STRIKES, FORFEITURE OF ENTITLEMENTS AND THE CONUNDRUM OF THE 21ST CENTURY WORKPLACE

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ABSTRACT
This article evaluates the ambit of forfeiture of entitlements in the context of strikes in the workplace. It acknowledges that the right to strike inures in favour of workers' trade unions, and the invocation of strikes give rise to an array of liabilities on the part of striking workers. It also harnessed the "no-work, no-pay" rule in labour law jurisprudence, tracing its evolution from Common Law to entrenchment in domestic labour regulations of diverse jurisdictions across the globe. This article finds, *inter alia*, that the notion of forfeiture of entitlements in the context of strikes is rooted in the suspension theory of strike which resonates in section 43(1)(a) Trade Disputes Act 1976. Aside from indicating that this statutory provision formed the fulcrum of forfeiture of entitlements in the context of strikes in Nigeria, it is also shown that the ambit of the statutory provision transcends the much-touted "no-work, no-pay" rule to the issue of forfeiture of remunerations, other than wages or salaries, for the period of strikes as well as the forfeiture of rights dependent on continuity of employment. Drawing from the prescriptions of the International Labour Organization and the legislative stance in some States, this article recommends, *inter alia*, for the alteration of domestic labour regulations in Nigeria to allow for striking workers to take up temporary employment in another workplace during the period of a strike, and to also allow for employers of striking workers to temporarily engage replacement labour for the duration of strikes. It also recommends that the "no-work, no-pay" rule be altered to cater for all scenarios of strikes, including inchoate strikes assuming the nature of work of "work-to-rule" or "go-slow."

1.0 INTRODUCTION

Strikes are treasured possession of workers' trade unions.[1] Over the years, workers' trade unions have shown a preference for the industrial action option of strikes, and have employed

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[1] Ogbole Ogancha O, Ekhaesomhi Douglas Ighodaro and Polycarp Arinze Okoro, 'Interrogating the Impacts of Funding Deficits as Precursor for Strikes by the Academic Staff Union of Universities in Nigeria' [2024](5)(1) *Obafemi Awolowo University Journal of Public Law*, 44.

strikes in altering existing terms and conditions of work, and also in introducing newer sets of terms and conditions of work to reflect the aspirations of workers' trade unions. One profound implication of this reality is that strikes have become a common workplace phenomenon occasioning an array of disruptions that have attracted the attention of labour regulations across the globe. In seeking to curb the increasing rate of strikes and cushion the disruptive impact of strikes in the workplace, labour regulations introduced an array of prescriptions, including the prescription relating to the forfeiture of entitlements on the part of striking workers for invoking strikes in the workplace. In a basic form, the prescription relating to forfeiture of entitlements in the context of strikes seeks to strip striking workers of certain accruable benefits or claims during strikes.

The idea of forfeiture of entitlements constitutes one of the liabilities for invoking strikes in the workplace. By withholding certain accruable benefits or claims during strikes, the prescription relating to the forfeiture of entitlements seeks to keep the workplace running by incentivising aggrieved workers and workers' trade unions to resolve trade disputes through peaceful means that guarantee a harmonious workplace. It also discourages workers and workers' trade unions from participating in strikes, which is perceived as a drastic measure that often disrupts productivity and the overall stability of the workplace. For several reasons, the prescriptions of domestic labour regulations on forfeiture of entitlements in the context of strikes leave a lot to be desired.

First, despite the inevitability of strikes in the workplace most contracts of employment hardly contemplate or make provisions for the forfeiture of entitlements in the context of strikes. This represents a major lacuna for the most significant workplace pact which should ordinarily be detailed enough to cater for all incidences in the workplace. Second, under Common Law, forfeiture of entitlements in the context of strikes was narrowly construed in relation to the issue of wages and within the context of the "no-work, no-pay" rule which was designed to address the exigency for suspending the Masters' obligation to pay wages for work not rendered during the pendency of a contract of employment. However, the prescriptions of domestic labour regulations in various jurisdictions across the globe are not uniform and have, in most cases, extended the ambit of forfeiture of entitlements in the context of strikes beyond the issue of wages or salaries to other forms of accruals creating the impression of some sorts of adaptation or variation of the Common Law's "no-work, no-pay" rule. In a way, this raises concerns about the exact scope of the notion of forfeiture of entitlements in the context of strikes in labour law jurisprudence.

Third, should it be taken that the intendment of the notion of forfeiture of entitlements in the context of strikes is to curb the increasing rate of strikes and cushion the disruptive impact of strikes in the workplace, the muteness of domestic labour regulations, in deserving instances where the precept is jettisoned by employers, creates further challenges for the management of trade disputes and by extension, for the regulation of the incidence of strikes in the workplace. Under Common Law, from which the notion of forfeiture of entitlements in the context of strikes is modelled, strikes were largely treated as "fundamental breach" grievous enough to discharge the contracts of service and also allowing aggrieved Masters to mete dire

consequences on striking Servants.[2] Notwithstanding, there has been dilly-dallying among scholars on whether it is the suspension theory or repudiation theory that applies to strikes in light of the prescriptions of extant domestic labour regulations. The array of concerns raised makes it expedient to interrogate the ambit of forfeiture of entitlements in the context of strikes, the utility and impact of the forfeiture of entitlements in the context of strikes as well as the effectiveness of the forfeiture of entitlements in the context of strikes in curbing the increasing rate of strikes in the workplace, and the extent to which the notion of forfeiture of entitlements in the context of strikes aligns with the prescriptions of the International Labour Organization and global best practices.

2.0 THE MEANING AND NATURE OF STRIKE

Strike may be defined as the cessation or withdrawal of services of the employees in furtherance of a trade dispute.[3] By this, it means that striking workers can withdraw labour in protest against real or perceived grievance(s) against the employer of labour.[4] Work stoppage due to a strike must of necessity be temporary and, therefore, susceptible to be called off or suspended once certain demands are met or certain adjustments are made by the employer against whom the strike is invoked. A strike is a sort of unarmed war or conflict between two distinct orders of mankind. It is a deliberate stoppage of work by workers designed to pressure an employer to accede to certain demands.[5] In as much as these clarifications encapsulate the essence of a strike, the clarifications are devoid of certain essential elements of a strike in the strict sense. However, the clarifications provide robust base for the broader articulation of the concept of strike as imbued in the definition proffered by Lord Denning in *Tramp Shipping Corporation v Greenwich Marine Inc.*[6] as follows:

> A concerted stoppage of work by men, done with a view to improving their wages or conditions of employment, or giving vent to a grievance or making a protest about something or sympathizing with other workmen in such endeavour. It is distinct from stoppage brought by an external event such as a bomb scare or by apprehension of danger.[7]

The above judicial definition of strike contains both inclusion and exclusion clauses. The definition accommodates within the ambit of strike protest and sympathetic agitations in support of other striking workers, but excludes spontaneous causation of work on account of events or incidents with no link with the workplace. So long as the cessation of work is predicated on a dispute, which is intrinsically linked with satisfaction or dissatisfaction with terms of employment and physical conditions of work, the duration of such cessation of work as well as the conduct of the employer that instigates it remains immaterial. It suffices that

[2] Chioma Kanu Agomo, *Nigerian Employment and Labour Relations: Law and Practice* (Concept Publications Limited 2011) 173; Akintunde Emiola, *Nigerian Labour Law* (4th edn, Emiola (Publishers) Limited 2008) 183; Emeka Chianu, *Employment Law* (Bemcov Publishers (Nigeria) Ltd. 2004) 15.
[3] Suleiman Ismaila Nchi, *The Nigerian Law Dictionary* (Greenworld Publishing Company Limited 2000) 498.
[4] Agomo (n 2) 301.
[5] OVC Okene, 'The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law' [2007](1)(1) *African Journal of International and Comparative Law*, 30.
[6] (1975) All ER 898 at 990.
[7] Ibid.

the above judicial definition is also radical and represents a major digression from the prevailing precepts of labour law. At the time the definition was proffered, Common Law courts favour individualism, and a large number of English Jurists did not recognise strike as a legitimate entitlement of workers.[8] This is underscored by the absence of a statutory definition of strike under English statutes.

While the above judicial definition has gained the endorsement of scholars,[9] the usage of the term "protest" needs clarification. In the context of this judicial definition, the term "protest" means work stoppage on account of grievances in the workplace without more. However, the term "protest" generally enjoys a broader connotation extending beyond strikes to embrace, at least, resistance, demonstrations, rallies or riots, sometimes involving some measure of violence, by aggrieved workers or workers' trade unions against injustices, oppressions, and other objectionable dispositions on the part of the employer of labour.

Considering the civility of the workplace and its incidents, the usage of the term "protest" excludes violent demonstrations and disruptions by striking workers. Whereas trade unions are allowed to engage in peaceful picketing to give efficacy to ongoing strikes,[10] violence of all sorts is not permissible during strikes. Violent strikes involving destruction of equipment, locking up of members of management and forcible closure of factories have equally been matched with police brutality under the guise of preservation of "public order" or the rights of non-striking workers.[11] Section 48(1) Trade Disputes Act 1976[12] defines a strike as:

> …the cessation of work by a body of persons employed acting in combination, or a concerted refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or person or body of persons employed, or to aid other workers in compelling their employer or any persons or body of persons employed, to accept or not accept terms of employment and physical conditions of work.

Although this statutory definition is devoid of an exclusion clause, it encapsulates the essential elements of a strike. By expanding the expressions "cessation of work" and "refusal to continue to work" to include "deliberately working at less than usual speed or with less than usual efficiency" and "refusal to work at usual speed or with usual efficiency" respectively,[13] this makes the above statutory definition of strike wider and all-embracing. A strike must not necessarily be in the nature of total stoppage of work. Cessation of work on account of strike may either be total or partial.[14] Hence, domestic labour law jurisprudence in

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[8] ACL Davis, 'Judicial Self-Restraint in Labour Law' [2009](38)(3) *Industrial Law Journal*, 278.
[9] EE Uvieghara, *Labour Law in Nigeria* (Malthouse Press Limited 2001) 446; Oladosu Ogunniyi, *Nigerian Labour and Employment Law in Perspective* (2nd edn, Folio Publishers Limited 2004) 403.
[10] Trade Unions Act Cap T14, Laws of the Federation of Nigeria 2004, s 43.
[11] Dafe Otobo, *Industrial Relations: Theory and Controversies* (Malthouse Press Limited 2013) 184.
[12] Trade Disputes Act Cap T8, Laws of the Federation of Nigeria 2004.
[13] Ibid s 48(1)(a) and (b).
[14] Matthias Zechariah and Grace Dalong-Opadotun, 'Laws Regulating Strikes in Nigeria and the Desirability of Compliance with International Best Practices' [2016](9) *Journal of Public Law & Constitutional Practice*, 25.

Nigeria admits within the ambit of strike diversionary strategies such as “go-slow,” “work-to-rule,” “work-to-contract,” “sit-in” and “overtime ban” which are often employed by striking trade unions to avoid liabilities for the total cessation of work. This entails that there can be a valid strike in situations where workers, in pursuance of certain grievances, decide to provide partial service less than what is expected under the contract of employment within the contractual working time or where full service is provided within the contractual working time but in a haphazard manner.[15] This makes the concept of strike multi-dimensional.

The expressions “body of persons employed acting in combination” and “concerted refusal under a common understanding” indicate that strike has to be deliberate, planned and agreed on by at least two employees. In other words, an individual worker has no right to strike regardless of the magnitude of the grievance(s) in the workplace and could be summarily dismissed or sued for breach of contract of employment by the employer.[16] Even two or more workers acting in combination, in concert or under a common understanding cannot declare or engage in a strike unless properly constituted as a trade union. The rationale for this position is to strengthen trade unions whose major object is to substitute individual bargaining for collective bargaining in the workplace. This requirement aligns with the position at Common Law under which work stoppage by a single worker does not constitute strike.[17] At Common Law, an individual worker who embarks on a strike could be summarily dismissed or sued by the employer for breach of contract of employment.

Against this backdrop, and for several other reasons, the phrase “any number of persons employed’’ in the statutory definition of strike cannot be construed as entitling a single worker to the right to strike. First, the right to strike is a concerted right exercisable by trade unions of workers only,[18] and it takes a minimum of fifty persons to form and register such a trade union.[19] Second, were the right to strike exercisable by a single worker it would have been needless to contemplate pre-ballot and simple majority vote under the law.[20] Third, the obligation for registered rules of trade unions to contain a provision that no member of the trade union shall take part in a strike unless a majority of the members have in a secret ballot voted in favour of the strike is a clear pointer to the concerted nature of the right to strike.[21] Even in the absence of a formal agreement, the agreement of parties may be inferred from the uniformity of workers’ interests and demands garnered from the mutual feeling of *esprit de corps* shared by striking workers.

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[15] Ogbole Ogancha O, ‘Repositioning the Regime on Strike Towards the Guarantee of Minimum Service in the Nigerian Workplace’ [2016](6)(1) *Human Right Review*, 178.

[16] Anene v J Allen & Co Ltd (1975)5 UILR (Pt IV) 404; *Simon v Hoover* (1977) 1 ALL ER 777.

[17] Chianu (n 2) 236; Anene v J Allen & Co Ltd (1975) 5 UILR (Pt 4) 404.

[18] Trade Unions Act 1973 (as amended) Cap. T14, Laws of the Federation of Nigeria 2004, s 31(6)(e); Attorney General of Enugu State v National Association of Government General Medical and Dental Practitioners & Anor (Unreported) Suit No NIC/EN/16/2010. This judgment was delivered on 20th June 2011; EA Kenen, ‘Strike Under Nigerian Law: An Appraisal’ [2014](3)(1) *Benue State University Law Journal*, 3; OVC Okene, ‘The Legal Regulation of Strikes in Nigeria: A Critical Appraisal’ [2001](5)(4) *Modern Practice Journal of Finance and Investment Law*, 605.

[19] Trade Unions Act 1973 (as amended) Cap T14 Laws of the Federation of Nigeria 2004, s 3(1)(a).

[20] Ibid s 31(6)(e).

[21] Ibid s 4(1) and para 14 First Schedule.

The expressions "…as a means of compelling…" and "…in compelling…" render strike as a sanctionable form of industrial action. As a means to an end, a strike is designed and intended to exert pressure on the employer. By deliberately and concertedly withdrawing labour, striking workers intend to put pressure on the employer to do something which otherwise would not be done.[22] The essence of such pressure, which may either be coercive or persuasive, is to deprive the employer of labour input and, thereby, diminish through loss of production and earning capacity in the hope that the resulting economic strain would compel the employer to come around to strikers' point of view.[23] The pressure may even be remote. This explains why the phrase "to aid other workers in compelling their employer or any person or body of persons employed, to accept or not accept terms of employment and physical conditions of work" has been interpreted to give legitimacy to sympathy strikes. A strike is a weapon to secure demands and a demand to compel concessions.[24] It is also an indispensable tool for trade unions for the defence and promotion of the rights and interests of members.[25]

Unlike acceptability, non-acceptability of terms of employment and physical conditions of work is more susceptible to strike. Globally, a strike is an essential tool for defending and promoting the rights and interests of labour and serves as a necessary counterforce to the power of capital.[26] A strike may also be invoked to call the attention of the public and the employer to the need for improving terms of employment and conditions of work. Strikes often result from a total breakdown of harmonious mutual engagements between employer and employees or employees' trade unions or from unfruitful non-radical courses of action invoked to address issues of concerns in the workplace. A strike is essential for invocation of collective bargaining, and also necessary for enforcing collective agreements. It plays the same role in negotiation in the workplace that warfare plays in diplomatic relations. Strike is the most effective and most important instrument for employees in labour conflicts.[27] Despite the utility of strikes, the right to strike is not couched in absolute terms. The exercise of the right to strike is circumscribed by the right of the employer to suspend certain benefits or claims that would ordinarily have accrued in favour of the worker under the contract of employment.

3.0 THE AMBIT OF FORFEITURE OF ENTITLEMENTS

[22] Oji Elizabeth A and Offornze D Amucheazi, *Employment & Labour Law in Nigeria* (Mbeyi & Associates (Nig.) Ltd. 2015) 287.
[23] AB Ahmed, 'A Critical Appraisal of the Right to Strike in Nigeria' [2014](4)(11) *International Journal of Humanities and Social Science*, 302.
[24] Chianu (n 2) 252-268.
[25] Prince Ikwuadi Azubuike, 'The Right to Industrial Action in Nigeria: A Comparative Review of International Labour Standards' [2019](10)(1) *The Gravitas Review of Business & Property Law*, 18.

[26] Foluke Dorcas Moronkeji, 'The Right to Strike as an Instrument for Enforcing Collective Agreements: ASUU v. Federal Government of Nigeria' [2023](4)(1) *OAU Journal of Public Law*, 270.

[27] Jens Kirchner and Hanna Goedecke, 'Labour Conflicts' in Jens Kirchner, Pascal R Kremp and Michael Magotsch (eds.), *Key Aspects of German Employment and Labour Law* (2nd edn, Springer-Verlag GmbH 2018) 258.

Generally, the ambit of forfeiture of entitlements connotes the scope under which an individual or entity loses certain accruable benefits or claims due to specific reasons which may include misconduct, criminal conviction or breach of laid down rules. A legal entitlement, which may assume the nature of accruable benefit or claim, is a legal construct that may be forfeited due to an action or inaction on the part of the beneficiary. The implication is that the ambit of forfeiture depends on applicable laws, regulations and or the contractual arrangements governing the specific entitlement in question. This makes it expedient for enforcers of this precept to be conversant with normative prescriptions specifying the potential repercussions of actions and inactions. To ensure that accruable benefits or claims are not treated with disdain, it is expedient for due process to be followed in ensuring that any forfeiture of entitlements aligns with the principles of natural justice.

Under domestic labour regulations in Nigeria, the ambit of forfeiture of entitlements is not restricted to strikes alone. It also extends to lockouts.[28] However, in the context of strikes, the ambit of forfeiture of entitlements connotes the benefits or claims as prescribed by the extant legal framework as the loss incurred by workers of a striking worker's trade union owing to the invocation of a strike in the workplace. Accordingly, section 43(1)(a) Trade Disputes Act 1976 provides that:

> …where any worker takes part in a strike, he shall not be entitled to any wages or other remuneration for the period of the strike, and any such period shall not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment shall be prejudicially affected accordingly.

The above statutory provision is instructive for several reasons. First, the statutory provision operates notwithstanding anything contained in the Trade Disputes Act 1976 or any other law operating in Nigeria.[29] This accords some sort of supremacy to the above statutory provision in the determination of the question of the entitlements of striking workers for the period of a strike. Second, the statutory provision seems to have been stimulated by the reality that contracts of employment are hardly detailed or explicit enough to provide for the implication of strikes on the entitlements of workers during the period of strikes. Thirdly, the statutory provision constitutes the authoritative scope of the ambit of forfeiture of entitlements in the context of strikes in Nigeria. The consequences which the law attaches to strikes are material in assessing the status and scope of the right to strike.[30] To this end, the above statutory provision is broader than the Common Law's "no-work, no-pay" rule, in that, it deals with the issue of remuneration for the period of strike as well as rights dependent on continuity of employment. This means that the transposition of the Common Law's "no-work, no-pay" rule into domestic labour law jurisprudence in Nigeria is imbued with modifications of some sort. These modifications are stimulated not necessarily by peculiarities of the workplace, but on account of the obligation imposed by Nigeria's membership of the International Labour Organization.

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[28] Trade Disputes Act 1976, s 43(1)(b)

[29] Ibid s 43(1).

[30] OVC Okene and CT Emejuru 'Liability for Exercising the Right to Strike in Nigeria: Some Reflections' [2010](1)(1) *Abuja Journal of Public and International Law*, 182.

Fourth, whereas the forfeiture of entitlements in the context of the strike has been construed in relation to the "no work, no pay" rule,[31] the above statutory provision does not only make a "special provision concerning payment of wages during strikes," but also deals with remuneration other than wages for the period of the strike, questions relating to the period of continuous employment, and rights dependent on the continuity of employment. Once a strike is invoked by a workers' trade union, "any such period shall not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment shall be prejudicially affected accordingly."[32] This connotes that strikes rupture the continuity of employment and not the employment status itself.[33] The rupturing of continuity of employment also impacts the array of benefits or claims anchored on the continuity of employment.

Section 43(1)(a) Trade Disputes Act 1976 makes no distinction between the legal effect of lawful strikes and unlawful strikes. This is unlike the Ghanaian Labour Act 2003.[34] However, what section 43(1)(a) Trade Disputes Act 1976 as well as the Trade Disputes Act 1976 contemplates is lawful strikes. It is trite that lawful strikes are anchored on the right theory and thus enjoy the protection of the law in most jurisdictions including Nigeria. This being the case, it remains incongruous that participation in lawful strikes should incur the punitive consequence of rupturing the continuity of employment. Absence from work on account of strikes is justifiable since strikes are rooted in the right to strike which is a creation of law. This concern may have influenced the non-implementation of the prescription relating to forfeiture of entitlements in the context of strikes despite its unambiguous nature. It is, therefore, submitted that the continuity of employment of workers involved in lawful strikes is sustained with such striking workers considered to be in service, even though not actively working during the period of lawful strikes.

Finally, section 43(1)(a) Trade Disputes Act 1976 also provides for the forfeiture of "*other remuneration for the period of the strike.*" The term "remuneration" is broad and represents the total pecuniary entitlement of a worker in a workplace. It includes basic salaries, bonuses, health insurance benefits, commissions, retirement benefits, overtime pay, reimbursements and other financial benefits. Remuneration is a vital source of income that plays an important part in human resources management, in that, it influences many aspects of employee-employer relations, workers' attraction, retention, and commitment to work. The factors that influence and determine the remuneration package of a worker include the worker's role and responsibilities, industry standards, market conditions, the financial position of the workplace, and the worker's skills, experience, and performance. The question of remuneration for the period of strikes goes beyond the question of wages or salaries of striking workers, and may therefore extend to questions of pensions and gratuities, workplace bonuses, incentives and

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[31] Asogwa Maximus NO and Ugwuonu Casmir N, 'The Jurisprudential Position of Strike in Nigeria: Interrogating the Principle of No Work No pay' [2022](1)(1) *Caritas Journal of Management, Social Sciences and Humanities*, 24.

[32] Trade Disputes Act 1976, s 43(1)(a).

[33] Okene and Emejuru (n 30) 195.

[34] Ghanaian Labour Act 2003 s 168(4) and s 169(1).

fringe benefits. Hence, the "no-work, no-pay" rule which is sometimes construed by scholars, albeit erroneously, as the holistic representation of the ambit of forfeiture of entitlements in the context of strikes merely articulates the issue of wages or salaries to the exclusion of other benefits or claims recognised by the law.

4.0 THE "NO-WORK, NO-PAY" RULE

The "no-work, no-pay" rule is a delicate labour law precept which was introduced to curb the increasing rate of strikes and also to protect employers from losses arising from strikes. It is predicated on the reasoning that striking workers should not be allowed to enjoy pecuniary gain for services not rendered owing to the cessation of work on account of strikes. This is conceived against the backdrop of the fact that payment constitutes a critical component of the contract of employment which in itself rests on the worker's duty to work where one is provided in exchange for the employer's obligation to make payment for work done by a worker. By withholding payment for the duration of a strike, the "no-work, no-pay" rule encourages aggrieved workers to resolve trade disputes by means other than strike to guarantee a harmonious workplace. If strikers were paid, there would be very little incentive on their part to end the dispute, while the pressure on the employer would be overwhelming.[35]

The "no-work no-pay" rule does not exist in isolation. Rather, it operates in the context of strikes by linking the issue of payment wages or salaries to the performance of the contract of employment. In other words, earnings in the workplace are tied to productivity. A striking employee cannot claim to be willing and ready to serve and at the same time stay away from work.[36] Thus, the employee loses his right to wages, not because the contract has ended but because, in failing to earn them, he has failed to fulfil the condition precedent to their becoming payable.[37] Whereas labour law jurisprudence in Nigeria has a dent of the militarisation which is reflected in the rigidity of several precepts of domestic labour regulations, the "no-work, no-pay" rule does form part of the rigidity of domestic labour regulations since the precept was originally a conception of Common Law that was transposed into the *corpus juris* in Nigeria on account of colonial linkage.

At Common Law, strike generally amounts to breach of contract of employment, and workers who participate in a strike are generally not entitled to payment.[38] This position is predicated on the fact that Common Law construed employment relationship from the prism of "Master-Servant" relations requiring a servant, who in contemporary labour law jurisprudence is referred to as worker or employee, to be willing and ready to serve or work as a condition precedent of earning and receiving wages. Common Law entitles a Master whose Servants embark on a strike to two options: either to ignore the breach of the contract of employment by the striking workers or treat such a strike as a fundamental breach which

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[35] A.C.L. Davies, *Perspectives on Labour Law* (2nd edn, Cambridge University Press, 2009) 234.

[36] Okene and Emejuru (n 30) 193.

[37] Ibid.

[38] Morgan v Fry (1968) 3 All ER 452 at 458.

automatically repudiates the contract of employment.[39] Where the first option is opted for, a Master is empowered to withhold payment for the duration of a strike and also bring an action against the striking workers for damages occasioned by such a strike.

Under the jurisprudence of the International Labour Organization, salary deductions for days of strike do not give rise to objections from the perspective of view of freedom of association principles.[40] The International Labour Organization also refrains from criticizing the domestic legislation of Member States encapsulating the "no-work, no-pay" rule.[41] While this stance is reinforced by the fact that deductions on account of strikes qualify as lawful deductions, it must be pointed out that the International Labour Organization also considers this issue as falling within the ambit of "negotiable issues" in respect of which parties are at liberty to freely determine the scope thereof.[42] This subjects the "no-work, no-pay" rule to the discretion of parties, and also gives the employer the liberty to jettison the "no-work, no-pay" rule and make payment for the period of a strike.

The prescriptions of the International Labour Organization further provide that the deduction for the period applies to workers who partake in a strike,[43] and the permissible deduction must be commensurate with the earnings that would accrue for the duration of a strike.[44] In the United Kingdom, the Supreme Court confirmed that employers can deduct pay for striking workers but only a proportionate amount.[45] Accordingly, any deduction higher than the amount corresponding to the duration of the strike is completely outside the contemplation of the "no-work, no-pay" rule.[46] Similarly, selective deduction is deemed de facto discriminatory treatment against those affected.[47]

Beyond the recognition of the "no-work, no-pay" rule by Common Law and the jurisprudence of the International Labour Organization, domestic labour regulations in several jurisdictions also provide for this rule. The "no work, no pay" rule generally holds in the United States. However, the application of the rule depends on whether the employee is classified as exempt or non-exempt under the Fair Labor Standards Act 1938 (as amended) and also under other legal protections outlined in the contract of employment, company policy or collective bargaining agreement. A proposed bill in the United States known as the "No Work, No Pay Act of 2023" seeks to, *inter alia*, place members of Congress in the same

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[39] Chigozie Nwagbara, *Determination of Contract of Employment and Remedies for Wrongful Dismissal* (Tait Publishers 2000) 59.

[40] International Labour Organization, *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association* (6th edn, International Labour Office 2018) 176, para. 942.

[41] Ibid; Bernard Gernigon, Alberto Qdero and Horacio Guido, 'ILO Principles Concerning the Right to Strike' [1998](137)(4) *International Labour Review*, 471.

[42] International Labour Organization (n 40) 176, para. 948.

[43] Ibid 177, para. 950.

[44] Ibid 176, para. 943.

[45] Hartley v King Edward VI College [2017] UKSC 39.

[46] International Labour Organization (n 40) 176, para. 943.

[47] Ibid., 176, para. 946.

position as federal employees by prohibiting payment for members of Congress during periods in which any branch of the government experience shutdown.

In the United Kingdom, the law allows for forfeiture of wages when an employee refuses to work owing to strike action.[48] However, workers are entitled to the right not to suffer unauthorised deductions. Accordingly, section 13(1) United Kingdom Employment Rights Act 1996 (as amended) provides that an employer shall not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.
In South Africa, the "no work, no pay" rule is codified in section 67(3) Labour Relations Act 1995 which provides that "an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike." As to whether an employer is entitled to rely on the "no work, no pay" rule as a ground for making deductions from employees' salaries after the employer had paid the employees in full during a strike, the Labour Appeal Court, in the recently decided case of N*orth West Provincial Legislature v NEHAWU*,[49] held that once an employer has paid salaries in full to striking employees, the right to implement the "no work, no pay" policy is forfeited, and the employer is not permitted at a later stage to automatically effect salary deductions to recover the monies paid. The unambiguous nature of this provision of section 67(3) Labour Relations Act 1995 places in abeyance hurdles in the practical application of the provision particularly in situations where a strike is invoked in the workplace. However, the outbreak of the COVID-19 pandemic posed difficulty in navigating the "no-work, no-pay" rule in a situation where a worker is not at work and therefore cannot render their services for a reason beyond the worker's control. This concern was dealt with in *Macsteel Service Centres SA (Pty) Ltd v National Union of Metal Workers of South Africa and Others*[50] where the Labour Court observed as follows:

> The reality in law is that the employees who rendered no service, albeit to no fault of their own or due to circumstances outside their employer's control, like the global Covid-19 pandemic and national state of disaster, are not entitled to remuneration and the Applicant could have implemented the principle of 'no work, no pay.'
> (Underlining for emphasis)

This demonstrates that salaries were considered not earned during the lockdown on account of the outbreak of COVID-19 which is treated by the court as some sort of *force majeure* rendering impossible the performance of the contract of employment. The circumstances under which the above holding was reached are diametric to that under which workers' trade unions invoke strikes. This is buttressed by the fact that the invocation of strikes in the workplace cannot be construed as a workplace phenomenon that is to "no fault of their (workers) own or due to circumstances outside their employer's control." At least, workers, workers' trade unions and employers play critical roles in the invocation, sustenance and

[48] Miles v Wakefield Metropolitan District Council [1987] UKHL 15.
[49] [2023] 8 BLLR 745 (LAC).

[50] [2020] JOL 47372 (LC).

termination of strike actions in the workplace. The involvement of these stakeholders in the various phases of strikes also reflects some measure of fault culpability or responsibility for strikes.

In Ghana, the "no work, no pay" rule also holds, but only in respect of unlawful strikes.[51] This aligns with the view that the suspension of the main obligations of the employment relationship on account of labour conflict should be restricted to lawful labour conflicts.[52] In other words, the employment relationship itself persists during a lawful strike, and unlawful strikes do not have no suspending effect. In most jurisdictions, strikes are lawful provided that certain conditions are met. These conditions relate to subject matter or purpose of the strike or to the procedure to be followed by the union before organising the strike. The exclusion of lawful strikes from the ambit of this rule demonstrates Ghana's commitment to the protection of legitimate trade union activities as well as the need to avoid visiting the exercise of legal rights with punitive sanctions. In Nigeria, no distinction is drawn by domestic labour regulations on the impact of lawful strikes and unlawful strikes on the question of entitlements during strikes.

As shown above, section 43(1)(a) Trade Disputes Act 1976 also provides for the "no work, no pay" rule in Nigeria. This rule has been affirmed by the National Industrial Court of Nigeria in a plethora of cases. Specifically, the National Industrial Court of Nigeria has consistently upheld the right of the government to implement the rule with respect to strikes by trade unions, including the Academic Staff Union of Universities. Notwithstanding the entrenchment of the "no-work, no-pay" rule in section 43(1)(a) Trade Disputes Act 1976, employers have over the years made voluntary payments to workers for the period of strikes. In Nigeria, the practice is not novel, in that, the domestic labour regulation permits payment to workers during absence due to sick leave,[53] maternity leave, causal leave, annual leave, and annual holidays that have been duly declared by the State.[54] The practice has gained notoriety in the workplace, and this may have stimulated the view that the deduction of payment for the period of strike on account of the "no-work, no-pay" rule does not promote harmonious industrial relations.

On 20th October 2023, President Bola Tinubu of Nigeria approved the grant of an exceptional partial waiver of the "no work, no pay" Order that was instituted against striking members of the Academic Staff Union of Universities following the commencement of an eight-month industrial action which began on 14th February 2022 and was terminated on 17th October 2022.[55] This partial waiver allowed members of ASUU to receive four months' salary

[51] Ghanaian Labour Act 2003 ss 168(4) and 169(1).
[52] Kirchner and Goedecke (n 27) 266.

[53] Labour Act 1974 s 16.
[54] Ibid s 18.
[55] Chief Ajuri Ngelale, 'President Tinubu Approves Partial Waiver of the "No Work, No Pay" Order on ASUU Members, Orders Release of Four Months of Withheld Salary' October 20, 2023, The State House, Abuja <https://statehouse.gov.ng/news/president-tinubu-approves-partial-waiver-of-the-no-work-no-pay-order-on-asuu-members-orders-release-of-four-months-of-withheld-salary/#:~:text=Invoking%20the%20Principle%20of%20the%20Presidential%20Prerogative,eight%2Dmonth%20industrial%20action%20undertaken%20by%20the%20union.> accessed 27th March 2025.

accruals out of the eight months' salary which was withheld during the eight-month industrial action undertaken by the trade union.[56] The President has directed the grant of the waiver with a mandatory requirement that the Federal Ministry of Education and the Federal Ministry of Labour and Employment must secure a Document of Understanding establishing that this exceptional waiver granted by the President will be the last one to be granted to the Academic Staff Union of Universities and all other Education Sector Unions.[57]

Considering that effectiveness has been identified as one of the most important objectives of legislation,[58] the practice raises questions as to the proprietary of waiving a statutory provision designed to curtail the increasing rate of strikes in the workplace. Zechariah and Dalong-Opadotun suggest that the "no-work, no-pay" rule should be meted with a corresponding "no-pay, no-work" rule.[59] This suggestion seems to justify strikes predicated on non-payment of earned salaries. It also creates some balance and accords leverage to workers or workers' trade unions to invoke strikes on account of non-payment of earned salaries.

5.0 THE INTERVENTION OF THE NATIONAL INDUSTRIAL COURT OF NIGERIA

In most strikes declared in Nigeria, concerned trade unions would almost always insist on the payment of outstanding salaries, including those that accrued for the period of strikes, as one of the prerequisites for calling off the strikes. In as much as the practice of employers making payments for the period of strikes enjoys judicial recognition,[60] payment for the duration of strikes lies largely at the discretion of the employer. The employer is, therefore, at liberty to jettison the "no-work, no-pay" rule and make payment for the period of strike action.[61] The implication is that voluntary payments made for the period of the strike cannot be recovered.[62] The employer cannot make a claim for the deduction of such payment. It makes no difference that the strike was detrimental to such a magnanimous employer. According to Okene and Emejuru, payment of wages to striking workers would be classified as a mistake of law, and money paid under a mistake of law is irrecoverable.[63] Since the law does not impose any penalty on employers for making payments to striking workers, dispelling the

[56] Ibid.
[57] Ibid.
[58] Muhammed Tawfiq Ladan, *Introduction to Jurisprudence: Classical and Islamic* (Malthouse Press Limited 2010) 27.
[59] Zechariah and Dalong-Opadotun (n 14) 22.
[60] Federal Government & 1 Anor. v Academic Staff Union of Universities (Unreported) Suit No. NICN/ABJ/270/2022. This judgment was delivered on 30th May 2023; SSANU v Federal Government of Nigeria (2008) 12 NLLR (Pt. 33) 407; Oyo State Government v Alhaji Bashir Apapa & Ors. [2008] 11 NLLR (Pt. 29) 284; Management of UBN Ltd. v National Union of Banks, Insurance and Financial Institution Employees (1982-3) NICLR 213 at 247-8; Emiola (n 2) 115.

[61] Federal Government & 1 Anor. v Academic Staff Union of Universities Suit No. NICN/ABJ/270/2022. This judgment was delivered on 30th May 2023; SSANU v Federal Government of Nigeria (2008) 12 NLLR (Pt. 33) 407; Oyo State Government v Alhaji Bashir Apapa & Ors. [2008] 11 NLLR (Pt. 29) 284.

[62] Management of United Bank for Africa Ltd v National Union of Banks, Insurance and Financial Institutions Employees (1982/83) NICLR 211.
[63] Okene and Emejuru (n 30) 195.

"no-work, no-pay" rule automatically confers legitimacy to the practice. In *Senior Staff Association of Nigerian Universities (SSANU) v Federal Government of Nigeria*,[64] the National Industrial Court of Nigeria observed as follows:

> …it is perfectly lawful for an employer to choose to dispense with the 'no work, no pay' rule. In other words, strike pay is lawful if an employer chooses to pay same and not to penalize the strikers in any other way for the strike. In the same vein, it is lawful for workers to agree with their employer that wages will be paid and no other detriment suffered even when strike actions are embarked on.

In light of the above holding, an agreement between the employer and striking workers or workers' trade union to make payment for the period of a strike has a life of its own which is detached from the implication of the provisions of section 43(1)(a) Trade Disputes Act 1976. However, where the employer invokes the provision of 43(1)(a) of the Trade Disputes Act 1976, in withholding payment for the period of a strike, Courts would not hesitate to accord recognition to the "no-work, no-pay" rule. In *Federal Government & 1 Anor. v Academic Staff Union of Universities*,[65] the National Industrial Court of Nigeria, per Kanyip, PNICN, upheld the withholding of salaries of members of the Academic Staff Union of Universities who partook in a strike with the following observation:

> In the instant case, there is no such agreement before this Court on the part of the parties that salaries or wages would be paid to ASUU members for the period of the strike they embarked on. If anything, the claimants are praying this Court for a declaration that it shall be unlawful to pay wages or other remuneration to the academic workers in Universities in Nigeria who took part in the strike for the period of the strike beginning from 14 February 2022 to the day the strike ceases. On record, the claimants did not pay or agree to pay ASUU members wages or salaries for the period of the strike they embarked on. The claimants are not even ready to pay. Does this accord with the law? By section 43(1)(a) of the TDA, the answer is in the affirmative…

Even in the absence of any agreement to make payment for the period of a strike, the application of the "no-work, no-pay" rule by an employer can be garnered by the court from the failure or refusal of the employer to make payment for the period of a strike. The application of the "no-work, no-pay" rule is not dependent on the legality or otherwise of a strike. Since section 43(1)(a) Trade Disputes Act 1976 makes no distinction between genres of strikes, it suffices that the "no-work, no-pay" rule applies to both lawful and unlawful strikes.[66] The position in Ghana is quite different, in that, the "no work, no pay" rule holds only in respect of unlawful strikes. As such, section 168(4) of the Ghanaian Labour Act 2003

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[64] (Unreported) Suit No. NIC/8/2004. This judgment was delivered on 8th May 2007.

[65] (Unreported) Suit No. NICN/ABJ/270/2022. This judgment was delivered on 30th May 2023.

[66] SSANU v Federal Government of Nigeria (2008) 12 NLLR (Pt. 33) 407, 420-441; SSANU v Federal Government of Nigeria (Unreported) Suit No. NIC/8/2004. This judgment was delivered on 8th May 2007.

allows for forfeiture of remuneration in respect of the period during which a worker is engaged in an illegal strike. During lawful strikes in Ghana, the employment relationship between the employer and the workers is not in any way affected by a lawful strike and any termination of the contract of employment as a result of the lawful strike is void.[67] Clearly, domestic labour regulations in Nigeria are devoid of the above distinction drawn between lawful strikes and unlawful strikes. The "no-work, no-pay rule" is self-executory.[68] This means that once the fact of a strike is established, the implementation of the "no-work, no-pay" rule flows without the necessity for further enquiry or service of formal notice or grant of an order of a court.[69]

6.0 THE DEFICIT OF THE "NO-WORK, NO-PAY" RULE

In Nigeria, domestic labour regulation embodying the "no-work, no-pay" rule suffers several lacunas. The first lacuna revolves around the muteness of the engagement of replacement labour, otherwise known as strike-breakers, either on a permanent or temporary basis, during strikes. In as much as replacement labour robs strikes of much of the desired potency in catalysing the resolution of trade disputes, the domestic labour regulations of several States are crafted to provide for or against the use of replacement labour during strikes. Such an approach takes the use of replacement labour outside the ambit of speculation. In Ghana, the law protects against the hiring of replacement labour during a lawful strike.[70] In South Africa, the use of replacement labour is permitted only during a lockout that is in direct response to a strike.[71] South Africa has experienced many violent strikes in recent years, and it seems the use of replacement labour has also contributed to triggering violence during strikes.

Considering the need to curtail loss that may be occasioned during strikes, reform of domestic labour regulations in Nigeria to allow for the use of replacement labour, at least temporarily, will not be out of place. This aligns with section 43(1)(a) Trade Disputes Act 1976 which leans in favour of the suspension theory of strike. At the point the statutory provision embodying the "no-work, no-pay" rule was introduced, through the Trade Disputes (Amendment) Decree 1977, it was Lord Denning's suspension theory that was in vogue.[72] Lord Denning's suspension theory was heralded by Lord Delvin's decision in *Rookes v Barnard*[73] to the effect that "the object of a strike notice was to break the contract by withholding labour but keeping the contract alive for as long as the employers would tolerate the breach without exercising their right of rescission." The suspension theory of strike makes the case for deferral of, at least, certain rights, duties and obligations under the contract of employment for as long as a strike subsists.

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[67] Ghanaian Labour Act 2003 s 169(1).
[68] Ibid.
[69] Federated Motor Industries v Automobile, Boatyard, Transport Equipment and Allied Workers' Union (2008) 11 NLLR (Pt. 29) 196.

[70] Ghanian Labour Act 2003 s 170.
[71] Labour Relations Act 1995 s 76(1)(b); *National Union of Metalworkers of South Africa v Trenstar* (Pty) Ltd 2023 (7) BCLR 814 (CC).

[72] Morgan v Fry (1968) 3 All ER 452 at 458; Chianu (n 2) 274.
[73] (1964) AC 1129, 1204.

Already, the International Labour Organization has worked out blueprints to guide Member States on how to tailor domestic labour regulations on the issue of replacement labour. The International Labour Organization's Committee on Freedom of Association permits the use of replacement labour in the case of a strike in an 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.[74] Furthermore, the International Labour Organization's Committee on Freedom of Association permits the use of replacement labour in situations where striking workers are involved in the provision of essential services such as health services.[75]

In Nigeria, workers in essential services are completely stripped of the right to strike in line with section 31(6)(a) Trade Unions Act 1973 (as amended). This, therefore, renders the use of replacement labour in the workplace that qualifies as essential service incongruous. On the flip side, the International Labour Organization's Committee on Freedom of Association is of the view that hiring workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association.[76] Again, it suggests that if a strike is legal, recourse to the use of labour drawn from outside the undertaking to replace the strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights.[77]

The second lacuna relates to the muteness of domestic labour regulation embodying the "no-work, no-pay" rule on the proprietary of striking workers taking up temporary employment in another workplace during the period of a strike. The third lacuna relates to the fact that the domestic labour regulation embodying the "no-work, no-pay" rule does not contemplate all practicable scenarios of strikes. At Common Law, a strike means complete cessation of work. However, under the domestic labour regulations in Nigeria, a strike transcends complete cessation of work to include "deliberately working at less than usual speed or with less than usual efficiency"[78] and "refusal to work at usual speed or with usual efficiency"[79] sometimes referred to as "work-to-rule" or "go-slow."

Unlike in the case of complete cessation of work that automatically attracts non-payment of wages, the law does not contemplate *pro rata* or *quantum meruit* arrangements for strikes that assume the nature of work-to-rule or go-slow. The implication is that an employee who goes to work and in concert with other employees performs his duties at less than usual efficiency would not be entitled to payment for work done. Although it is doubtful if any employer, in the overall interest of industrial harmony, would withhold payment under such a situation, the scenario remains outside the contemplation of domestic labour regulation in Nigeria. This makes the "no-work, no-pay" rule impracticable as it relates to inchoate or haphazard strikes. This, therefore, makes it expedient to expand the scope of the "no-work,

[74] International Labour Organization (n 40) 172, para. 917.

[75] Ibid., 173, para. 925.

[76] Ibid 172, para. 918.
[77] Ibid 172, para. 919.
[78] Trade Disputes Act 1976 s 48(1)(a).
[79] Ibid s 48(1)(b).

no-pay" rule under section 43(1)(a) Trade Disputes Act 1976 to sufficiently cater for all scenarios of strikes.

In addition, there should be some sort of adaptation or variation of the "no-work, no-pay" rule as encapsulated in section 43(1)(a) Trade Disputes Act 1976 in relation to strikes by workers under the auspices of the Academic Staff Union of Universities. This should take cognisance of the fact that services rendered by workers who are members of the Academic Staff Union of Universities encompass teaching or lecturing; marking, grading and computation of results of examinations; research and publication of articles, chapters in books and books, and supervision of theses and dissertations and so on. Whereas strikes by the Academic Staff Union of Universities largely affect the teaching or lecturing component, other components remain largely unaffected during the pendency of strikes. This may have been part of the consideration for the non-invocation of the "no-work, no-pay" rule in many strikes that have been invoked by the Academic Staff Union of Universities.

7.0 CONCLUSION AND RECOMMENDATIONS

It has been demonstrated that the ambit of forfeiture of entitlements in labour law jurisprudence represents one of the many implications for invoking strikes by workers' trade unions in the workplace. The ambit of forfeiture of entitlements transcends the much-touted "no-work, no-pay" rule which was originally evolved by Common Law, but subsequently transposed to the domestic labour regulations of diverse jurisdictions across the globe. In Nigeria, the discretion that parties enjoy on the implementation of section 43(1)(a) Trade Disputes Act 1976 renders the "no-work, no-pay" rule a mere mantra. It seems the non-application of the "no-work, no-pay" rule has made nonsense of the safeguard evolved by the legislature to stem the rising cases of strikes in the workplace. The deficits of the "no-work, no-pay" rule make it expedient to reform domestic labour regulations in Nigeria. As such, future reforms of domestic labour regulations in Nigeria should allow for striking workers to take up temporary employment in another workplace during the period of a strike and also allow for employers of striking workers to temporarily engage replacement labour for the duration of strikes. Domestic labour regulations embodying the "no-work, no-pay" should also be altered to cater for all scenarios of strikes, including inchoate strikes assuming the nature of work of "work-to-rule" or "go-slow."