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ESSENTIAL SERVICE NOTION AND ITS LEGAL IMPLICATIONS UNDER NIGERIAN LABOUR LAW

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Abstract

The essential services provision of the Trade Dispute Act 2004 appears to have restricted the ability of Nigerian workers to exercise fundamental rights pertaining to work-related issues, including freedom of expression and freedom of association. Consequently, Nigerian workers appear to have become susceptible to the whims and caprices of their employers, thereby infringing upon specific fundamental rights. This paper undertakes a critical examination of the notion of essential services as it pertains to labour law in Nigeria. In doing so, it questions underlying assumptions and investigates the legal ramifications, delineating intricate aspects and possible drawbacks. The paper contends, through the use of a doctrinal design, that the existing categorisation of essential services might be excessively general and susceptible to abuse. Although this designation is meant to protect the public interest, it frequently results in limitations on workers' rights, such as the right to engage in strikes and the balance of power between employers and employees. By analysing Nigerian legislation and labour laws in other pertinent jurisdictions through the lens of the Nigerian Labour Act and other pertinent provisions, the primary objective is to disprove the concept of essential service. In its conclusion, the paper recommends that policymakers consider implementing a more all-encompassing legal structure that protects the fundamental rights of employees and promotes enhanced reciprocal rights between employees and employers. Through legal reforms and dialogue, it is possible to achieve a more just and equitable balance between the needs of essential services and the rights of workers in Nigeria and beyond.

Keywords: labour law, industrial law, essential service, rights of workers, Nigerian labour law

1. Introduction

All human beings have inalienable rights as provided by the constitution. These rights are God given rights which ought not to be denied except in critical situations. Some of these rights are right to life, freedom of expression, freedom of association to mention but a few. As a consequence of their employment and services rendered, certain individuals are unable to exercise certain fundamental rights. These individuals are referred to as essential service workers. Essential services are those that society depends on for fundamental functionality and security. Health care, law enforcement, emergency response, utilities (such as

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water and electricity), transportation, food supply, and public health functions are often included.¹

2. Conceptualisation of Essential Services

Essential services may be defined differently in various countries, regions, or contexts. During a public health emergency such as the COVID-19 pandemic, for instance, it may be deemed necessary to provide supplementary services such as supply stores, pharmacies, and delivery networks.

Essential services means services, by whomsoever rendered, and whether rendered to the Government or to any other person, the interruption of which would endanger the life, health or personal safety of the whole or part of the population.²

These are essential services for maintaining public health, safety, and welfare as well as the smooth operation of society. Healthcare, public transit, emergency services (fire, police, ambulance), and utilities (water, electricity) are typical examples.

The primary objective of essential services is to prevent the loss of life, as their interruption would jeopardise the safety and well-being of the entire or a portion of the population. Essential services have evolved through the years. Its development can be traced through various phases, including ancient civilizations, the Middle Ages, the Industrial Revolution, urbanization, World Wars, post-war periods, regulation and privatization, and the digital revolution³. All these periods witnessed the display of certain sectors of the economy and their importance to the entire wellbeing.

Essential services are critical for daily life, require high reliability, and are typically regulated and protected to ensure accessibility, affordability, and resilience against disruptions. Examples of essential services include healthcare, public safety, utilities, transportation, communication, and sanitation. The COVID-19 pandemic underscored the critical nature of essential services, particularly healthcare, logistics, and communications. Governments worldwide implemented measures to protect these services and ensure their continuity during lockdowns and restrictions⁴. Essential services remain a cornerstone of

¹ Timo Knäbe and Carlos R Carrión-Crespo, 'The Scope Of Essential Services: Laws, Regulations and Practices,'(2019) International Labour Office, Sectoral Policies Department (Working paper : WP 334)

<International Labour Organisation <https://www.ilo.org/media> accessed 30 July 2024.

² Digest of the Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO 5 (revised) edition (Geneva: International Labour Office, 2006) p 116 para 564.

³ IOE International Policy Paper on Essential Services.

⁴ Essential health care service disruption due to COVID-19: Lessons for sustainability in Nigeria. Brazzaville: WHO Regional Office for Africa; 2022. Licence: CC BY-NC-SA

societal stability and development, reflecting the evolving needs of societies and the increasing complexity of urban and technological development.

Essential services are crucial for public safety, health, and welfare, especially during emergencies or pandemics. Labour rights, economics, public health, and emergency management often focus on essential services.⁵

Theories of Essential Services: Essential services theories are typically derived from economic, ethical, and legal frameworks. The following are the primary theories and perspectives on the concept of essential service-

Public Interest Theory - This theory posits that essential services are those that are essential for the well-being of society and serve the broader public interest.⁶ Services such as healthcare, transportation, water, and power are classified as essential under this theory due to the potential negative impact on public health, safety, and social stability if they are disrupted. They are required for the protection of public health, safety, and welfare. The moral imperative of governments to guarantee the continuity of these services and the state's responsibility to regulate or provide these services in order to prevent disruption are all geared towards the interest of the public. Examples include police, fire departments, emergency medical services, and sanitation services.

Critical Infrastructure Theory - This theory concentrates on the notion that critical infrastructure, which encompasses systems and networks that are essential for national security and economic stability, includes essential services⁷. They are critical to economic stability and national security. They involve the interdependence of numerous sectors, such as telecommunications, water, and energy. These infrastructures are vulnerable to disruptions, including those caused by strikes, natural disasters, or cyber-attacks thus they are critical infrastructure. Examples include financial services, water supply, telecommunications, and power infrastructures.

Labour Relations Theory - The essential services concept in labour relations frequently involves the restriction of the right to strike in sectors that are considered to be of significant public welfare. This theory investigates the equilibrium between the necessity of ensuring uninterrupted services and the rights of workers, such as the right to strike. Defining specific industries as

3.0 <<https://iris.who.int/bitstream/handle/10665/363668/9789290234821-eng.pdf?sequence=3>> accessed 31 July 2024.

⁵ World Health Organisation, 'Maintaining Essential Health Services During Emergencies' <<https://www.who.int/teams/primary-health-care/health-systems-resilience/essential-services-during-emergencies>> accessed 30 July 2024.

⁶ Grace Sharon and 3 others, 'Depiction of Public Interest Theory Based on the Welfare Economic Concept on Indonesia Regulations (2022) 11(2) *Yustisia* 136.

⁷ Jonathan Gordon, Critical Infrastructure Protection in Modern Society {2024} <<https://industrialcyber.co/analysis/critical-infrastructure-protection-in-modern-society/>> accessed 10 September 2024.

essential is important to restrict labour actions (such as strikes) that could endanger public health or safety⁸ so as to create legal regimes in critical sectors that facilitate the resolution of labour disputes through arbitration rather than strikes. Examples include labour disputes involving healthcare personnel, public transportation workers, and teachers. Considering how the restriction of right to strike hampers the fundamental rights of the workers is very important.

Public Goods Economic Theory -This theory establishes a connection between the concept of public goods and essential services. Public goods are goods or services that are non-excludable and non-rival, meaning that they can be used by all without affecting the use of others. In accordance with this theory, essential services are public commodities that must be provided by the government or regulated entities to guarantee equal access,⁹ non-excludability and non-rivalry (everyone benefits without exclusion), the justification for government intervention or regulation to ensure that these services are provided equitably.

The function of public funding in the preservation of these services is important. Examples include environmental protection services, public roads, fundamental education, and national defence.

Human Rights Theory - This theory posits that essential services are a fundamental human right. It maintains that access to specific services, including healthcare, sanitation, and education, is indispensable for the fulfilment of fundamental human rights, and such access should be guaranteed regardless of the circumstances.¹⁰ There is a connection between the right to life, dignity, and well-being and essential services. The responsibilities of governments to guarantee universal access to these services, particularly for vulnerable populations, assure them of their access to human rights. Those workers are essential service workers.

3. Legal Framework of Essential Service

The Nigerian civil war of 1967-70 led to the enactment of revolutionary legislation on disputes in essential services.¹¹ The government aimed to end the war while preserving unity, as class action was seen as anti-government and unpatriotic. The Trade Disputes Emergency Decrees of 1968 and 1969 aimed to bring unions under strict control, circumscribing their freedom in the labor-

⁸ Bernard Gernigon, Albert Odera and Horacin Guido, *ILO Principles Concerning the Right to Strike* (international Labour Office Ed. 2000, Switzerland) 24.

⁹ RG Holcombe, Public Goods Theory and Public Policy In Narveson J Dimock S (eds) *Liberalism*. (Springer, Dordrecht 2009) https://doi.org/10.1007/978-94-015-9440-0_8

¹⁰United States Institute of Peace, 'Provisions of Essential Services'<https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/stable-governance/provision-esse> accessed 10 September 2024.

¹¹ Taoy Fasoyin, 'Regulation of Trade Dispute in Essential service' (1981)36(1) *Relations Industrielles/ Industrial Relations* 207-222

management relationship. The economic factor was also significant, with rapid economic activity due to oil wealth and reconstruction programs after the war. The government established the Adebo Wages and Salaries Review Commission to ensure uninterrupted implementation of developments and improve wages and conditions of service. However, the commission's awards produced more strikes than demanded, leading to unexpected strikes in both public and private sectors.

The government was concerned about the activities of some poorly organized and poorly led unions who were unwilling to educate their followers on the need for constructiveness in presenting demands and recognizing the essentiality of services provided to the public.¹² This led to the announcement of a revolutionary National Labour Policy in December 1975, emphasizing the government's commitment to monitor and control trade union activities.

The Trade Disputes Decree (No 7) promulgated in 1976 delineated essential services, which could be deemed essential depending on how the service came to be rendered. The law provides legalistic conditions for any service in Nigeria to be regarded as essential, depending on the particular circumstances.

The Trade Dispute Essential Services Act in its interpretation section describes essential services as:

- 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 councillor 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;

¹² Ibid.

- (iii) for maintaining ports, harbours, docks or aerodromes, or 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 carryon banking business under the Banks and Other Financial Institutions Act;

Section 48(1) of the Trade Disputes Act¹³ defines essential service as ‘any service mentioned in the First Schedule to this Act’. Paragraph 2 (c) of the first schedule to the Act listed the services that qualify as essential services to include; 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 for maintaining ports, harbours, docks or aerodromes or for, or in connection with transportation of persons, goods or livestock's by road, rail, sea or river qualifies as essential service.

Above definitions of essential services appear too wide and cumbersome. Scholars¹⁴ have concurred to this view by asserting that the definition of essential services under the Act covers a whole gamut of workers that when brought alongside the definition of essential services by the Freedom of Association Committee of the Governing Body of the ILO; ‘the services the interruption of which would endanger the life, personal safety or health of the whole or part of the population’ are essential services, they will seem ordinarily unnecessary to be in the list¹⁵.

4. Problems with Essential Services

The services of essential service workers demand that they work to maintain tranquillity in the wider society at the expense of their exercise of their human

¹³ Cap T8 LFN 2004

¹⁴ BU Chukwuma, ‘Legal Framework and Challenges of the Right to Strike in Nigeria,’ (2019) 25(3) *Labour Law Review*, 112-128 accessed 14 July 2024.

¹⁵ Ibid.

rights. Their freedom of association deprived from them denies them the right to strike and freedom of expression which deprives them of the fundamental right to express their demands to their employers are hampered. The ILO principles concerning the right to strike asserts that without autonomous, independent, representative employers and workers' organizations, tripartism's principle would be impaired, leading to prejudiced opportunities for social justice and the advancement of common welfare.¹⁶ More so, the Trade Union (Amendment) Act provides that section 30(6) (a) of the Trade Unions (Amendment) Act¹⁷ provides that; No person, Trade Union or employer shall take part in a strike or lockout or engage in any conduct in contemplation or furtherance of a strike or lockout unless:

the person, Trade Union or employer is not engaged in the provision of essential services Consequently, the aforementioned provisions of the Act prohibit individuals employed in the essential services sector from participating in strikes, and the consequence for doing so is a fine of N10,000, six months of imprisonment, or both.¹⁸

This provision clearly shows that the Nigerian employees in essential services are almost crippled as to their rights to strike or freedom of association to form trade unions and engage in collective bargaining.

Trade Dispute Essential Service Act¹⁹ empowers the president to proscribe any trade Union or association that the president believes that its members in essential services have:

(a) been engaged in acts calculated to disrupt the economy or acts calculated to obstruct or disrupt the smooth running of any essential service; or

(b) where applicable, wilfully failed to comply with the procedure specified in the Trade Disputes Act in relation to the reporting and settlement of trade disputes.

It is not in doubt that essential service providers are limited in the exercise of some of the fundamental rights. However because of the expedient services they offer they deserve to be given special option to ventilate their grievance anytime there is a dispute. This is in line with the provision of ILO's Committee on Freedom of Association as was cited in ILO's Principles Concerning the Right to Strike²⁰ where the Committee stated that a exclusion to strike in such situations should be 'accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take

¹⁶ (n10)

¹⁷ 2005

¹⁸ Trade Dispute Act 2004, s42(1)

¹⁹ (Trade Dispute (Essential) Services) Act s(1).

²⁰ (n10) 23.

part at every stage and in which the awards, once made, are fully and promptly implemented²¹

The trade Union Amendment Act ²² provides that before resorting to a strike, the Act underscores the significance of resolving disputes through negotiation, conciliation, or arbitration. Also the Act prohibits strike during arbitration.²³ Labour Act section 46²⁴ also provides for arbitration and conciliation. The Trade Dispute Act also makes provision for appointment of a conciliator and reference to an Industrial arbitration Panel²⁵ in case of industrial dispute that involves essential workers.. It is not in doubt that the essential workers in Nigeria can only resort to arbitration to resolving industrial dispute that might emanate in labour matters.

The legal implication of the aforementioned is that the essential service workers are not entitled to freedom of association, which also includes the right to join trade unions and freedom of expression, under the provisions of Nigerian labour laws. They are subject to the vagaries and caprices of their employers solely because they are essential workers, and the laws seem to be ineffective in alleviating the adverse effects of the provisions. The situation in a wider sense may be referred to as muzzling the Ox where it threshes the grain. Thus where the Ox works let it not enjoy the rights and privileges that accrue to it.

5. Essential Service Notion in other Jurisdictions

In Africa, South Africa appears to be one of the countries with good labour relations laws.²⁶ South Africa like Nigeria is also an African country. The essential services are governed by Labour Relations Act (LRA) no 66 of 1995. The law is flexible that it does not classify all workers as essential service but reviews each sector that should be classified as essential. The constitution provides for workers right to strike²⁷ and collective bargaining.²⁸

France has a robust Employment and Labour relation laws with right to strike and collective bargaining as fundamental components.²⁹ Nigeria is in economic

²¹ Ibid.

²² Trade Dispute Act 2004, s42(1)

²³ Ibid s8(g).

²⁴ Labour Act LFN 2004.

²⁵ The Trade Dispute Act, s18.

²⁶ Cindy Ross, 'How south African Labour Laws Compare to Other Developed Countries' *Art of Woman Magazine*(Johannesburg, 2 May 2022) accessed 30 September 2024.

²⁷ The Constitution of the Republic of South Africa 1996, section 23(2) c

²⁸ Ibid, section 25.

²⁹ European Public Service Union.' The Right to Strike in the Public Sector <France' Contrat D' Edition Et De Publication> accessed 30 July 2024.

relation with France. She is the France leading trading partner in sub-saharan Africa and the four largest in Africa.³⁰

The right to strike is a fundamental right in France, allowing workers to collectively withhold labor to defend their interests. The French labour code (Code du Travail) governs strike rules, including notification requirements, legal criteria for strikes, and protection against dismissal.³¹ Collective bargaining in France is regulated by national and sectoral agreements, with levels of bargaining at national, sectoral, company, and social dialogue levels. Major trade unions, such as the *Confédération Générale du Travail* (CGT), *Confédération Française Démocratique du Travail* (CFDT), and Force Ouvrière (FO), are key actors in representing workers' interests in collective bargaining.³² Since 2017, the French government has encouraged decentralization in collective bargaining³³.

5. Leeway and Judicial Responses to Essential Service Notion

The judiciary has expressed its perspective on the provision of essential services. In the case of *NAPPS and others v NUT*³⁴, the court declared that an individual has the right to establish or join any trade union of their choice in order to safeguard their interests without any restrictions. The court maintains that any action that is contrary to this is a violation of the constitutional right to freedom of association.³⁵

The provisions of the law that workers do not have the right to strike appear to be upheld by the previous court decisions in the interpretation of essential services provisions under sections 41(1) of the Trade Dispute Act and Section 1(1)³⁶ of the Trade Dispute Essential Services Act. The court in *Aero Contractors v Nigeria Association of Aircraft Pilots and Engineers* stipulated the definition of essential services, including electricity, water supply, and hospital sectors. He cautions that a strike restriction may not be justifiable. The court differentiated between essential and non-essential services, such as television, binding in order to ensure clarity. Consequently, the court contradicts

³⁰ Ministe're De L'europe Et Des Affaires Etrangeres, 'France Diplomacy' <<https://www.diplomatie.gouv.fr/en/country-files/nigeria/france-and-nigeria-65149/#:~:text=Nigeria%20is%20France's%20leading%20trading,deficit%20of%20%E2%82%AC2.3%20billion.>> accessed 30 July 2024.

³¹ (n29)

³² Ibid

³³ Ibid.

³⁴ 2012] 28 NLLR (Pt. 81) 483 at 489

³⁵ The Constitution of the Federal Republic of Nigeria as amended

³⁶ Trade Union Amendment Act 2005, section 8(c)

the provisions of the law regarding essential services having established between essential service and non-essential service.³⁷

In a more recent case,³⁸ the National Industrial Court vehemently voids - sections 7(1)(b)(vi) & 8(b) of the Trade Dispute Essential Services Act. The court maintains that collective agreements are no longer gentlemen agreements, but now enforceable in Court. The National Industrial Court in Nigeria has declared that teachers in Enugu State public primary schools, members of the National Union of Teachers (NUT), are not in essential services as classified by sections 7(6)(a) and 8(2) of the Trade Dispute Essential Services Act (TDESA) and section 48(1)(b) of the Trade Disputes Act. This is due to the Constitution and the ILO Convention, which prohibit strikes in essential services.

By virtue of section 40 which provides for freedom of association and section 45(1)(a)&(b) provides for restriction on derogation of fundamental rights and other provisions. Section 254C-(1)(f)-(h)&(2) of the Constitution and all other laws on that behalf, as well as the ILO Convention, especially, clearly shows that the public primary school teachers in Enugu state are entitled to exercise their labour rights, including the right to strike, through the NUT, provided that they comply with the issuance and service of the requisite notices. The court also ruled that the conducts of the Enugu State Government to the public primary school teachers were clearly discriminatory, unfair, and not in tune with international best practices in labour relations, contrary to provisions of the Constitution and the ILO Convention. The court dismissed the case for lack of merit and ordered parties to go back to the negotiation table in line with SS 14&20 of the National Industrial Court Act and the ILO Convention.

6. Conclusion and Recommendations

Presently, the above decision has led to rest the previous position of essential services as provided by Nigerian labour laws as collective agreements are no longer gentleman's agreement but they are now enforceable as provided by the Constitution. The implication of this decision is that policy makers take into consideration the possibility of putting into effect a legislative framework that is more comprehensive, safeguards the fundamental rights of workers, and encourages the development of greater reciprocal rights between workers and employers.

It is hereby recommended that Nigeria should work towards making the right to strike a fundamental rights like nations like South Africa and France to give the essential service workers in particular and all workers in general exercise their fundamental rights as other citizens even as they work.

³⁷ *Hon. Attorney-General of Enugu State v. National Association of Government General Medical and Dental Practitioners (NAGGMDP)*

³⁸ The case was decided in March 2022. *Government of Enugu State v NUT* NICN/EN/012022.

The legislative arm of government should promulgate more flexible laws regarding essential services, ensuring that only the services that are truly essential are included, rather than a broad category of services that encompasses nearly all Nigerian workers. They can borrow a leaf from South Africa.

Furthermore, it is essential that the government create supplementary channels for essential service workers to express themselves and communicate their grievances in order to inform them of their concerns and develop solutions.

In addition, it is imperative that essential service workers be motivated to work by offering them substantial financial incentives, promotions, and awards, rather than suppressing their fundamental rights to work.

Also, there should be protection for workers in essential services in the event of harm, as well as enough retirement and insurance benefits, in order to entice and retain workers in essential services.

A holistic protection of Nigerian workers to ensure that they can experience the dignity of their work and to minimise the frequent occurrence of strikes and confrontations between the government and workers, is an imperative.

It is feasible to establish a more just and equitable balance between the requirements of basic services and the rights of workers in Nigeria and worldwide through the implementation of policies garnered through concerned stakeholders' agreement.