RIGHT TO STRIKE: A CRITICAL APPRAISAL OF THE SRI LANKAN LAW

K.A.A.N. Thilakarathne

Attorney-at-Law,
LL.B (University of Colombo)
Lecturer,
Institute of Human Resources Advancement, University of Colombo

Introduction

Industrial relations are a dynamic field of study as it encompasses an everlasting conflict between the employees and their employers over their respective claims. While employers are more conscience about their profits, employees are at a constant war for better wages, working hours, working conditions, terms of employment, retirement benefits etc. The law relating to industrial relations have tried to intervene and ease out this tension by trying to manage and facilitate for the smooth functioning of these relationships while understanding the inherent disparity of the bargaining powers between the employers and the employees. Industrial law has therefore empowered the employees to use certain measures which are portrayed at balancing out this inequality of bargaining powers.

Trade unions are formed in order to strengthen the employees who, in isolation, would not have any bargaining power. They act as the medium in which employees can get together and form an association with a common objective(s) in order to further their respective claims. Members belonging to such trade union are given the opportunity of collective bargaining, where by with their collective power they can come to acceptable terms and conditions of labor with their respective employers. They can wield their powers through the strength in numbers. These unions can take trade union actions regarding the rights and interest of their respective members and one of the most commonly and widely used actions are strikes. The ability or the right to 'strike' is a very powerful tool of economic coercion, which the employees can utilize to make claims and demands for their rights and interests.[1] While being a very powerful mechanism of erasing out the bargaining differences between the employers and employees, the abuse of this supposed right would and could have very serious repercussions on the country. The frequency of strikes in Sri Lanka has brought about public fury as employees, mostly in the public sector, have resorted to this method for making claims and demanding for their rights and interest. The public outraged is so immense that there have been many instances where people actively engaged in strikes have come under threats and violence from the general public at large. While strikes have become the most powerful tool available for trade unions, it has also become one of the most hated actions by the public at large. In this backdrop, it becomes important to investigate upon the right to strike by the employees.

Historical Developments

As late as 1921, the prevalent view was that action of strikers was prima facie actionable and therefore, required justification, which is to be secured by the standard of public policy. The use of the strike grew and developed along with the union movement.[2] It is generally

[1] S.C. Srivastava, *Industrial Laws and Labour Relations* (6th Edn Vikas Publishing 2012)

[2] Sidney J Watts, 'The Right to Strike' (1948) 9 U Pitt L Rev 243

recognized that the strike has been and still is labour's most significant and powerful industrial weapon or device to materialize its objectives or to effectuate union-management policies. The workers usually strike if their collective bargaining activities fail to result in adequate or satisfactory wages, hours and conditions of employment. They do not quit their jobs permanently but cease to work until their demands are satisfied or until circumstances force them to return to their jobs.[3] Trade union leaders have sought (with uneven success) to incorporate strikes into their strategies, and democratic lawmakers have sought (again, with uneven results) to incorporate them into laws and public policies. Historically strikes have expressed an irritation, a refusal to work, a spontaneous revolt against what are deemed to be unacceptable employment conditions.[4] Employees' right to strike is an essential component of their right to freedom of association, and one of the weapons wielded by trade unions when collective bargaining fails. Strike action is the most visible form of collective action during labour disputes and is often seen as the last resort of workers' organisations in pursuit of their demands.[5] The right to strike can be considered from several points of view. From a socio-economic point of view, the strike action can be justified on principles of equilibrium, autonomy or freedom to work.[6]

The International Labour Organization is a United Nations agency which is devoted to promote social justice and internationally recognized human and labour rights, pursuing its founding mission that social justice is essential to universal and lasting peace[7]. It may be surprising to find that the right to strike is not set out explicitly in ILO Conventions and Recommendations. It has been discussed on several occasions in the International Labour Conference during preparatory work on instruments dealing with related topics, but for various reasons this has never given rise to international standards (Conventions or Recommendations) directly governing the right to strike. A review of the actions of the International Labour Conference (ILC), the Governing Body, the Committee on Freedom of Association and the Committee of Experts does not produce one explicit statement proclaiming that workers have a right to strike. Nor is there an express statement in the two Conventions dealing with Freedom of Association, Convention No. 87 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). While the lack of an explicit, declarative statement is not conclusive regarding the existence of such a right, it does necessitate an inquiry to determine whether a right to strike exists and if so, to identify its origins.[8]

Constitutional Framework of Trade Unionism

Form a Sri Lankan perspective, the **1978 Constitution**[9] recognizes the right to form and join trade unions under **Article 14 (1) (d) of the Constitution**. This right is associated with the freedom of association which is enshrined under **Article 14 (1) (C)** of the Constitution and both rights are inseparable from one another.[10] It is worth

[3] Walter L Daykin, 'The Right to Strike' (1955) 6 Lab LJ 361

[4] Jean-Michel Servais, 'ILO Law and the Right to Strike' (2009) 15 Canadian Lab & Emp LJ 147

[5] Ernest Manamela and Mpfari Budeli, 'Employees' Right to Strike and Violence in South Africa' (2013) 46 Comp & Int'l LJ S Afr 308

[6] J. Y Claasen, 'The So-Called Right to Strike' (1983) 46 THRHR 32

[7] International Labour Organization, 'Mission and impact of the ILO' <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> accessed on 10.11.2019

[8] Janice R Bellace, 'The ILO and the Right to Strike' (2014) 153 Int'l Lab Rev 29

[9] Constitution of the Democratic Socialist Republic of Sri Lanka

[10] J. Wickramaratne, *Fundamental Rights in Sri Lanka* (2nd Edn Stamford Lake 2013)

recalling exactly why we ask about the connection between the right to strike and the fundamental right to freedom of association. If there is no such link, it does not of course pull the rug from under the right to strike. It does mean, however, that without this or another equally robust connection to a constitution or other source of basic rights, the entitlement to strike will be on a short leash.[11] However, from the wording of the Constitution we can neither directly assert nor deny whether there is a right to strike *per se* guaranteed by the Constitution. A liberal interpretation of the Constitution[12] should mean that, if there is a right to form and join trade unions, those who belong to such an association should also be granted with the rights, duties and responsibilities which are by law and customs would be attached to such associations. The law governing trade unions are to be found in the **Trade Unions Ordinance No. 14 of 1935. The Industrial Dispute Act No. 43 of 1950** has also made some provisions which are relevant to trade unions and it has some provisions regarding strikes as well.

S. R. De Silva[13] opines that, the right to strike is one of the most fundamental rights enjoyed by the employees and their unions, and it is an integral part of their right to defend their collective economic and social interest. Employees used to stop work when their claims and demands were not met by their employers. The cession of work was used to coerce the employer to accept the claims and demands of the employees. The employers in the days gone by vehemently rejected this attitude and method of the employees in trying to win their claims and demands, and therefore, employers often repudiated the employment contracts which were drawn with these striking employees as a counter measure to stop them from carrying any further. However, that was later stopped and trade unions managed to stop this practice of repudiating employment contracts.[14]

What is a Strike

A strike is defined as 'the cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are, or have been so employed, to continue to work or to accept employment' under the Section 2 of the Trade Union Ordinance. However, it is to be mentioned that, a mere cessation of work does not constitute a strike and this was emphasized in the case of *Tata Iron and Steel Co. v Its Workmen*[15].

The above definition recognizes that it shall be an act done in combination and the use of the word concerted indicates that the act must be planned, arranged, adjusted or agreed on and settle between the parties acting together pursuant to some design or scheme.[16] In addition to this, the judicial decisions has clearly pointed out that, the time duration of a strike is immaterial in deciding whether there was a strike or not[17] and refusing additional work which an employer cannot legally require an employee to do[18], has not been considered as a strike.

In Western nations, a worker's power to strike has been interpreted in two ways: the right to strike or the freedom to strike.

[11] Sheldon Leader, 'Can You Derive a Right to Strike from the Right to Freedom of Association' (2009) 15 Canadian Lab & Emp LJ 271

[12] See, ***Visuavalingam and Others v Liyanage and Others*** [1984] 2 Sri L R 123, where the Supreme Court held that, a meaningful interpretation of freedom of expression should also include a right to receive information as well.

[13] S. R. De Silva, *The Legal Framework of Industrial Relations in Ceylon* (1st End H.W. Cave Publishers 1973)

[14] S, Egalahewa, *A General Guide to Sri Lanka Labour law* (1st Edn Stamford Lake 2018)

[15] [1967] 1 LLJ 381

[16] R. Sen, *Industrial Relations: Text and Cases* (2nd Edn McMillan 2010)

[17] ***Buckingham and Carnatic Co. Ltd v. Their Workers***, [1953] 1 LLJ 181

[18] ***North Brooke Jute Co Ltd v Their Workmen***, [1960] 1 LLJ 17

For example, Article 57 of the Uruguayan Constitution stipulates that, "the strike is declared to be a right of trade unions." According to Article 59(2) of the Constitution of the Republic of Poland, "trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute". These are instances in which a right to strike has been specifically recognized. On the other hand, when we speak of a freedom to strike, it is about a negative right in the form of non-prosecution for conducting a strike as we find with the Sri Lankan legal system where there is no right to strike *per se*.

The difference between the two interpretations is more than a superficial matter of semantics; each interpretation has vastly different implications in terms of how protections for strikers are translated into law. The first interpretation regards striking as a fundamental human right which must be protected by law.. The second interpretation treats the power to strike as an exemption from criminal or civil sanctions; the protection of strikers is expressed in immunities, in the withholding of state intervention.[19]

Strike as a Trade Union Action

The Sri Lankan legal framework pertaining to strikes takes the latter view in which persons who are taking part in strikes are given immunity from suite under **Trade Unions Ordinance**, where under **Section 26**, they are afforded immunity from suite for civil matters and **Section 27** provides for immunity from suite for tortuous acts. However, the above acts must be committed by or on behalf of the trade union in contemplation or in furtherance of a trade dispute. If the acts are not covered under the provision, both provisions will become inapplicable and hence the immunity will be lost. In addition to this, to be afforded with the immunity, the strike must be carried out thorough a registered trade union. If the association in question has failed to register as a trade union Section 25 declares that, such a 'trade' union shall not enjoy any of the rights, immunities or privileges of a registered trade union until it is registered'. Therefore, it could be argued that, since it is the trade unions, their officials and members who are given immunity from suite for carrying out or on with a strike, an association or a group of individuals who are not a part of a trade union would not be able to strike and be protected from such immunities granted in favour of trade unions. This can also be seen from the fact that certain individuals engaged in certain professions such as; judicial officers, members of the armed forces, police officers, prison officers and members of any corps established under the Agricultural Corps Ordinance are barred from forming trade unions and therefore, are also denied the right to strike.

The Industrial Dispute Act also refers to the term 'strike' where it declares that it shall have the same meaning as provided in the Trade Unions Ordinance. **Section 32(2) of the Industrial Disputes Act** requires that at least 21 days written notice be given, in the prescribed manner before the commencement of a strike in any essential industry. Any workman who contravenes the provisions of **Section 32(2)** and any person who incites a workman to commence, continue or participate in or do any act in furtherance of a strike in contravention of **Section 32(2)**, is guilty of offences as specified in **section 40(1) (d) and (n)** respectively. **Section 40(1) (f)** prohibits a workman who is bound by a collective agreement, a settlement under the Act or by an award of an arbitrator of an Industrial Court or of a Labour Tribunal from taking part in a strike with a view of procuring any

[19] Mayoung Nham, 'The Right to Strike or the Freedom to Strike: Can Either Interpretation Improve Working Conditions in China' (2007) 39 Geo Wash Int'l L Rev 919

alteration of the terms and conditions of that agreement, settlement or award. Similarly, it would be an offence in terms of Section 40(1) (fff) to take part in a strike with a view to procure any alteration of an order made by a labour tribunal in an application under section 31 B. Section 40(1) (m) prohibits a strike after a dispute has been referred for settlement, by arbitration to an arbitrator to an industrial court or by adjudication to a labour tribunal.

A Right to Strike

While a general right to strike has not been recognized under the existing laws, Courts have on many instances have recognized a general right to strike. In the case of Rubber *Company Ltd v Labour Officer Colombo*[20] the Court held that, the Industrial Disputes Act recognizes a basic right of workman to commence and to participate in a strike to express their grievances and to win their demands subject to restrictions and prohibitions specifically laid down. In the case of *Abbosally, Former Minister of Labour v Vocational Training and Others*[21] it was held that, the workers had a right conferred on them to launch a legitimate strike. The right to strike has been recognized by necessary implication in the industrial legislation in Sri Lanka and there are numerous express statutory provisions providing for the regulation of strikes. It is, thus a recognised weapon for the workmen to resort to in asserting their bargaining power and for promoting their collective demands upon an unwilling employee. In addition to this, it was made clear that, even a probationary employee has a right to strike and this was made clear in the case of *Ceylon Mercantile Union v Ceylon Cold Stores Ltd and Another*[22] where the court held that, a probationer has as much a right to strike as a confirmed workman and the proper exercise of that right cannot place the probationer in jeopardy insofar as the employer's right to terminate his services during the period of probation is concerned.

Conclusion

From the above it is evident that, in Sri Lanka, there is freedom of strike rather than right to strike which is not directly recognized as a right *per se*. However, the governing legal framework is enough to afford protection for those who do get engaged in strikes through a combination of statutory provisions and decided case law.

[20] [1990] 2 Sri L R 42
[21] [1997] 2 Sri L R 137
[22] [1995] 1 Sri L R 261