the Minister of Labour that such trade dispute is one to which persons employed in any essential service are a party or might become a party.⁴⁶ While the exercise of this power is designed for expediency, the muteness of the law on the option(s) opened to parties in instance where the Ministry of Labour fails to exercise this power can create an atmosphere of confusion capable of leaving parties at a loss on what step to take to resolve a trade dispute. Again, it has been shown that a trade dispute can either be declared by parties thereto or apprehended by the Minister of Labour.⁴⁷ Except for the trade disputes that have gained public attention through media reports or where parties to the trade disputes draw the attention of the Minister of Labour to the existence of such trade disputes, the Minister of Labour hardly apprehends trade disputes in practice. This renders the exercise of the special power conferred on the Minister of Labour to refer certain trade disputes to Industrial Arbitration Panel for settlement superficial and redundant.

Apparently, the list of essential services in Nigeria embraces virtually all sectors of the economy.⁴⁸ Domestic labour regulations provide elastic conditions for any service to be regarded as essential service.⁴⁹ As such, the definition of essential services in Nigeria has been heavily criticised.⁵⁰ This is attributed to the fact that the statutory definitions of essential services under domestic labour regulations fall short of the prescription of ILO which demands that essential services should be defined and interpreted in the strict sense of those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.⁵¹ This demonstrates that disruptions, on account of strike and other forms of industrial actions, in essential services can have unbearable and sometimes, irreparable consequences. From the perspective of governments, interference with rights, guarantees and freedoms within essential services becomes a matter of necessity and public policy. This reflects in the vagaries of extreme measures adopted by governments in ensuring non-interruption of essential services. In Ghana, essential service is defined strictly in line with the standards of ILO.⁵² This heralds the need to modify the scope of essential services in Nigeria to conform to the prescriptions of ILO.

Under the jurisprudence of ILO, the following services are considered to be essential services: the hospital sector; electricity services; water supply services;

⁴² Ibid s 3(2).

⁴³ Ibid ss 1(1) and 7(1)(d).

⁴⁴ International Labour Organization (n 12) para 856, p 162; Otuturu (n 19) 38.

⁴⁵ Trade Disputes (Essential Services) Act 1976, s 5.

⁴⁶ Ibid.

⁴⁷ Trade Disputes Act 2004, ss 1(1) and 5.

⁴⁸ Francis C Anyim, Dumebi A Ideh, and Rosemary A Danesi, 'The Legal Framework of the Right to Strike in Nigeria' [2017](1)(1) *Ilorin Journal of Human Resource Management*, 22.

⁴⁹ OVC Okene, 'The Devil in the Detail: The Trade Union Law (Amendment) Act 2005 in International Perspective' [2008](2)(3) *Nigerian Journal of Labour Law & Industrial Relations*, 56.

⁵⁰ Okene (n 13) 51; Tayo Fashoyin, *Industrial Relations in Nigeria: Development and Practice* (2nd edn, Learn Africa Plc 1992) 170.

⁵¹ Tolu' Odupe, 'Right to Strike in Nigeria: A Simple Analysis' in Yemi Akinseye-George, Samuel Osamolu and AO Oluwadayisi (eds), *Contemporary Issues on Labour Law, Employment and National Industrial Court Practice and Procedure: Essays in Honour of Honourable Justice Babatunde Adeniran Adejumo*, OFR (Lawlords Publications 2014) 237; OVC Okene, 'Current Issues and Developments in Workers' Freedom of Association in Nigeria' [2007](5)(1) *Journal of Commonwealth Law and Legal Education*, 63; Okene (n 13) 33; International Labour Organization, *Freedom of Association and Collective Bargaining: Report of the Committee of Experts on the Application of Conventions and Recommendations* (International Labour Conference, 81st Session, Report 111, Part 4B 1994) 68.

⁵² Ghanaian Labour Act 2003, s 175.

the telephone service; the police and the armed forces; the fire-fighting services; public or private prison services; the provision of food to pupils of school age and the cleaning of schools; and air traffic control.⁵³ Even within essential services, certain categories of employees, such as hospital labourers and gardeners, should not be deprived of the right to strike.⁵⁴ The inclusion of air traffic control within the ambit of essential services under the jurisprudence of ILO directly indicts the stance of domestic labour regulations in Nigeria. In *Aero Contractors Co. of Nigeria Limited v National Association of Aircrafts and Engineers, Air Transport Services Senior Staff Association of Nigeria, National Union of Air Transport Employees*,⁵⁵ the National Industrial Court of Nigeria was confronted, *inter alia*, with the question whether members of the trade unions, viz., the National Association of Aircrafts Pilots and Engineers, the Air Transport Senior Staff Association of Nigeria and the National Union of Air Transport Employees had the right to embark on strike action. In reaction to this question, the Claimant argued that the law restricted the right to strike of the members of these trade unions. This position was anchored on the provisions of the Trade Unions Act of 2004 and its view that the transport of passengers and goods was an essential service. On the other hand, the trade unions argued that the prohibition of strike action in the case of essential services was solely acceptable when there was a clear and imminent threat to the life, personal safety or health of the whole or part of the population. They further argued that since these requisites were not fulfilled in this case, members of these trade unions were entitled to the right to strike. This is more so that the prohibition of strike constituted a breach of the rights to freedom of association and collective bargaining enshrined in the provisions of the Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention of 1949 (No. 98). The National Industrial Court of Nigeria leaned in favour of the trade unions and held that members of the trade unions in this case have the right to embark on strike action since the services they provided were not essential.

The Court, however, observed that members of the trade unions that provided air traffic control services are prohibited from engaging in strike since such service constitutes essential service.

In opting for the definition proffered in the jurisprudence of ILO, the National Industrial Court of Nigeria had to digress from the statutory definitions of essential services in domestic labour regulations in holding that all workers in the aviation sector, apart from those engaged in the air traffic control, are deemed as providing non-essential services, allowing for the exercise of the right to strike by this category of workers. This decision digresses from the earlier decision of the Court in *The Hon. Attorney-General of Enugu State v. National Association of Government General Medical and Dental Practitioners (NAGGMDP)*⁵⁶ where the concept of essential services was espoused within the ambit of extant statutory provisions. This clearly shows that air transport in general does not constitute essential services. As such, workers in air courier services, air cargo handlers, aircraft pilots and engineers should be deemed as providing non-essential services within the aviation sector. The restriction on the right to strike for workers engaged in air traffic control applies to all forms of strikes including go-slow and work-to-rule.⁵⁷ These inchoate forms of strikes may be just as dangerous as a regular strike.⁵⁸ The current disposition of the National Industrial Court of Nigeria sets the tone for re-classification of essential services using a more useful and practical model that looks at the particular type of service provided in order to determine its essentiality and in distilling true essential services from non-essential ones.

On the other hand, the following services do not constitute essential services under the jurisprudence of ILO: radio and television; the petroleum sector and oil facilities; distribution of fuel to ensure that flights continue to operate; filling and selling gas canisters; banking; the Central Bank; insurance services; computer services for the collection of excise duties and taxes; department stores and pleasure parks; the metal and mining sectors; transport generally, including metropolitan transport; airline pilots; production, transport and distribution of fuel; rail services; postal services; refuse collection services; refrigeration enterprises; hotel services; construction; car manufacturing; agricultural activities, the supply and distribution of foodstuffs; tea, coffee and coconut plantations; the Mint; the government printing service and the state alcohol, salt and tobacco monopolies; the education sector; mineral water bottling companies; aircraft repairs; elevator services; export services; private

⁵³ International Labour Organization (n 12) para 840, pp 156-157.

⁵⁴ Ibid para 849, p 161.

⁵⁵ (Unreported) Suit No NICN/LA/120/2013. This judgment was delivered on 4th February 2014 by the Lagos Division of the National Industrial Court of Nigeria.

⁵⁶ (Unreported) Suit No NIC/EN/16/2010. This judgment was delivered on 20th June 2011 by the Enugu Division of the National Industrial Court of Nigeria.

⁵⁷ International Labour Organization (n 12) para 841, p 157.

⁵⁸ Ibid para 841, p 157.

security services (with the exception of public or private prison services); airports (with the exception of air traffic control); bakeries; beer production; the glass industry.⁵⁹ Apparently, the education sector does not constitute an essential service. In Nigeria, it is not the case that the education sector has always been a non-essential service. Under the repealed Teaching, etc. (Essential Services) Decree 1993, the scope of essential services was extended to cover teaching, thereby banning workers of the teaching profession from embarking on strike.⁶⁰ This position has since been reversed with the abrogation of the legislation.

As it stands, education, at primary, secondary and tertiary levels, is outside the ambit of essential services. However, incessant strikes by the Academic Staff Union of Universities (ASUU) in public universities have raised the need for placement of the education sector in the gamut of essential services in Nigeria. ASUU is one of the five public university-based workers' trade unions in Nigeria. Other public university-based workers' trade unions are the Senior Staff Association of Nigerian Universities, National Association of Academic Technologists, Non-academic Staff Union of Universities, Congress of University Academics, and National Association of Medical and Dental Academics. Membership of ASUU is open to academic staff in both the Federal and State Universities. The objectives of this trade union include regulation of relations between academic staff and employers; encouragement of the participation of its members in the affairs of the university system and of the nation, protection and advancement of the socio-economic and cultural interest of the nation; establishment and maintenance of a high

standard of academic performance and professional practice; establishment and maintenance of just and proper conditions of service for its members.⁶¹ ASUU was formed in 1978 as the successor to the defunct Nigerian Association of University Teachers which was formed in 1965 covering academic staff in the University of Ibadan, University of Nigeria, Ahmadu Bello University, University of Ife, currently known as Obafemi Awolowo University, and University of Lagos.⁶² ASUU has evolved with such humongous impact that the domestic labour history of trade unions and trade unionism cannot be reeled out without acknowledgment of its contributions. The disenchantment of ASUU with government over issues of university autonomy, poor conditions of service, poor funding and non-conducive environment for academic pursuit had been simmering for years, and had been the theme for fruitless negotiations and dialogues.⁶³ Since cessation of the educational services rendered by ASUU cannot by any stretch of imagination endanger the life, personal safety or health of the whole or part of the population, it remains pointless to argue for the inclusion of the education sector in the gamut of essential services in Nigeria.

3. Prohibition of Strike in Essential Services

In Nigeria, workers in essential services are prohibited from taking part in a strike or engage in any conduct in contemplation or furtherance of a strike.⁶⁴ The complete prohibition of strikes in essential services is reinforced by the imposition of a fine of ₦10,000 or six months' imprisonment or both the fine and imprisonment for any person, trade union or employer who contravenes the above position of the law.⁶⁵ This clearly undermines the exercise of the right to strike, in that many workers are denied the right to strike under the guise of essential services. To determine situations in which strike could be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population.⁶⁶ Again, the right to strike can be restricted or even prohibited in essential services in so far as a strike there could cause serious hardship to the national community, and provided that the limitations are accompanied by certain compensatory guarantees.⁶⁷ While the ban on strike in the context of essential services is consistent with the prescriptions of ILO,⁶⁸ it must be stressed that the restrictions on the right to strike in essential services should be accompanied by compensatory guarantees to safeguard the interests of the affected workers and compensate for the deprivation

⁵⁹ Ibid para 842, pp 157-160.

⁶⁰ Teaching, etc. (Essential Services) (Amendment) Decree 1993, s 2(1).

⁶¹ Uzoh Bonaventure Chigozie 'An Assessment of the Impact of Academic Staff Union of Universities (ASUU) on Human Resource Development in Nigerian Universities' [2017](7)(4) *International Journal of Academic Research in Business and Social Sciences*, 742.

⁶² Adeyemi A Dawodu and Others 'Collective Bargaining Challenges in Nigeria Public Universities' [2017](1)(1) *Ilorin Journal of Human Resource Management*, 55; Ogbette Afamefuna Samuel, Eke Israel Emenike and Ori Ogbonnaya Eze 'Causes, Effects and Management of ASUU Strikes in Nigeria, 2003-2013' [2017](3)(3) *Journal of Research and Development*, 15.

⁶³ Uzoh (n 61) 741.

⁶⁴ Trade Unions Act 1973 (as amended), s 31(6)(a).

⁶⁵ Ibid s 31(7).

⁶⁶ International Labour Organization (n 12) para 836, p 156.

⁶⁷ Ibid para 827, p 154.

⁶⁸ Ibid para 830, pp. 154-155; Right to Organise and Collective Bargaining Convention (No. 98) 1949, art 6; Okene (n 13) 33.

of an essential means of defending their occupational interests.⁶⁹ The compensatory guarantees are in the nature of adequate, impartial and speedy conciliation and arbitration proceedings involving all the parties concerned and in which the awards, once made, are fully and promptly implemented.⁷⁰ This is designed as speedy and efficient mechanism for resolution of trade disputes involving workers in essential services. In South Africa, persons engaged in essential services are precluded from participating in strikes but as an alternative to participation in strikes, such persons are compelled to refer their disputes to arbitration.⁷¹ This protection is lacking in domestic labour regulations in Nigeria, and may have accounted for the preponderance of strikes in every sector in Nigeria.

4. Emerging Issues of Concerns

There has been growing concerns on the utilisation of minimum services and replacement workers in the course of industrial action in essential services. Under the jurisprudence of ILO, two categories of minimum services are recognised. The first category of minimum service is *minimum safety service* which involves minimum service imposed to guarantee the safety of persons and equipment. In this regard, restrictions on the right to strike in certain sectors to the extent necessary to comply with statutory safety requirements are considered normal restrictions.⁷² Furthermore, it is prescribed that occupational organizations in all branches of activity were obliged to ensure that the staff necessary for the safety of machinery and equipment and the prevention of accidents continued to work, and that disagreements as to the definition of “necessary staff” would be settled by an administrative arbitration tribunal.⁷³ These instances constitute situations and conditions in which minimum safety service may be imposed to guarantee the safety of persons and equipment. The second category of minimum service is *minimum operational service*. In the

case of strike, it is prescribed that minimum operational service should only be possible in services the interruption of which would endanger the life, personal safety or health of the whole or part of the population; services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and in public services of fundamental importance.⁷⁴

Apparently, three clear situations and conditions are prescribed for imposition of minimum operational service. The first situation and condition which relates to essential services in the strict sense of the term does not present significant challenge. In relation to the second situation and condition which relates to non-essential services, the difficulties and inconveniences that the population may be subjected to on account of strike formed the fulcrum of the imposition of minimum operational services. For instance, ferry service is not an essential service.⁷⁵ However, in view of the difficulties and inconveniences that the population living on islands along the coast could be subjected to following a stoppage in ferry services, an agreement may be concluded on minimum operational services to be maintained in the event of a strike.⁷⁶ In relation to the third situation and condition, it appears the expression “public services of fundamental importance” relates to intermediate services between essential services and non-essential services in which industrial action can result in irreversible damages.

The scope of the minimum operational service should not render the strike ineffective.⁷⁷ As such, minimum operational service should be restricted to the operations which are necessary to satisfy the basic needs of the population or the minimum requirements of the service.⁷⁸ This means that the minimum operational service to be allowed must be strictly circumscribed in a manner to avoid endangering the life or normal living conditions of the whole or part of the population. In addition, workers' organizations should be able to participate in defining the scope of minimum operational service in the same way as employers and the public authorities.⁷⁹ The negotiations on the definition and organisation of the minimum operational service should not be held during a labour dispute so that all parties can examine the matters with full frankness and objectivity.⁸⁰ Any disagreement on minimum operational service should be settled by an independent body, like judicial authorities, and not by the Ministry of Labour.⁸¹ Specifically, in cases of strikes of long duration, the jurisprudence of ILO allows for provision of minimum

⁶⁹ International Labour Organization (n 12) para 853, p 162; para 860, p 163; para 827, p 154.

⁷⁰ Ibid para 856, p 162.

⁷¹ South African Labour Relations Act 1995, ss 65(1)(d) and 74(1).

⁷² International Labour Organization, para 864, p 164.

⁷³ Ibid para 865, p 164.

⁷⁴ Ibid para 866, p 164.

⁷⁵ Ibid para 886, p 168.

⁷⁶ Ibid.

⁷⁷ Ibid para 874, p 166; Ogbole (n 31) 179.

⁷⁸ International Labour Organization (n 12) para 874, p 166.

⁷⁹ Ibid para 873, p 165.

⁸⁰ Ibid paras 875-876, p 166.

⁸¹ Ibid para 876, p 166.

operational service in the education sector in full consultation with all the social partners.⁸² This cannot be construed as contrary to the principles of freedom of association.⁸³ Furthermore, the jurisprudence of ILO permits for strikers to be replaced only in the case of a strike in essential service in the strict sense of the term in which the legislation prohibits strikes, and where the strike would cause an acute national crisis.⁸⁴ In non-essential services, hiring of workers to break a strike constitutes a serious violation of the principles of freedom of association.⁸⁵ It, therefore, follows that domestic labour regulations suffer deficits in failing to make prescriptions for the provision of minimum service of any sort as well as the use of replacement workers in the context of strike and other industrial action.

5. Conclusion and Recommendations

It has been shown that services within the workplace qualify as either essential services or non-essential services. The notion of essential services is averse to the unfettered strike models which construe strike and the right to strike in absolute term. By interrogating the notion of essential services under domestic labour regulations as well as international labour standards as reflected in the jurisprudence of ILO, the deficits of the

domestic labour regulations on the notion of essential services in Nigeria have been espoused. As such, a re-classification of the list of essential services in Nigeria is suggested. This is necessary to distil the true essential services from the nonessential ones and to bring the domestic labour regulations on the discourse of essential services at par with the prescriptions of ILO.

It has also been shown that unlike the prescriptions of ILO, domestic labour regulations suffer deficits in relation to the provision of minimum services in the context of strike under certain circumstances. This makes it expedient for cue to be taken from the jurisprudence of ILO. This remains a major strike mitigation mechanism that can be harnessed in mitigating the adverse impact of strikes on the workplace and the populace. It suffices that another strike mitigation mechanism that needs to be harnessed by domestic labour regulations in Nigeria revolves around the use of replacement workers. This must be done in a manner that sustains the utility and efficacy of strikes in the workplace. Harnessing these strike mitigation mechanisms by domestic labour regulations remains inevitable for the attainment of the ubiquitous drive towards the globalisation of labour standards by nation-states.

⁸² Ibid para 898, p 169.

⁸³ Ibid para 899, p 169.

⁸⁴ Ibid para 917, p 172.

⁸⁵ Ibid para 918, p 172.