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RIGHT TO STRIKE: AN UNSETTLED WEAPON

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Labour legislation guaranteed the right to negotiate, collective bargain, and strike for workers in workplaces and employment-related processes due to great sacrifices and agitations with a history as long as human life. From the end of the 18th century, organised movements developed, and through three centuries of continuous struggle, the needs of the workers in the workplace achieved an organised character and brought security and self-confidence among them.[1] This article is trying to analyse one controversial question: whether the right to strike is intrinsically linked to the freedoms of association or union, so the right to strike is a fundamental part of a democratic state. The right to strike has been recognised as crucial in the process of collective bargaining. The labour movement is also known for its strikes for the decent lives of labourers. The word strike's ordinary meaning is associated with labour rights and their collective movements for better living standards. It denotes noncooperation in the industry against the employer and some aggressive nature on the part of collective labour as recognised as one form of collective bargaining under labour jurisprudence.

The legal definition of strikes is controversial in academic circles and varies from one legal system to another[2]. However, it defined a strike as a stop of work done by labourers or employees intending to accept their demands with the employers. Strike means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal or a refusal under common understanding, of any persons who are or have been so employed to continue to work or accept employment[3]. The Committee on Freedom of Association of ILO explained the meaning of strike rather than define the word strike. The Committee has stated that any work stoppage, however brief and limited, may generally be considered as a strike. This is more difficult to determine when there is no work stoppage as such but a slowdown in work (go-slow strike) or when work rules are applied to the letter (work-to-rule); these forms of strike action are often just as paralysing as a total stoppage.

[1] Shri A. Krishnaswamy, Calling Attention (Rule-197) on 18 August, 2004 at Lok Sabha

[2] Jane Hodges-Aeberhard; Alberto Odero de Dios, *Principles of the Committee on Freedom of Association Concerning Strikes*, 126 Int'l Lab. Rev. 543, 547 (1987)

[3] Industrial Dispute Act, 1947 section 2(q)

Noting that national law and practice vary widely in this respect, the Committee believes that restrictions on the forms of strike action can only be justified if the action ceases to be peaceful[4]. A strike is the withholding of labour by workers in order to obtain better working conditions or a work stoppage caused by the mass refusal of employees to perform work. Demonstrations, such as picketing, parades, and meetings, generally accompany such withholding of labour. A strike usually takes place as a last resort in response to employee grievances. The employees' strike was a strategic movement that was effectively used during the Industrial Revolution when mass labour became important in factories and mines. Labours reserved this weapon as a threat of last resort against employers during collective bargaining.

COLLECTIVE BARGAINING

An independent organisation must bargain collectively for workers, and that organisation must represent employees with self-governing rights. There should be no yielding to any influence of capitalists or their organisations. In considering the bargaining power of labourers concerned, there are some questions raised on the nature of the right whether collective bargaining can be categorised as civil liberty, political right or socio-economic[5]. The Committee of Freedom of Association[6] (CFA) emphasised that the voluntary negotiation of the collective agreement and the bargaining partners' autonomy are fundamental aspects of the principles of freedom of association. Freedom of association protects the capacity of labour unions to engage in collective bargaining in the workplace[7].

[4] ILO, 1994a, paras. 173 and 174

[5] Tonia Novits, Workers'Freedom of Association, in Human Right in Labour and Employment Relations: International and Domestic Perspectives (Edited Book by James A. Gross and Lance Compa) p 148

6 Founded in 1951 on the proposal of the ILO Administrative Council, the Committee on Freedom of Association examines and concludes complaints about member states based on conventions 87 and 98. The CFA recognizes the right to strike as an integral part of trade union freedom.

[7] Canadian Supreme Court in *Health Service case,* 2007 SCC27paragraph 25. has concluded that "the section 2 (d) of guarantee of freedom of association protects the capacity of labour unions to engage in collective bargaining on workplace issues". This conclusion constituted a substantial departual from twenty years of jurisprudence that interpreted the freedom of association as eluding collective bargaining.

No international labour Conventions or Recommendations explicitly recognise or dealt with the right to strike[8]. Abolition of Forced Labour Convention, 1957 (No. 105), which forbids the use of any form of forced or compulsory labour as a punishment for having participated in strikes[9]. The absence of expressed ILO provisions or standards regarding the right to strike does not mean that the ILO has ignored the right to strike or is not recognised as a means of protection for the exercise of collective bargaining. The following four facts exemplify the ILO's recognition of workers' right to strike[10]. Firstly, article 3 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), lays down the general and unrestricted right of workers' organisations to organise their administration and activities and to formulate their programmes - and strikes are obviously a common and important activity of workers' organisations. Secondly, the ILO supervisory bodies, particularly the Committee of Experts on the Application of Conventions and Recommendations and the Governing Body Committee on Freedom of Association, when considering the application by various countries of Article 3 of Convention No. 87, have consistently reaffirmed the principle of the right to strike, subject to any reasonable restrictions imposed by law, and have defined the limits within which the right to strike may be exercised and thirdly, there are numerous provisions in Conventions and Recommendations (especially those relating to the right to organise and bargain collectively) that, as will be seen below, guarantee protection to workers against acts of discrimination based on their participation in trade union activities. Although these instruments do not explicitly reference the type of activity protected, given the general tenor of the provisions in question, there is no reason to consider them not to cover participation in lawful strikes. The Freedom of Association Committee and the Committee of Experts have made it abundantly clear that protection against acts of antiunion discrimination covers participation in lawful strikes. Finally, the resolution concerning trade union rights and their relation to civil liberties adopted by the International Labour Conference at its 54th Session in 1970 invited the Governing Body to instruct the DirectorGeneral to take action to ensure full and universal respect for trade union rights in their broadest sense, drew particular attention to the right to strike.

[8] The International Labour Conference has on several occasions, particularly between 1947 and 1950 and again in 1978, discussed the right to strike in the context of preparatory work on instruments covering related subjects, but those discussions did not give rise to international standards expressly covering the right to strike.

[9] Abolition of Forced Labour Convention, 1957 (No. 105), Article 1 (d)

[10] Jane Hodges-Aeberhard; Alberto Odero de Dios, *Principles of the Committee on Freedom of Association Concerning Strikes*, 126 Int'l Lab. Rev. 543, 544 (1987)

The legislation of most countries lays down a number of requirements governing the lawfulness of strikes. Such requirements should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organisations[11]. The following requirements are acceptable in most countries. The obligation to give notice; the obligation to resort to conciliation and (voluntarily agreed) arbitration procedures in collective disputes prior to calling a strike, provided they are adequate, impartial and speedy and involve the participation of the parties at every stage; the obligation to observe a fixed quorum; the use of secret ballots in strike votes; the adoption of measures to ensure observance of safety regulations and to prevent accidents; the maintenance of a minimum service[12]. Two resolutions of the International Labour Conference, in one way or another, emphasised recognition of the right to strike in member States. Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation, adopted in 1957[13] and the Resolution concerning Trade Union Rights and Their Relation to Civil Liberties, adopted in 1970[14]. The right to strike has also been affirmed in various resolutions of regional conferences of the ILO, industrial committees and other international bodies[15]. The right to strike is an essential and legitimate means for workers and their organisations to advance and protect their social and economic interests[16].

STATUTORY CONTROL OVER THE RIGHT

The Trade Unions Act 1926 and the Industrial Disputes Act 1947 are the primary pieces of Central legislation regulating the right to strike in India. The Trade Union Act, 1926 provides a limited right

[11] Jane Hodges-Aeberhard; Alberto Odero de Dios, *Principles of the Committee on Freedom of Association Concerning Strikes*, 126 Int'l Lab. Rev. 543, 553 (1987)

[12] Jane Hodges-Aeberhard; Alberto Odero de Dios, *Principles of the Committee on Freedom of Association Concerning Strikes*, 126 Int'l Lab. Rev. 543, 553 (1987)

[13] The resolution called for the adoption of laws ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers. ILO, 1957 P. 783

[14] The Resolution invited the Governing Body to instruct the Director-General to take action in a number of ways "with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense", with particular attention to be paid, inter alia, to the "right to strike " (ILO, 1970, pp. 735-736)

[15] Jane Hodges-Aeberhard; Alberto Odero de Dios, *Principles of the Committee on Freedom of Association Concerning Strikes*, 126 Int'l Lab. Rev. 543, 545 (1987)

[16] Freedom of Association Reports, 1-14 (Geneva, ILO, 1952-54), 2nd Report, Case No. 28, para. 68, and 4th Report, Case No. 5, para. 27. In Case No. 28 the Committee described the right to strike as one of the "essential elements of trade union rights". The adjective "legitimate" was added when examining Case No. 5. See also Digest, paras. 362-363

to strike to registered trade unions to settle a trade dispute. The law fixes the limits of such a legal right as a legitimate weapon of the trade unions. The Act protects the activities of registered trade unions by providing that a trade union, office bearer or member of a registered trade union shall not be subject to a suit or claim in a civil court alleging conspiracy or interference in trade or business[17] The Industrial Disputes Act is a Social Welfare Legislation enacted by Parliament of India for the investigation and settlement of industrial disputes. The Act's main purpose is to maintain peace in the industrial atmosphere, thereby bringing industrial development to India. Suppose an employer denies giving its workers some benefit to which they are entitled under the law or under the contract of service with the employer. In that case, the Act gives the concerned employees a weapon to force the employer to accede to their demands and give them their legitimate dues. The employees complied with all the formalities stipulated in the statute before going on strike, which would be considered legal[18].

Chapter V of the Act deals with strikes by workers in an industrial establishment, which requires employees to complete specific procedures before going on strike; otherwise, their strike may be considered illegal. No workman who is employed in any industrial establishment shall go on strike in breach of contract during the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings[19]; during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal and two months after the conclusion of such proceedings[20]; during the pendency of arbitration proceedings before an arbitrator and two months after the conclusion of such proceedings, where a notification has been issued under sub-section (3A) of section 10A;[21] or during any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award[22]. Strikes are not banned, even in the case of public utility services. They are only subjected to certain limitations. If any public utility service employee goes on strike, the following requirements must be fulfilled. A strike notice is given to the employer at least six weeks before the strike[23]. The strike shall not take place within fourteen days of the notice

[17] Section 18

[18] *Amalendu Gupta And Ors. vs Life Insurance Corporation* Of ... on 25 August, 1982 Equivalent citations: (1982) IILLJ 332 Cal

[19] Section 23 (a)

[20] Section 23 (b)

[21] Section 23 (bb)

[22] Section 23 (c)

[23] Section 22 (1) (a)

or before the end of the strike date specified in the notice[24]. There shall be no strike during the pendency of any conciliation proceedings before the Conciliation Officer and for seven days after the conclusion of such proceedings[25]. There is no doubt that the Act recognises strikes as a legitimate weapon in the matter of industrial relations.

The principle of no work, no pay policy is denied because of the application of the collective bargaining doctrine in the Industrial law framework. But any labour who took part in any illegal strike cannot get such benefit. Whether a striking employee is entitled to wages for that period usually arises in connection with strikes. Often, employers deny wages during strike periods as a retaliatory measure. This often leads to industrial disputes between the trade union and management. This issue is often resolved depending on the nature of the strike. This issue was examined by the Calcutta High Court in *Amalendu Gupta v. Life Insurance Corporation*[26]case. Considering the facts and circumstances, the court directed the respondent to pay the strike period wages to the concerned workmen with interest at 12% per annum. The court clarified that workers cannot claim strike wages whenever they resort to force, violence or sabotage during a strike[27]. The Constitution Bench of the Supreme Court in *Syndicate Bank v. K. Umesh Nayak*[28] held that the right of the workmen to receive strike wages is only when the strike is legal and justified.

A legal strike provides protections to workers with immunity from legal consequences and security from termination of their employment[29]. However, determining the strike's legality is essential to obtaining this unique protection. This should be regulated by a well-defined law that leaves no room for doubt. It has to be determined within the four corners of the law that any strike outside the framework of the law can be considered an illegal strike, and thus, a worker participating in an illegal strike faces legal consequences. Observation made by HANNEN, J, in *Farrer v. Close*[30] is very pertinent in this discussion. He opined that strikes are not necessarily illegal, and their legality or illegality must depend on the means by which it is enforced and on their objects. It can be said illegal if it is done for the purpose of injuring, molesting, or other criminal acts either the owner or other

[24] Section 22 (1) (b) & (c)

[25] Section 22 (1) (d)

[26] (1982) IILLJ 332 Cal

[27] *Crompton Greaves Ltd.* v. *Workmen*, AIR 1978 SC 1489

[28] AIR 1995 SC 319

[29] Human Rights Features , voice of Asia Pacific Human Rights Network, HRF 121/05, 24 June 2005

[30] (1869) 4 QB 602

employees, and some strikes are perfectly innocent if it is the result of voluntary togetherness of employees for the purpose of benefiting them by raising their wages, compelling fulfilment of a contract framed between employees and employer are legally considered as a legal strike.

Determining the legality of a strike under industrial law is a question of law and is assessed on the facts and circumstances of each case. Some of the observations made by the Supreme Court in this regard are very significant. That is, for workers to be entitled to wages during the strike period, the strike should be legal as well as justified[31]. Force, violence or acts of sabotage resorted to by workers during a strike disqualify them from wages for the period of the strike[32]. Therefore, the strike must be reasonable and relevant in accordance with the provisions of the Act.

The essence of the principle of collective bargaining is the right to organise and strike. Workers have used strikes as a legal weapon, which has emerged as the inherent right of every worker in the industry. The Bombay High Court beautifully illustrates the importance of collective bargaining of workers against management in an industry in the following observations relevant to determining the nature of strikes in a legal system.

> The right to strike as now understood is an essential element in the principle of collective bargaining. The power of a management to shut down the plant which is inherent in the right of property would not be matched by corresponding power on the side of labour. If the workers could not as the last resort collectively refuse to work they could not bargain collectively. Strike and lock-out therefore constitute the essential elements of bargaining power of the two sides. There can be no equality with the bargaining power of the management without the freedom to strike. In protecting their freedom the law recognises the legitimate expectation of the workers, that they can make use of their collective powers. It corresponds to protection of the legitimate expectation of management that It can use the right of property for the same purpose on its side by declaring a lock out. Even in England the right to strike was not recognised as a common law right. It is a right which has been recognised by law consequent to organisation of labour and the process of collective bargaining. It is a part of concerted industrial action which results in stoppage of work. There are also other concerted industrial actions like go slow, work to rule. etc. which are not strike. A complete denial or severe restriction of the freedom to strike in any country would indicate that the

[31] *Crompton Greaves Ltd. v.The Workmen*, 1978-II-L.L.J, 80

[32] *Ibid*

> pretence of freedom of organisation, exists only on paper. Under the Indian Constitution, Article 19(l)(c) confers a right to form associations or Unions. This right to form associations or unions is subject to reasonable restrictions that may be imposed by law. Our Constitution guarantees the right to form association. Our Constitution guarantees the right to form associations, not for gregarious pleasure, but to fight effectively for the redressal of grievances. Our Constitution is sensitive to workers' rights. Our story of freedom and social emancipation led by the Father of the Nation has evolved, from the highest of motives, combined action to resist evil and to right wrong even if it meant loss of business profits.[33]

Thus, trade unions sought to redress long-standing inequalities of bargaining power between workers and employers. As an organisation of workers, trade unions help workers to give their opinions and voice, advocate for better working conditions and fair wages through collective bargaining, and, if necessary, adopt methods, including strikes, to achieve workers' demands. Therefore, trade unions and the right to strike are essential elements of collective bargaining. The theory of social justice justifies strike as a legal weapon available to employees or workers. Justice Krishna Iyer examined its legal aspects, and his observation is very relevant to progressive legal thinking[34]. The broad basis is that workers are weaker, although they are the producers, and their struggle to better their lot has the sanction of the rule of law. Unions and strikes are no more conspiracies than professions and political parties are, and, being for weaker, need succour. Part IV of the Constitution, read with Art 19, sows the seeds of this bargaining jurisprudence, and this bargaining ensures economic equity in industry. Within these parameters, the right to strike is integral to collective bargaining.[35] In accordance with these observations, the right to strike is an integral part of collective bargaining and is accepted as a legal right in the field of industrial jurisprudence. If the workmen, after resorting to a strike, seek any remedy, that remedy should be sought within the four corners of the Act and not by taking recourse under Article 226 of the Constitution. Therefore, any dispute relating to the enforcement of a right or obligation created under the Industrial Disputes Act has to be redressed within the limits of that law[36].

[33] Bharat Petroleum Corporation ... vs Petroleum Employees Union 2001 (2) BomCR 447, (2001) 1 BOMLR 112

[34] *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha,* AIR 1980 SC 1896

[35] *Ibid*

[36] *The Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke,* MANU/SC/0369/1975

CONCOMITANT RIGHT IS NOT PROTECTED UNDER ARTICLE 19 (1) (c)

Literature in this regard holds that the principle of collective bargaining is a part of freedom of association, but does the Indian legal system recognise this? Is collective bargaining recognised under Article 19 (1) (c) of the Constitution? What are the observations of the Supreme Court delivered in this regard? These questions are to be examined here. There are some views that freedom of association guaranteed under the Constitution extends only to association for the purpose of exercising other fundamental rights. Collective bargaining and industrial actions are outside the concept. In early cases (Labour Trilogy), the Canadian Supreme Court concluded that statutes that restricted strikes did not violate the provision made for freedom of association in section 2 (d) of the Charts[37]. Another interpretation states that freedom of association goes beyond merely protecting the formation of labour unions and providing protection of their essential activities – collective bargaining and the freedom to strike[38].

The question of whether the conflict between individual freedom of association and collective bargaining of a group falls within the protection of fundamental rights guaranteed by the Constitution of India is very relevant. Obviously, Article 19 is a fundamental right granted only to the citizens of India. As the group does not come within the definition of citizen, it is argued that the prerogative of collective bargaining of that group does not fall within the fundamental rights granted by Article 19, but the Indian citizen as an individual has the right to form a group and participate in collective bargaining. The key questions surrounding this are whether the fundamental right to form associations or unions under Article 19 (1) (c) includes the right to collective bargaining and strike. The right guaranteed by Article 19(1) (c) of the Constitution does not carry with it a concomitant

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[37] Tonia Novits, Workers'Freedom of Association, in Human Right in Labour and Employment Relations: International and Domestic Perspectives (Edited Book by James A. Gross and Lance Compa) p 137,

Canadian Charter of Rights and Freedoms, 1989, which is Part I of the Canadian Constitution Act, 1982 section 2 of the Charter states the following

> Everyone has the following fundamental freedoms
>
> (a) freedom of conscience and religion;
>
> (b)) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) Freedom of association.

[38] Tonia Novits, Workers'Freedom of Association, in Human Right in Labour and Employment Relations: International and Domestic Perspectives (Edited Book by James A. Gross and Lance Compa) p 137

right that unions formed for protecting the interests of labour shall achieve their object. Article 19(1) (c) rights are limited to forming an association or union. It is not possible to achieve all the objectives for which the association was formed[39]. The court denied the argument that the fundamental right to go on strike. Further, the court held that government employees have no statutory, equitable, or moral right to go on strike. Therefore, insofar as it prohibited strikes, the rule was valid since there was no fundamental right to resort to strikes[40].

CONCLUSION

Industrial jurisprudence recognises the right to strike as part of collective bargaining to negotiate and access justice and is supported by the concept of social justice. It is universally recognised that the right to strike is the concomitant right of collective bargaining, irrespective of the nature of governments. Democratic governments, whether capitalist or socialist, have legally recognised and protected the right to organise trade unions and to conduct strikes for their reasonable needs in an industry. Courts are considered the last resort in most legal systems, subject to restrictions on workers' right to strike. But suppose this right, which is part of the workers' freedom of bargaining, is not used legally and rationally. In that case, it will affect the industry's production and the economic sector's collapse, thus the country's development. In India, the Supreme Court has held that while the right to protest is a fundamental right under Article 19 (1) (a) & (c) of the Constitution, the right to strike does not fall within it, so it is only a statutory right provided by Trade Union Act, 1926 and Industrial Dispute Act, 1947. Further restrictions have been placed on workers' right to strike in essential services. Accordingly, the government has more power to act against workers participating in illegal strikes. The Maintenance of Essential Services Act 1968 clearly defines essential services and gives discretion to the government to include more services under the protection of the Act. Since the right to organise and strike is a vital part of a democratic government, and efforts to achieve it are part of democratic struggles, these mechanisms should be used judiciously for the progress of the country.

[39] *All India Bank Employees' Association* v. *National Industrial Tribunal* AIR 1962 SC 171

[40] (2003) 6 SSC 581