A WORKER'S PERSPECTIVE ON SECTION 43 OF THE TRADE DISPUTES ACT: THE NIGERIAN EXPERIENCE*

Abstract

More than ever before, the need to minimize the frequency of industrial actions in Nigeria because of its adverse effects on the nation's economy and manpower has become overly imperative. The government has adopted the 'no work no pay' provision in Section 43 of the Trade Disputes Act[1] as a means to discourage labour unions' incessant resort to industrial actions. This has led to quite a number of debates on the implications of this provision and the exercise of workers right to embark on industrial actions. Indeed, international law and national legislations have provided workers with the right to freely associate and form trade unions as well as recognised workers right to strike. However, some pieces of legislation such as the Trade Disputes Act have provisions which severely limit this right. The aim of this work is to demonstrate that the provisions of section 43 by implication are one of such restricting provisions. This paper indicates that loss of pay, which in this case is represented by the 'no work, no pay' rule as provided in section 43, gags the exercise of the right to strike and recommends inter alia the amendment of section 43 of the Trade Disputes Act and the conduct of impact assessment checks by organised labour before embarking on industrial actions, as ways forward.

Keywords: Contract of Employment, Industrial Action, Lock Outs, Strike, Trade Disputes, 'No Work, No Pay', Workers.

1. Introduction

The inequalities in power and economic wealth create an enduring power struggle between workers and their employers over the control of various aspects of work.[2] Employers wield so much power and influence at the expense and exploitation of the workers. Thus, in response to such exploitative tendencies, workers have formed trade unions, since it is rather difficult, and dangerous for workers to individually express their grievances to their employers. Over the years, the trade unions have employed industrial actions as a means to draw the attention of their employers to their grievance; to bring their employers to the negotiating table and require a performance of their agreement. However, in recent times in Nigeria, industrial action has become so prevalent that it has almost lost its constructive essence. It has become a menace to economic development to the detriment of the general populace. Despite the legal framework which has been put in place for the settlement of trade disputes, incessant industrial actions still pervade the Nigerian economy, sometimes lasting for several months. The Federal Government of Nigeria in a bid to checkmate these long strikes has taken the decisive step of implementing the 'no work, no pay', rule which is provided for in section 43 of the Trade Disputes Act.

2. An Overview of the Trade Disputes Act

The Trade Disputes Act was enacted in 1976 as an Act to make provisions for the settlement of trade disputes and other matters ancillary thereto. The Trade Disputes Act defines a trade dispute as 'any dispute between employer and workers or between workers and workers which is connected with the employment or non-employment or the form of employment and physical condition of work of any person'[3]. The Trade Disputes Act recognizes the inevitability of disputes between parties in the industrial relations system and thus makes provisions for voluntary and compulsory processes for the resolution of industrial disputes.[4] These provisions can be found in sections 4, 5, 6, 7 and 18 of the Act. Section 4 (1) for example, provides, thus;

> If there exists agreed means for settlement of the dispute apart from this Act, whether by virtue of the provisions of any agreement between organisations representing the interests of employers and organisation of workers or any other agreement, the parties to the dispute shall first attempt to settle it by that means.

The import of the above provision is that the parties to the trade dispute must first of all attempt to settle the disputes themselves in accordance with any standing agreement made by them for that purpose. Hence Section 4

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[1] Cap. T8 LFN 2004.

[2] T. Fashoyin, *Industrial Relations in Nigeria* (2nd Edn.) (Lagos Longman Nigeria Plc 1992) p.

[3] Section 48 (1)

[4] Felix Amadi and Gogo Otuturu, *Alternative Dispute Resolution Processes for the Resolution of Trade Disputes in Nigeria: Lessons from South Africa.* https://www.researchgate.net/publication/353751859_alternative_dispute_resolution_processes_for_the settlement_of_trade_disputes_in nigeria_lessons_from_South_Africa>| assessed 13 July 2023.

(1) recognizes the possibility of collective bargaining by way of negotiation for the settlement of trade dispute. The Trade Disputes Act in Section 18 (1) also recognizes the right of workers to embark on strikes albeit, after compliance with the processes laid down in sections 4, 5, 6 and 7 of the Act. Contravention is an offence punishable under section 18(2) of the Act. One other striking provision of the Act is that of section 43; which is the main focus of this paper. Section 43 of the Trade Disputes Act provides as follows:

> (1) Notwithstanding anything contained in this Act or in any other law-
> (a) 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; and
> (b) where any employer locks out his workers, the workers shall be entitled to wages and any other applicable remuneration for the period of lock-out and the period of the lock-out shall not prejudicially affect any rights of the workers being rights dependent on the continuity of period of employment.
> (2) If any question should arise as to whether there has been a lock-out for the purposes of this section, the question shall on application to the Minister by the workers or their representatives be determined by the Minister whose decision shall be final.

The above makes provisions for the status of the contract of employment as regards wages and remuneration and the continuity of period of employment during a strike or lockout. Strikes and lock outs are both forms of industrial actions, though, strike which is the commonest and most popular form of industrial action is almost synonymous with the apparently wider term.[5] A Strike or lock-out in the context of section 43 is as defined in Section 48 of the Trade Disputes Act. Under the Act, Strike is defined as:

> the cessation of work by a body of persons employed acting in combination or a concerted refusal or a refusal under 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 the employer or any person or body of persons employed, to accept or not to accept terms of employment and physical conditions of work.

While a lock out is defined as:

> the closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with a view to compelling those persons, or to aid another employer in compelling persons employed by him, to accept terms of employment and physical conditions of work;

Thus in the context of section 48 of the Trade Disputes Act, the wordings of the definition of strike is couched in a manner that provides for an extensive definition to the word strike. According to section 48 (a) (b) of the Trade Disputes Act, cessation of work includes working with less than usual speed or with less than usual efficiency, while refusal to continue to work includes a refusal to work at usual speed or with usual efficiency. It is thus clear that from the statutory definition of strike, different forms of cessation of work or refusal by employees to work would constitute a strike.[6] As can be seen, strikes and lock outs are both collective bargaining weapons which however represent two sides of the same coin. In a strike, workmen withdraw their labour to protest against some real or perceived grievance against their employer, whereas in a lock out, the employer locks out workmen from access to work premises, again as an expression of grievance against the workers.[7]

The effect of the provisions of section 43 is two fold; to begin with, striking workers are not entitled to salary for the period they embarked on strike; and in addition, the period of the strike should not count for the purpose of reckoning the period of continuous employment and all rights dependent on continuity of employment are prejudicially affected accordingly. This effect is far reaching on the contract of employment. The contract of employment creates rights and duties for the parties which are reciprocal in nature. Whereas the employee owes the employer the duties of obedience, fidelity, care and skill, the employer owes the employees the duties to pay remuneration, provide work and care.[8] The duty to pay remuneration is the most basic duty of an employer. In

[5] Sam Erugo, *Introduction to Labour Law* (Ikeja Princeton & Associates Publishing Co. Ltd 2019) P.354
[6] Kenneth Chinemelu Nwogu, *Collective Agreement in the Settlement of Industrial Trade Disputes in Nigeria: Implications for Industrial and Labour Relations* (Nolix Educational Publications Nig. 2010) p. 323.
[7] Chioma Kanu Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Lagos Concept Publications Limited 2011) P. 301.
[8] (n7) p.130

the case of *Chemical and Non-Metallic Products Senior Staff Association v Benue Cement Company Plc,*[9] the National Industrial Court held that the issue of payment of salaries is a sacred one. It is ordinarily expected that an employer should pay salaries or wages to an employee in accordance with the terms of the contract of employment. [10] At common law, once a duty to pay remuneration exists, an employer is expected to continue to pay such remuneration to a worker who is ready and willing to work, whether or not work is provided for the employee. There is however no duty to pay where the inability to provide work is outside the control of the employer. [11] An employer's duty to provide work may seem irrelevant where he pays remuneration as agreed. However, in contracts where actual work is of the essence,[12] then it would mean that the employee has a right to be given the opportunity to do his work.

3. The Legality of the provision of Section 43 of the Trade Disputes Act

The Nigerian Courts have on a number of occasions pronounced on the legality of this provision. In *SGS Inspection Services (Nigeria) Limited v. Petroleum and Natural Gas Senior Staff Association of Nigeria*,[13] the employees were prevented by armed policemen from entering the premises of the employer on the invitation of the employer. The National Industrial Court, held that employees who are locked out by their employer shall be entitled to wages and any other applicable remuneration for the period of lock out on the authority of Section 42 (1) (b) of the Trade Disputes Act (now section 43 (1) (b)) and the court may not be inclined to order re-instatement of locked out workers. The attitude of the court is similar to that on strike.[14] In the case of *Abdulraheem & Ors. v. Olufeagba & Ors.,* [15] the respondents were university lecturers who embarked on a strike to protest their salary structure. They absented themselves from duty against the directives of the university authorities. The appellants therefore terminated the appointments of the respondents. Aggrieved by the action of the appellants, the respondents filed an action as plaintiffs at the Federal High Court, claiming *inter alia* an order compelling the defendants to reinstate the plaintiffs to their jobs with all their rights, entitlements and other prerequisites of their offices and an order compelling the defendants to pay all their salaries and allowances from February 2001 till the day of judgment and thenceforth. At the end of the trial, the trial court held in favour of the respondents. The appellants, being dissatisfied with the judgment, appealed to the Court of Appeal. Allowing the appeal and setting aside the judgment of the lower court, the Court of Appeal held that the order of the learned trial Judge was given in clear violation of the unambiguous provisions of section 42(1) (a) of the Trade Disputes Act and the award of the salaries and allowances to the respondents by the trial Judge is not only illegal but also inequitable.' Consequently, the respondents were not entitled to payment of salaries and allowances for the period of the strike. Also, in the case of *Federated Motor Industries v. Automobile, Boatyard, Transport Equipment and Allied Workers' Union*[16] the National Industrial Court (NIC) applied the rule. The Court found that in the collective agreement signed by the respondents and the appellants the principle of 'no work, no pay' was clearly set out and that by virtue of Section 32A (1) (a) of Trade Disputes (Amendment) Decree No. 54 of 1977, any worker who takes part in a strike shall not be paid for the period for which he did not work. The Court therefore held that the workers are not entitled to any pay for the period they acted in breach of the terms of the collective agreement and the statutory provisions. In this judgment, the NIC appears to have impliedly laid emphasis on the fact of the adoption of this principle in the collective agreement as the basis of the decision. It is respectfully submitted that, whether the principle or rule is adopted or not by the parties it is of no moment since it is a statutory provision which does not need any adoption for it to be valid and applicable.[17]

Furthermore, as far back as 2007, before the Third Alteration to the 1999 Constitution, in *Senior Staff Association of Nigerian Universities v. Federal Government of Nigeria*,[18] the NIC noted that the provisions of section 43(1) (a) is self-executory and its implementation without more does not depend on any further enquiry, that is, a strike whether legal or not, falls squarely within the ambit of the said section, and for which the strikers are disentitled from wages and other benefits envisaged by the section. The Court also held that it is (not 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,

[9] (2006) 5 NLLR (pt.14) 1
[10] *Browning & Ors. v Crumlin Valley Collieries Limited* (1926)1 KB 522; *Way v Latilla* (1937) 3 All E.R. 756
[11] *Ibid.*
[12] Such as apprenticeship contracts or piece rate (remuneration by commission)
[13] Suit No. NIC/3/2000, Judgment delivered 26 July, 2001.
[14] (n5) p.369
[15] [2006]17 NWLR (pt1008) 280 CA
[16] (2008) 11 NLLR (Pt. 29) 196.
[17] Hilary Ekpo, 'Relevance of no work, no pay rule in curbing incessant labour unrest in Nigeria's public Sector' <https://www.guardian.ng/features > accessed 14 March 2023
[18] (2008) 12 NLLR (Pt. 33) 407,420 – 421. Suit No. NIC/8/2004 delivered 8 May 2007

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. The doctrine of 'no work, no pay' is a simple philosophy, and one backed by equity and natural justice principles. As indicated already, the concept of 'no work, no pay' cannot exist in isolation. It is only when cessation of work or refusal of employees to work has occurred that the principle of no work, no pay can apply.[19] Again, the doctrine of 'no work, no pay' is consistent with the suspension theory. In other words, when workers are on strike, the obligations and responsibilities of both the workers and employers are suspended. This theory was enunciated in the case of *Morgan v. Fry*,[20] According to this theory, when there is a strike, the contract of employment is not terminated but suspended for the period of strike and it is revived again when the strike is called off. Ordinarily, this policy seems equitable and in line with the principles of natural justice. It can be argued that the legal position of Section 43(1) (a) of the Trade Disputes Act, although bitter to one party exercising their constitutional right, lays a strong foundation to industrial peace and harmony as well as economic stability in the long run.[21] However, it may also be argued that where a worker is required to do work in arrears, that is to say, to continue from where he stopped in his duties on his job, then this policy may be unfair. This is the case of the Federal Government and the Academic Staff Union of Universities (ASUU). Recently, the 'no work, no pay' policy became an issue for public discourse when the Federal government applied the policy to striking members of ASUU. The Federal Government through the Minister for Labour and Employment pursuant to section 17 of the Trade Disputes Act, referred a dispute between the Federal Government and ASUU to the National Industrial Court.[22] One of the prayers in the referral instrument was the interpretation of Section 43 of the Trade Disputes Act. Relying on section 43(1) (a) of the TDA, the claimants argued that it will be in breach of section 43(1) (a) of the TDA to pay wages and or other remuneration to the academic staff of 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 ceased. Secondly, that the period of strike embarked on should not count for the purpose of reckoning the period of continuous employment of members of ASUU who partook in the strike, and all rights dependent on continuity of employment should be prejudicially affected accordingly. The Court *per* Kanyip, PJ, declared that the claimants are legally permitted, not just by section 43(1) (a) of the TDA, but also by Article 8 of the ILO Convention No. 87, and its accompanying ILO jurisprudence, to withhold, and so not pay, the salaries of members of ASUU who partook in the strike that commenced on 14 February 2022 up to the date the strike was called off. Additionally, the court, after considering Paragraphs 951 to 964 of the ILO's Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association[23] which deals with ILO's jurisprudence as to sanctions that are often imposed in the event of a legitimate strike,[24] rejected the submission and dismissed the prayer that the period of strike by the defendant union (ASUU) 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. The Court held that this provision is penal in nature as there is no evidence that the defendant union were not peaceful during their strike.

The National Industrial Court considered and applied Conventions and international best practices in international labour law in its adjudication of trade disputes. This is possible because section 254C(1) (f) and (h), and (2) of the 1999 Constitution and section 7(6) of the National Industrial Court (NIC) Act 2006 permits the NIC to apply international best practices in labour, and the Treaties, Conventions, Recommendations and Protocols on labour ratified by Nigeria. As such, they form part of the corpus of our labour laws in Nigeria, which can be judicially noticed. The Supreme Court had in *Abacha & Ors. v. Fawehinmi*, [25]held that;

> conventions and treaties create rights and obligations not only between member states themselves but also between citizens and member states and between ordinary citizens'; and that 'the spirit of a convention or a treaty demands that the interpretation and application of its

[19]Eseoghene Palmer and Olajide Oyewole, Nigeria: Analysing the Legal Implications of the 'No work, No Pay' Government policy, - Employee Rights/ Labour Relations - Nigeria <https://www.mondaq.com/nigeria> assessed 29 April 2023.

[20] (1968) 2 Q.B. 710

[21] (n19)

[22]Federal Government of Nigeria (FGN) v Academic Staff Union of Universities (ASUU) Suit No. NICN/ABJ/270/2022. Judgment delivered 30 May 2023.

[23] ILO's Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association (Geneva: International Labour Office 2018), (6th Edition)

[24] These provisions frown on penal sanctions being imposed on peaceful strikers. Paragraph 951:'imposing sanctions on unions for leading a legitimate strike is a gross violation of the principles of freedom of association.' Paragraph 953: 'No one should be penalised for carrying out a legitimate strike'. Paragraph 954: 'Penal sanctions should not be imposed on any worker for participating in a peaceful strike'. Paragraph 956: 'Legislative provisions which impose sanctions in relation to the threat of strike are contrary to freedom of expression and principles of freedom of association'.

[25] [2000] 6 NWLR (Pt 660) 228

> provisions should meet international and civilized legal concepts, which are widely acceptable and at the same time of clear certainty in application.

Additionally, by section 19 (d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), one of the foreign policy objectives of Government include the respect for international law and treaty obligations. Accordingly, section 254C (1) (f) and (h), and (2) of the 1999 Constitution and section 7(6) of the National Industrial Court (NIC) Act 2006 simply align with section 19 (d) of the 1999 Constitution. In *Sahara Energy Resources Ltd v. Mrs Olawunmi Oyebola*[26] the Court of Appeal held that section 254C (1) (f) and (h), and (2) of the 1999 Constitution imposed an obligation on the National Industrial Court of Nigeria to now apply good or international best practices in adjudication. Currently, Nigeria is a member of the International Labour Organisation (ILO) and by virtue of its membership is bound by the ILO Convention No. 87, a core Convention, which Nigeria ratified on the 17 October 1960.[27] It is believed that the decision of the court in *FGN v. ASUU*[28] invariably applies to the provisions of Section 43 (1) (b) of the Trade Disputes Act. Furthermore, the National Industrial Court in *FGN v. ASUU* declared that section 43(2) of the Trade Disputes Act falls foul of Convention No. 87[29] when it made the decision of the Minister to be final. Section 43 (2) provides that: 'If any question should arise as to whether there has been a lockout for the purposes of this section, the question shall on application to the Minister by the workers or their representatives be determined by the Minister whose decision shall be final' The determination of the question whether there has been a lockout is a question for the court to determine, and not for the minister (who is of the executive arm of government). To that extent, section 43(2) of the TDA also falls foul of section 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), which places judicial power in the court (Judiciary), and not the Executive arm of government, represented by the Minister for Labour and Employment. Section 43(2) of the Trade Disputes Act is accordingly unconstitutional, null and void.

4. Worker's Perspective

The codification of the 'no work, no pay' rule in section 43 of the Trade Disputes Act creates certain implications on the employment relationship. These implications range from socio economic to legal. The 'no work, no pay' rule creates financial hardship for the workers and their families especially if there is no other source of income. The essence of getting a job is to earn an income. Where workers are deprived of their income because of the expression of grievance, it puts the workers in a difficult position. In this position, the issues that gave rise to the trade dispute takes a back seat, because now, the worker is only concerned about meeting his day-to-day needs. This reduces the bargaining strength of the trade unions. Industrial action plays the same role in labour negotiations that warfare plays in diplomatic negotiations.[30] Thus, where the workers who make up the trade unions are financially constrained and are not able to meet their financial obligations, they would have no option than to accept whatever bargain the employers propose. Trade unions are usually in a vantage position to bargain more effectively with employers. This bargaining power, however, would be considerably reduced, if the union and its members are not permitted to demonstrate their position. Strikes are a form of this demonstration, as strikes have been adjudged, the most effective and most concerted effort which trade unions use to fight for their interest and common goal. Thus, strike is recognized as a mode of redress for resolving workers grievances.[31] Most usually, trade disputes result in strike actions as internal mechanisms to resolve these disputes before strike actions are unproductive. The provisions of section 43 may also lead to more disputes between the employer and the workers, as its' implementation most often leads to more legal battles between the parties. It also reduces general productivity and output as workers will be discouraged from giving their best effort. Bottom of Form

5. Conclusion and Recommendations

In conclusion, the provision of Section 43 (1) of the Trade Disputes Act is lawful. As can be seen, the ILO does not frown at the principle of 'no work, no pay'; both international law and national legislations recognise the 'no work, no pay' rule as legal. Accordingly, the 'no work, no pay' rule has come to stay. Due to the spate of industrial crises engaged by workers from many sectors of the economy, the government is now more willing to

[26] [2020] LPELR-51806(CA)

[27]ILO Conventions: Ratifications for Nigeria https://www.ilo.org./dyn/normlex/en/f?p =NORMLEXPUB: 11200:0:NO::P11200_COUNTRY_ID:103259 assessed 02 August 2023.

[28] (n 22)

[29] Article 8 of Convention No. 87 acknowledges that in exercising rights under the Convention, the law of the land is to be respected, but this must not be at the expense of the guarantees provided by the Convention.

[30] J.G. Getman and F.R. Marshall, The Continuing Assault on the Right to Strike 79(3), *Tax Reform Review* (2000- 2001) 703- 735, at 703–704.

[31] Nwogu P. 345

implement the provisions of section 43 of the Trade Disputes Act to discourage workers from embarking on strike actions. For the government, there's little or no doubt that workers' strikes have become rampant, pointless and, in some cases, political, with no bearing on the need to improve conditions of workers.[32] Striking workers must therefore understand that liability may be incurred where an employer decides to apply the provisions of Section 43 of the Trade Disputes Act during a strike. The purpose of organized labour is the representation of workers' interest. As such trade union must ensure that any industrial action, they embark on is done with due consideration of the legal and socio economic implications on their members and the society at large. The 'no work, no pay' is not just a policy, it is a law captured in the provisions of Section 43 of the Trade Disputes Act and well recognized under international labour law by the ILO. The following recommendations are proffered:

Prior Assessment of the impact of a proposed Industrial Action

The unions who represent the workers have a duty to serve the best interests of their members. Their duty expands beyond just engaging in collective bargaining on behalf of their members. They have an important role to educate their members regarding their actions and advise them on the possible consequences. From the reports on most industrial actions, it appears evident that while workers had huge expectations regarding improvements in their working conditions and salaries as a result of the industrial action, they were not aware of the real implications it would have on their personal circumstances in terms of loss of income during the strike[33]. They were not aware of how the 'no work, no pay' rule would affect them financially. Therefore, unions should provide a complete picture of the impact that industrial action would have on the workers before embarking on strike.

Agreement by the Parties to jettison the 'No Work, No Pay,' Rule

It is quite lawful for an employer to choose to dispense with the 'no work, no pay' rule. Parties in respect of a strike action are entitled to jettison the 'no work, no pay' rule and agree on salaries or wages to be paid even for the period of a strike action.[34] An agreement between an employer and strikers to pay wages or salaries for the period of a strike action is legal as the agreement acquires a life of its own, and section 43(1)(a) of the TDA cannot be called to use in such a circumstance.

Amendment of section 43 (1) of the Trade Disputes Act

Section 43 of the TDA which provides for the no work no pay rule should be amended to operate after a particular period of time fixed by law and not upon the commencement of a strike or anytime the employer choses. This will provide a leveled opportunity for collective bargaining within the period of the strike. The provision for the purpose of reckoning the period of continuous employment should be totally abrogated because apart from the fact that it appears penal in nature, it would be practically difficult and untidy to compute. More importantly, its application would amount to another issue of trade dispute between the workers and their employers.

Abrogation of Section 43 (2) of the Trade Disputes Act

The NIC have held that the provisions of this sub section is unconstitutional and void as it is inconsistent with the provisions of section 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The Minister of Labour and Employment should not be the final authority to determine whether or not there has been a lock out for the purposes of the section. This amounts to bestowing judicial powers on the Minister who is a representative of the executive arm of government.

[32] No work, no pay: Implications on national development (vanguardngr.com)

[33] J. Surujlal, A Critical Analysis of the Impact of Industrial Action in South Africa, *Proceedings of 10th Asian Business Research Conference 2014, Novotel Bangkok on Siam Square, Bangkok, Thailand.*

[34] (n. 18); Oyo State Government v. Alhaji Bashir Apapa & Ors. [2008] 11 NLLR (pt.29) 284.