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Methods of Trade Union Action: Part I — The Right to Strike, its Consequences and Some Problems in the Public Service

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IN this three-part study, the different methods adopted by trade unions in industrial warfare and the reception accorded them by different industrial relations systems with particular reference to Ceylon, will be analysed. Trade Union action was originally restricted to the strike weapon, but with the emergence of trade unions as powerful bodies capable of exerting economic, social and political pressures, other forms of trade union action have developed. Just as in the case of the strike weapon, so also in the case of these other forms of trade union action, the reception accorded to them in different countries has varied. But the earliest, and perhaps the most effective of all these types of trade union action and the one that has been accorded the widest recognition, is the strike.[1]

The Right to Strike:

The right to strike is the most fundamental of all the rights enjoyed by employees and their trade unions, and is an integral part of their right to defend their collective economic and social interests. The right generally follows from the right of workers to organize for trade union purposes and the right to bargain collectively. Both these rights are protected by the right to strike. For instance, the right to strike provides some guarantee that employers will bargain in good faith with organisations of workers. The justification for the right to strike is to be found in part in the fact that it is the one weapon which can correct the unequal bargaining position between employer and employee. That is why a strike in breach of a collective agreement, as opposed to an individual contract of employment, cannot claim the same justification. On the whole, parties to collective agreements as distinct from individual contracts of employment bargain more or less on an equal footing; that is why the tendency today is to restrict the right to strike rather than enlarge it. It follows that there is less justification for granting the right to strike against terms and conditions of employment which have been contracted for on an equal footing than where there has been a patent lack of equality in the bargaining positions of the parties. Like most rights, the right to strike is never absolute, and limitations exist on the exercise of this right, the extent of these limitations varying from country to country. The reasons for these varying limitations are also not always the same. Limitations may stem from different political ideologies, from the fact that suitable alternative methods for the settlement of industrial disputes exist and the different stages in the development of the various countries. As stated by *Wilfred Jenks*:[2]

1. The purpose of this article is to examine the right to strike and some of its more important legal consequences, and to highlight some of the problems which arise in the public sector in regard to strikes.
2. *The International Protection of Trade Union Freedom* (Stevens—London, 1957) p. 359.

> 'The right to strike, subject to regulation by law, is proclaimed by the Inter-American Charter of Social Guarantees but has not otherwise found expression in any formal international text. The concept is indeed a political and economic rather than a legal one, and although it is now expressed in many national constitutions, particularly in Latin America, it is difficult to express it in an appropriate legal form. Any such expression of it almost inevitably tends either to be so absolute as to overlook necessary qualifications or to be so qualified as to lose most of its value as a statement of rights. Such legal recognition may also tend to place a premium on industrial conflict rather than on the settlement of industrial disputes by negotiation and other peaceful means.'

While the law in several countries expressly recognises the right to strike, in others strikes are totally prohibited.[3] In still others only certain types of strikes are prohibited or restrained, e.g. general strikes, stay-in-strikes, sympathetic strikes, strikes designed to inflict hardship on the community and/or to coerce the government. In some countries a strike the object of which is not the furtherance of a trade dispute within the industry concerned is prohibited. Strikes have been declared illegal when called by organisations which do not enjoy trade union status under the relevant law. Some legal systems require conformity with a certain proceedure if a strike is to be considered legal, e.g. the strike must be decided on by a certain proportion, or by a majority of the members, or the decision should be taken by secret ballot. Some legal systems, such as the Malayan, regard a strike as legal, but as a breach of contract justifying dismissal.[4] In Australia strikes have generally been considered to be against public policy and therefore illegal,[5] and it has been said:

> 'Whatever useful purpose may have been served by strikes in the past, a strike in this State today is a blow at the social as well as the industrial order'.[6]

In view of the existence of a system of compulsory arbitration in Australia, a strike is considered a 'repudiation of the system of industrial arbitration'.[7] In Canada, on the other hand, strikes are legal and in some provinces protected. The 'result of making a strike a legally protected activity is that all breaches of duty, as distinguished from breaches of discipline, such as absence without leave, neglect of job duties, and disobedience of orders, reasonably consequent on the strike, are withdrawn from the disciplinary power of the employer by statutory policy'.[8]

The Governing Body Committee of the International Labour Organisation on Freedom of Association has found that the following limitations which exist in various countries on the right to strike, do not infringe the freedom of association:

(1) Prosecution under the law for threats of intimidation.

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3. Ibid Ch. 17, Alfred Avins *Employees' Misconduct* (Law Book Company—Allahabad—1968) pp. 446-54.
4. *Ponnampalam Vs. Public Prosecutor*, Malayan Union Law Reports 224.
5. *R. Vs. Smith* (1918) 2 South Australian Industrial Reports pp. 1, 3.
6. Ibid.
7. *National Oil Proprietors Ltd. Vs. Australian Workers' Union* 52 Commercial Arbitration Reports 650.
8. Alfred Avins *Employees' Misconduct* (Law Book Company—Allahabad—1968 p. 452.

(2) A declaration as illegal a strike designed to coerce the government in regard to a political matter.

(3) Restrictions placed on the right to strike in essential services, (e.g. prior notice, etc.), provided there are satisfactory alternative arrangements for the redress of grievances.

The Right to Strike in England:

The right to strike has not been expressly recognised in English law, and legal recognition has been given to strikes in the form of certain immunities granted by legislation to strikers and their trade unions.[9] The law exhibits the dominant characteristic of modern British labour law, which, Kahn-Freund[10] has said is abstention as far as possible from control of industrial relations. The Contracts of Employment Act (1963) defines a strike as a—

> 'Cessation of work by a body of persons employed acting in combination, or a concerted refusal or a 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 any person or body of persons employed, to accept or not to accept terms or conditions of or affecting employment'.

With the passing of the Conspiracy and Protection of Life and Property Act (1875), strikes were protected from the criminal law and peaceful picketing was legalised. This, however, did not protect trade unions from tortious liability since a trade union official inducing workers to go on strike may be guilty of the tort of inducing a breach of contract by the strikers. Thus when in the *Taff Vale Case*[11] trade unions were held liable in damages for the tortious acts of their members, the strike weapon was rendered ineffective and the very existence of trade unions threatened. As a result of widespread agitation, the Trade Disputes Act (1906) was enacted conferring immunity on trade unions in respect of torts and protecting them from a civil action for conspiracy. The resulting position is that today strikes in England in furtherance or in contemplation of a trade dispute are legally protected, in the sense that a strike is neither a crime nor a tort.[12] Thus the Royal Commission on Trade Unions and Employers' Associations (1965-68)[13] thought it unnecessary to grant by statute the right to strike in express terms.

Certain restrictions, however, exist in England in regard to the right to strike. The armed forces and the police do not enjoy the right to strike. Certain restrictions may be imposed in times of emergency under the Emergency Powers Act (1920). Under the Conspiracy and Protection of Life and Property Act (1875) a person who breaks his contract of employment wilfully and maliciously, knowing that the probable consequences of so doing either alone or in combination will be to endanger human life or cause serious bodily injury,

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9. There have, however, been certain judicial dicta recognising the right to strike. Thus Lord Wright in *Crofter Handwoven Harris Tweed Company Vs. Veitch* (1942) Appeal Cases 435 at 463 has said: 'Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of the men to withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining'.
10. Labour Law in *Law And Opinion In The 20th Century* Ed. Ginsberg, 1959, p. 215.
11. 1901 Appeal Cases 426.
12. *Rookes Vs. Barnard* 1964(1) All England Reports 367.
13. Paragraphs 928-935. Hereafter this Report will be referred to as The Royal Commission.

or expose valuable property to destruction or serious injury, is liable to be prosecuted. Further, persons employed in a gas or water supply undertaking are made liable to prosecution for wilfully and maliciously breaking their contracts of employment, knowing that their action will deprive consumers wholly or to a great extent of their supply. This provision was extended in 1919 to electricity undertakings, while the Fire Service Act (1947) made it an offence for a fireman to disobey or refuse to obey an order. All these provisions apply only where there is a breach of a contract of employment, and not where the employees have given notice of strike. Under the Merchant Shipping Act (1894) seamen involved in a strike while the ship is on the high seas or calling at a foreign port during a voyage, may be considered guilty of combining to disobey lawful commands, this being a criminal offence.

The Right to Strike in Ceylon:

The only statutory definition of a strike in Ceylon is to be found in the Trade Unions Ordinance (1935), which defines a strike 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'.

This follows the definition in the now repealed English Trade Unions Act of 1927. Section 47 of the Industrial Disputes Act (1950) states that the term 'strike' shall have the same meaning as in the Trade Unions Ordinance.

Though the right to strike is not expressly conferred by statute, the same result as in England is reached by giving protection in respect of strikes in contemplation or in furtherance of a trade dispute against a civil action for inducing breach of contract, torts and crimes.[14]

In Ceylon, too, the right to strike is not absolute and the following restrictions exist:

(1) A strike in an essential industry must be preceded by a written notice in the prescribed form of the intention to commence the strike, and such notice must be given to the employer at least 21 days before the date of the commencement of the strike.[15] Any workman who contravenes this provision is guilty of an offence[16] and any person who incites a workman to commence, continue or participate in, or to do any act in furtherance of a strike in contravention of this provision is guilty of an offence.[17]

(2) Any person, who, being bound by a Collective Agreement or by a Settlement under the Industrial Disputes Act or by an award of an Arbitrator or an Industrial Court and being a workman or a person other than a workman, incites or induces a workman to strike or to discontinue employment or work, with a view to procuring the alteration of any of the terms and conditions of such Agreement, settlement or award, is guilty of an offence.[18]

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14. See Sections 26, 27 and 29 of the Trade Unions Ordinance (1935).
15. Industrial Disputes Act 1950 as amended, Section 32(2).
16. Ibid. Section 40(1) (d).
17. Ibid. Section 40(1) (n).
18. Ibid. Section 40(1) (e).

(3) Any person who participates in a strike or discontinues employment or work in the circumstances set out in (2) above is guilty of an offence.[19]

(4) Any person who participates in a strike or discontinues employment or work with a view to procuring the alteration of any order made by a Labour Tribunal is guilty of an offence.[20]

(5) A workman who commences, continues or participates in, or does any act in furtherance of a strike in any industry after an industrial dispute in that industry has been referred for settlement to an Industrial Court, or an Arbitrator, or a Labour Tribunal, but before an award in respect of such dispute has been made, is guilty of an offence.[21] A person who incites a workman to strike in the above circumstances is also guilty of an offence.[22]

(6) Members of the Police, Prisons and Armed Forces have no right to strike.

(7) The Public Security Act No. 25 of 1947, as amended by Act No. 22 of 1949, No. 34 of 1953 and No. 8 of 1959 is intended to preserve public order and maintain supplies and services essential to the community. The Prime Minister is empowered to call out the armed forces and declare certain services essential if circumstances arise endangering the public security. It is an offence for any person engaged in an essential service to refuse to work or to obstruct a person carrying on his service, or to incite a person to depart from his employment, but the cessation of work in consequence of a strike by a registered trade union in pursuance of an industrial dispute is not an offence.

The only illegal strikes in Ceylon are strikes in violation of the above provisions and strikes the objects of which are illegal under the common law.[23] A strike without notice is not illegal in Ceylon, except in essential industries or where notice is required to be given by collective or other agreements.[24]

The Effect of a Strike:

(*a*) *On the Contract of Employment.* In English common law the right to strike is dependent on each individual employee's right to terminate his or her contract of employment by giving notice to the employer. Such notice is a unilateral act in the sense that its legal effectiveness is not dependent on the employer to whom the notice is given.[25] The legal effect of giving due strike notice is to sever the employment relationship between the striking employees and their employer,[26] and, on the conclusion of the strike the strikers, in strict legal theory, offer themselves for re-employment. English

19. Ibid. Section 40(1) (b).
20. Ibid. Section 40(1) (fff).
21. Ibid. Section 40(1) (m).
22. Ibid. Section 40(1) (o).
23. *The United Engineering Workers' Union Vs. Ocean Foods & Trade Ltd.*, Ceylon Government Gazette 14,789 of 16th February 1968.
24. Ibid. Though not expressly conferred by statute, the right to strike has been recognised by labour courts in Ceylon. For cases see the text at footnote 65.
25. *Riordan Vs. War Office* (1959) 1 Weekly Law Reports 1046 at 1054, affirmed by the Court of Appeal in (1961) 1 Weekly Law Reports 210.
26. *Rookes Vs. Barnard* 1964 Appeal Cases 1129 at 1218-19, 1237; *Stratford Vs. Lindley* 1965 Appeal Cases 269 at 306-7.

law does not recognise the suspension of a contract of employment in such a situation, since a suspension of a contract of employment must be concensual. As it has been well stated by *Cyril Grunfeld*:[27]

> 'Effective notice terminating the contract of employment may be given by one side only at common law, but to suspend the employment contract the common law requires that both contracting parties must agree; in other words, while a terminating notice may be unilateral, suspension of a contract must be concensual'.

English law has still not accepted the suggestion that there is an implied term in every contract of employment that an employee can unilaterally suspend the contract by giving notice of strike.[28] The notion of suspension unilaterally has been expressed by Donovan L.J. and Lord Devlin in *Rookes Vs. Barnard*[29] and by Lord Denning in *Stratford Vs. Lindley*.[30] According to Lord Denning:

> 'Suppose that a trade union officer gives a 'strike notice'. He says to an employer: 'We are going to call a strike on Monday week unless you increase the men's wages by £ 1 a week'—or 'unless you dismiss yonder man who is not a member of the union'—or 'unless you cease to deal with such and such a customer'. Such a notice is not to be construed as if it were a week's notice on behalf of the men to terminate their employment, for that is the last thing any of the men would desire. They do not want to lose their pension rights and so forth by giving up their jobs. The 'strike notice' is nothing more nor less than a notice that the men will not come to work. In short, that they will break their contracts'.

This problem was examined by the Royal Commission,[31] which thought that the creation by statute of a unilateral right to suspend the contract of employment should not be introduced without a thorough examination of the entire problem and its consequences by an expert Committee. They pointed out that a law recognising suspension would face the following, among other, problems. Would it apply to all strikes whether official or unofficial, to go-slow, to strikes without notice and to strikes where some notice has been given though less than the notice required for termination of the contract? The problem arises as to whether it would apply to essential services, whether this affects the employer's right to take disciplinary action against strikers in certain circumstances, and if attempts at settlement fail, upon what event would the suspension of the contract cease and be replaced by termination. The Commission further thought that in many cases the intention of the striker is precisely to give notice of termination of his contract (para 948) 'even though he remains ready to conclude another on terms more favourable to him; and the employer has no choice but to accept the situation that the old contract is at an end, however much he may wish to retain his employee's

27. *Modern Trade Union Law* (Sweet & Maxwell, London, 1966) p. 331.
28. See also Garcia-Nieto in The Right To Strike: Some Moral and Sociological Factors Reconsidered in *Industrial Relations: Contemporary Issues* Ed. B.C. Roberts (Macmillan, London, 1968). French and Italian Law have accepted this concept.
29. (1963) 1 Queen's Bench at pp. 682-3 (Court of Appeal) and 1964 Appeal Cases at 1204 (House of Lords). In point of fact the statements in this case are not helpful on this matter and the suggestion is more implied than expressed.
30. 1965 Appeal Cases at p. 285.
31. On this whole question see paragraphs 936-952.

services. He can do this only by entering into another contract on new terms'. The views regarding suspension of the contract in the cases cited earlier proceed on the basis that since the industrial intention of the striker is to suspend the contract, a notice of strike is a notice of an intention not to work in breach of a subsisting contract. Hence, the combination of the views that on the one hand a strike notice does not terminate and on the other such notice is invalid in law to suspend leads to the conclusion that every strike is a breach of contract, so that in strict law there is no right to strike. Foreseeing, perhaps, these dangers, Lord Denning in *Morgan Vs. Fry* (1968) has said that when due strike notice is given an agreement must be implied by both parties to suspend the contract, while Davies L.J. thought, further, that due strike notice may terminate the contract of employment with an offer to continue on different terms.

The Contracts of Employment Act (1963) requires every employee other than civil servants, merchant seamen and dock workers, to give, after 26 weeks' continuous service, at least 7 days' notice if he wishes to terminate his contract of employment. But this minimum period may often be longer, as in cases where the contract of employment itself or a collective agreement stipulates the period of notice. The Act, by making strikes in breach of contract break the continuity of employment, indirectly discourages strikes. This does not, however, preclude parties from agreeing that strikes in breach of contract do not affect continuity of service.

Where employees strike in breach of their contracts of employment, which occurs either because due notice has not been given or their action is contrary to a 'no-strike' clause in an agreement,[32] the strike is unlawful, and the employer has two civil remedies open to him:

(*a*) to treat the action of the employees as a fundamental breach of contract and, therefore, a repudiation of the relationship of employer and employee,

(*b*) an action for damages against each of the strikers for breach of the individual contract of employment.[33]

In strict legal theory, then, the employer need not re-employ the striking employees on the conclusion of the strike. Whether the employer would be able to do so would depend on his relative strength as compared with the union. The law does not help the worker. But even in England industrial practice does not regard a strike as terminating the contract of employment.[34]

Many other legal systems regard a strike as only suspending the contract of employment. Thus for Australia Edward I. Sykes[35] says:

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32. In India a strike in violation of a no-strike agreement between a union and employer is illegal—*Deshpande Vs. Ferro Alloys Corporation* All India Reports 1964 Andhra Pradesh 471. In Ceylon, as we have seen, a strike in violation of a collective agreement is illegal.
33. For the basis on which damages are awarded see *National Coal Board Vs. Galley* (1958) 1 Weekly Law Reports 16, for a discussion of which see Cyril Grunfeld, *Op. Cit.* pp. 325-8. It need hardly be said that such an action is impractical.
34. Cyril Grunfeld, *Op. Cit.* pp. 322, 333.
35. *Strike Law in Australia* (1960) p. 57.

> 'A strike does not of itself break the employment nexus, though if the striking employees do not give the requisite notice of termination of their services they commit a breach of contract in striking. On the other hand a combination which would otherwise amount to a strike does not cease to be such merely because the men give notice of termination of their individual contracts of service . . . The only effect of the giving of notice is that the strikers cannot be sued individually for breach of contract'.

In India, too, the view is that a strike does not automatically sever the employment relationship.[36] If the strict English view is applicable in Ceylon it would be followed by the ordinary courts of the land. But in Ceylon the Industrial Disputes Act (1950) has established several bodies to determine industrial disputes and termination of employment, and these bodies are not bound by the common law of master and servant. As stated by Lord Devlin in *United Engineering Workers' Union Vs. Devanayagam*:[37]

> 'It is commonplace that with respect to industrial relations the common law of master and servant has fallen into disuse. Disputes about conditions of employment are not usually settled by the Courts in accordance with the terms, express or implied, of the contract of service. Trade unionism could no doubt have used its increased bargaining power to obtain more realistic and elaborate contracts of service within the framework of the old common law, but it preferred to use it to seek advantages irrespective of contract and enforceable not by legal machinery but by the threat of the strike. The law has therefore had to make a new entry into the field of industrial relations. It has had to start again from the beginning, and, as in the field of international relations, has had to make its way in by formulating methods of securing the peaceful settlement of disputes'.

Therefore, labour courts in Ceylon have held that a strike which is not illegal does not terminate the relationship of employer and employee, notwithstanding anything to the contrary in any contract of employment or standing orders:[38]

> 'The modern view, however, as one gleans from a study of judgements, is even more emphatic inasmuch as the opinion of employment today is not so much one of contract of employment but a state of things: that is why even in the case of casual workers where the work done is continuous and the contractual engagement merely an habitual act and of repeated incident therein, it has been held that the refusal by such workers

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36. *Pioneer Match Factory Vs. Their Workmen* 1951(1) Labour Law Journal 43, *Punjab National Bank Ltd. Vs. Their Workmen* 1953 Labour Appeal Cases 1, *The Workers of Express Newspapers Ltd. Vs. Express Newspapers Ltd.* 1957 Labour Appeal Cases 75 at 87, 92, *Spencer & Company Ltd. Vs. Their Workers* 1956(1) Labour Law Journal 714 at 721, 727. So also *Cox & King's (Agent) Ltd. Vs. Their Employees* 1949 Labour Law Journal 796 at 803, 804: 'By striking work, the members withdraw from work but insist at the same time upon holding their jobs. This is an essential feature of the strike'. The fact that the strike is illegal does not alter this position—*Jairam Sonu Shogale Vs. New India Rayon Mill Company Ltd.* 1958(1) Labour Law Journal 28 at 29-30.
37. 69 New Law Reports 289 at 303-4.
38. *The United Engineering Workers Union Vs. Ocean Foods & Trade Ltd. Op. Cit.* The same view was taken in *Ceylon Press Workers' Union Vs. E. Chithambaram, Proprietor, Silver Crown Printers,* Ceylon Government Gazette 14, 818 of 5th September 1968 p. 546.

to accept a particular engagement legally constitutes a strike. Whether one treats employment as a contract or as a state of things the fact is clear that the relationship of the employer and employee does not altogether cease when a strike occurs, but remains in what may be described as a state of belligerent suspension'.

(*b*) *Employer's Right to Dismiss Strikers.* From the point of view of industrial relations, it is quite clear that a strike does not terminate the contract of employment. The English common law rule implies that the employer is under no obligation to re-employ the strikers. It is inconsistent to say on the one hand that a strike is a legitimate trade union weapon and on the other that the strike terminates the employment relationship. It is therefore a common feature in most industrial relations systems which expressly or impliedly recognise the right to strike that generally strikers are entitled to reinstatement on the conclusion of a strike. The industrial law in various countries differs to some extent as to the circumstances in which an employer is entitled to dismiss strikers participating in an illegal or unjustified strike. The position depends somewhat on the distinction between a justified, unjustified and illegal strike.

The difference between a justified and unjustified strike is a question of fact in each case.[39] The mere fact that the demands resulting in the strike are subsequently rejected by a Tribunal does not render a strike unjustified, unless the reasons for the demands are absolutely perverse and unsustainable.[40] In judging the justifiability of a strike, the fairness and reasonableness of the demands by the employees would be an important factor, but it would not be fair to view the problem exclusively from the standpoint of whether the employees had first exhausted other legitimate means to have their grievances remedied prior to embarking on a strike.[41] It is material to consider whether the demands in question were made with a view to improving conditions of service or were made with some other purpose in view.[42] A strike which is illegal cannot be justified.[43] Decisions in India have emphasized the necessity for bona fides of the demands made by the employees. Thus in *Ram Krishna Iron Foundry Vs. Their Workers*[44] the Labour Appellate Tribunal, having

39. *Swadeshi Industries Ltd. Vs. Their Workmen* 1960(2) Labour Law Journal 78 at 81 (Supreme Court).
40. *Bihar Fireworks & Potteries Workers' Union Vs. Bihar Fireworks & Potteries Ltd.* 1953(1) Labour Law Journal 49 at 52, *The United Engineering Workers Union Vs. Ocean Foods & Trade Ltd., Op. Cit.*
41. *National Transport & General Company Ltd. Vs. Their Workmen* (1956) 10 Factory Journal Reports 411.
42. *Western India Match Company Ltd. Vs. Wimco Mazdoor Union* 1957 Labour Appeal Cases 322, *The United Engineering Workers Union Vs. Ocean Foods & Trade Ltd. Op. Cit.* Thus strikes for reasons unconnected with employment--*Hyderabad Agricultural Cooperative Association Vs. Industrial Tribunal* 1961(1) Labour Law Journal 25, short strikes at repeated intervals to harass the management— *Kanyakaparameswari Groundnut Oil Mill Company Vs. Their Workmen* 1955(1) Labour Law Journal 561, justify dismissal. So also a purely sympathetic strike— *Rashtriya Mill Mazdoor Sangh Vs. India United Mills Ltd.* 1951(2) Labour Law Journal 242, *Caltex Ltd. Vs. Bhosak* 1956 (2) Labour Law Jl., 81.
43. *Indian General Navigation Railway Company Ltd. Vs. Their Workmen* 1960(1) Labour Law Journal 13, *Ceylon Bank Employees' Union Vs. Bank of Ceylon and The Commercial Banks Association* Industrial Dispute 306 Ceylon Government Gazette 13,170 of 22nd June 1962. *The United Engineering Workers Union Vs. Ocean Foods & Trade Ltd., Op. Cit. Quaere* the position where an illegal strike is entirely provoked by the conduct of the employer?
44. 1954 Labour Appeal Cases 73 at 76-7.

pointed out that reasonableness may be a misleading test since reasonableness may differ according to the employer's and employees' points of view, stated:

> '. . . bona fides would be a relevant and important factor. Thus when a strike is resorted to under the pretence of backing a current demand but with a real object of compelling the employer to re-open a demand which had already been settled by adjudication . . . or when it is resorted to frivolously and frequently, the dominating motive being to ruin the industry, the position would be different, and in cases of those types or others where extraneous considerations rule, the employer should have the right to dismiss a workman joining such a strike'.

In *The Hotel, Bakery and Beverages Workers' Union Vs. The Management of Sirisala Bakery and Hotels*,[45] the Arbitrator was called upon to decide, inter alia, whether the strike in question was justified. He concluded, from the fact that other avenues of settlement had not been exhausted and the strike was not the last resort, that the strike was unjustified.[46] A contrary view was taken in *The United Engineering Workers' Union Vs. Ocean Foods & Trade Ltd.* where it was held that a strike is not unjustified merely because it is availed of without resort to other legitimate means available for the settlement of the dispute. As pointed out by the Arbitrator, the existence of other means of settlement of disputes under the Industrial Disputes Act does not imply that the strike weapon should be availed of only as a last resort.

While the authorities in India are agreed that participation in an illegal strike is misconduct warranting some punishment, they are in conflict on the question whether mere participation justifies termination of or refusal to re-employ the strikers. The weight of authority favours the view that mere participation does not justify dismissal and for this purpose a distinction must be made between the passive participants in the strike and those who actually instigated it or were guilty of misconduct during the strike. Only the instigators and those guilty of misconduct are liable to dismissal.[47] According to the Supreme Court of India in *Indian General Navigation & Rly. Co. Ltd. Vs. Their Workmen*[48] if the standing orders provide for dismissal for participation in an illegal strike, it is open to an industrial tribunal to order reinstatement.[49] The principles relating to this matter were expressed in the following terms:

45. Ceylon Government Gazette 12,609 of 18th August 1961 p. 1756.
46. At paragraphs 18-22.
47. For the view that mere participation in an illegal strike justifies dismissal see *United Bleachers Ltd. Vs. Workers* 1959(2) Labour Law Journal 635, *Khan Vs. Kanpur Electricity Supply* 1958(1) Labour Law Journal 195, *Solar Works Vs. Their Workmen* 1958(1) Labour Law Journal 765, *Jairam Sonu Shogale Vs. New India Rayon Mills Company Ltd., Op. Cit., Shalimar Rope Works Ltd. Vs. Sethy* 1956(2) Labour Law Journal 123. For the contrary view see *Swadeshi Industries Ltd. Vs. Workmen* 1955 Labour Appeal Cases 265, *Osmanshahi Mills Ltd. Vs. Its Workmen* 1959(1) Labour Law Journal 187.
48. 1960(1) Labour Law Journal 13 at 26-7
49. Similarly, the Supreme Court of India in *Punjab National Bank Ltd. Vs. Their Workmen* 1959(2) Labour Law Journal 666, recognised that an industrial tribunal is empowered to reinstate strikers who have been dismissed for mere participation in an illegal strike. So also *Caltex (India) Ltd. Vs. Their Workmen* 1955(2) Labour Law Journal 693.

'To determine the question of punishment, a clear distinction has to be made between those workmen who not only joined in such strike, but also took part in obstructing the loyal workmen from carrying on their work, or took part in violent demonstrations, or acted in defiance of law and order, on the one hand, and those workmen who were more or less silent participators in such a strike. It is certainly not in the interest of the workmen themselves. An industrial tribunal, therefore, has to consider the question of punishment, keeping in view the overriding consideration of the full and efficient working of the industry, as a whole. The punishment of dismissal or termination of services has, therefore, to be imposed on such workmen as had not only participated in the illegal strike, but had formented it, and had been guilty of violence or doing acts detrimental to the maintenance of law and order in the locality where work had to be carried on'.

This decision was interpreted by the Supreme Court itself in *Bata Shoe Co. Vs. Ganguly*[50] to mean that where there is no provision in the standing orders regarding illegal strikes, the Tribunal's jurisdiction extends to the question of punishment, but where provision is made in the standing orders for dismissal for participation in an illegal strike and a proper inquiry has been held, dismissal is justified. It is respectfully submitted that this decision is against the weight of authority in India. In any event, it would have no application in Ceylon[51] since, unlike in India, the jurisdiction of the courts established under the Industrial Disputes Act always extends to the question of punishment and is not limited to the four situations enumerated in *Buckingham & Carnatic Mills Ltd. Vs. Its Workmen.*[52] Dealing with the circumstances in which an employer may dismiss participants in an unjustified strike, the Tribunal in *Ram Krishna Iron Foundry Vs. Their Workers*[53] held that:

(1) a workman cannot be dismissed for joining a strike which is not illegal but which is simply unjustified;

(2) the employer, however, will have the right to dismiss a workman joining an unjustified strike—

  (*a*) when the strike itself was not bona fide;

  (*b*) when it was launched on other extraneous considerations and not solely with a view to better the conditions of labour.

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50. 1961(1) Labour Law Journal 303 at 310-11. The view that participation in an illegal strike may warrant dismissal if provided for in the standing orders was taken in *Ram Krishna Iron Foundry Vs. Their Workers* 1954 Labour Appeal Cases 73 at 75. See also *Model Mills Ltd. Vs. Dharamdas* All India Reports 1958 Supreme Court 311.

51. *The Ceylon Workers' Congress Vs. The Superintendent, Kallebokke Estate* 63 New Law Reports 536 at 539-42.

52. 1952 Labour Appeal Cases 490. The *Indian Navigation Case* was followed in *I.M.H. Press Vs. Additional Industrial Tribunal* All India Reports 1961 Supreme Court 1168 at 1170.

53. 1954 Labour Appeal Cases 73 at 78. The Tribunal further held that the propriety of the dismissal must be left to the Tribunal without the limitations in the *Buckingham & Carnatic Mills Case.* See also *Mill Mazdoor Sabha Vs. Swastik Textile Mills Ltd.* 1966 Industrial Court Reporter 327.

This decision was followed by the Labour Appellate Tribunal in *Spencer & Co. Ltd. Vs. Their Workers*[54] where the strike was held to be unjustified and the employer was therefore free to dismiss the strikers. The Tribunal concluded that the strike was not bona fide since the demands themselves were excessive and unreasonable, the workers sought to re-agitate matters that were already settled and the strike was commenced inspite of the employer's willingness to settle the matters by negotiation. Where the strike is not the result of an unfair labour practice by the employer, it is open to an employer to recruit new employees to carry on his business.[55]

Notwithstanding the conflict of authority on the question of an employer's right to dismiss strikers for mere participation in an illegal strike, the position appears to be reasonably clear since the decision in the *Indian General Navigation & Rly. Co. Case* has been followed by the Supreme Court itself in *I.M.H. Press Vs. Add. Ind. Trib.*[56] notwithstanding *Bata Shoe Co. Vs. Ganguly*.

In Ceylon the weight of authority is in favour of the view that where a strike is illegal or unjustified the employer can replace the strikers with new employees and is under no obligation to employ the strikers on the termination of the strike. Thus in *Nidahas Karmika Saha Velanda Sevaka Vurthiya Samithiya Vs. Martinus C. Perera & Sons*[57] the Industrial Court held that the strike was unjustified and that the strikers were not entitled to reinstatement.

In the *All Ceylon Commercial and Industrial Workers' Union Vs. Asbestos Cement Industries Ltd.*[58] the cause of the strike was the dismissal of the vice-president of the branch union and the issue of show cause notices to twenty one workers. During the strike the Company put up a notice calling on the strikers to return to work by a certain date, failing which they would be considered to have vacated their posts. None of the strikers returned to work, whereupon the Company recruited new labour including some who were on strike. The Industrial Court held that the strike was unjustified and that the non-employment of the strikers was justified.[59] The view that an employer is entitled to dismiss employees who engage in an unjustified strike was upheld in *The Eksath Engineru Saha Sāmanya Kamkaru Samithiya Vs. The Municipal Council, Nuwara Eliya*:[60]

54. 1956(1) Labour Law Journal 714 at 723-4. See also *Caltax (India) Ltd. Vs .Their Workmen* 1955(2) Labour Law Journal 693 at 700.
55. *Spencer & Company Ltd. Vs. Their Workers, Op. Cit.* at p. 729, following American law. For the position in the United States of America see Ludwig Teller *Labour Disputes And Collective Bargaining* (Baker, Voorhis & Co., New York, 1940) Vol. II Section 318. *cf.* also on this point *Nidahas Karmika Saha Velanda Sevaka Vurthiya Samithiya Vs. Car Mart Ltd.* Industrial Dispute 146 Ceylon Government Gazette 11,846 of 4th September 1959 paragraph 3: 'During a strike, the members of a Union are authorized to picket the premises and persuade the employees from entering the premises. They have no right whatever to block the doors or gates, thereby preventing other employees from entering the premises although they might wish to do so'.
56. All India Reports 1961 Supreme Court 1168.
57. Industrial Dispute 115 Ceylon Government Gazette 11,752 of 29th May 1959 at paragraphs 18 and 19.
58. Industrial Dispute 166 Ceylon Government Gazette 12,073 of 4th March 1960.
59. Paragraphs 18 and 19.
60. Industrial Dispute 191 Ceylon Government Gazette 12,176 of 5th August 1960.

'In our opinion the strike of the 10th June was legal but unjustified and the strike of the 12th June unjustified, and we hold that the Council has every right to dismiss the workers who have been proved guilty of misconduct'.

A similar decision was reached in *All Ceylon Commercial & Industrial Workers' Union Vs. The Ceylon Glass Co. Ltd.*,[61] where the Industrial Court held:

'The management of a company whose employees are on strike is not obliged to cease the conduct of its business. It has the right to employ others to take the place of the strikers. It has been held in the case of Spencer and Company vs. Workers, 1959, *I. Labour Law Journal*, page 67, that where any company employs others during a strike and it is held that the strike is not justified the previous employees are not entitled as of right to be reinstated.

In the present case we find that both the Company and the Union have not acted in the best interests of industrial peace. We have therefore to consider what decision is fair and reasonable considering all the circumstances of this case. It has been reported that the new employees who were engaged after the strike had been employed on a permanent basis. They have worked satisfactorily and the production of the Glass Factory is higher than before the strike. The Company might be adversely affected if these good employees are discontinued and their places taken by the old employees who would have bitter feelings against the Company and specially against the Production Manager. We consider in these circumstances we should not order reinstatement of the employees but we consider that the employees are entitled to some measure of relief'.

The Court awarded two months' wages.

In *Ceylon Mercantile Union vs. The Associated Newspapers of Ceylon*[62] the problem that arose was different, in that during the strike the Company had reorganized its business. The Court held that the termination of the services of the employees who failed to turn up for work inspite of a request to do so after an unjustified strike and where the Company had reorganized its business and employed new permanent hands was held to be justified in the circumstances. The Company had dismissed an employee who habitually absented himself from work notwithstanding repeated warnings. His dismissal was held to be justified. The strike was the result of the Company's refusal to re-employ him on the undertaking given by the Union that it would ensure his regular attendance in future. During the strike the Company called upon the strikers to return to work and on their failure to do so employed new hands. It was held that the strike was unjustified (various acts of mischief had been committed by the strikers e.g. sabotage of machinery) and that the workers were not entitled to reinstatement. The position of the Company was that since the strike, it had reorganized and rationalised its business,[63] e.g. reduced the number of editions of its newspapers. The Court directed that those of the strikers who were not re-employed should be treated as retrenched and paid two and a half months' salary. The Court referred to the Express Newspapers Case in India, to certain passages in Ludwig Teller and proceeded to say:

61. Industrial Dispute 284 Ceylon Government Gazette 12,681 of 29th September 1961, especially paragraphs 25 and 26.
62. Industrial Dispute 252 Ceylon Government Gazette 12,508 of 7th July 1961.
63. See paragraph 16.

> 'We would also invite attention to I.D. 166 where the problem was similar. The strike was held to be unjustifiable and the question was whether the Company should be compelled to reinstate the strikers when it had taken in new employees to carry on its business. It was held that the Company should not be compelled to and that the non-employment of the strikers was justified. We hold that in the circumstances of this case too, the Company should not be compelled to reinstate the workers whose cases we are dealing with and that their non-employment is justified'.

These decisions, except perhaps the Associated Newspapers Case, were influenced by Indian decisions which themselves have not been consistently followed in India. In the Associated Newspapers Case and, to a lesser extent in the Asbestos Cement Industries Case, the element of re-organization was a determining factor on the question of the re-employment of the strikers. Therefore, it is uncertain whether the same conclusion would be reached in the future in the absence of this circumstance. In fact, two cases have followed the later Indian view. In the *Hotel, Bakery & Beverages Workers' Union Vs. The Management of Sirisala Bakery & Hotels*[64] it was held that mere participation in an unjustified strike does not justify the dismissal of the strikers:

> 'The question might well be asked whether reinstatement should be considered in the case of those workers who had participated in an unjustified strike. The circumstances that they were members of the Union, and that they were obliged to toe the line with the leaders—rebels or not—for the sake of Union solidarity, explains their position, and presupposes their innocence. It must be mentioned that the mere participation in a strike, whether justified or not, is no reason for the termination of the services of a workman'.

Similarly, in *United Engineering Workers' Union Vs. Taos Ltd.*[65] the Industrial Court took the view that:

> 'When an employee participates in a strike he is using a fundamental right. He does not commit any offence when he takes part in a strike and an employer is not justified in dismissing a worker merely because he absents himself in furtherance of a strike. Action against a striker could be taken by an employer only when the strike is illegal and totally unjustified or when a striker commits misconduct by assaulting or threatening workers or by damaging the property of the employer. This question has been discussed in a number of cases in India. Several cases have been cited including Smith Stanistreet Company vs. Workers' Union reported in 1953, *I Labour Law Journal*, 67, and Caltex vs. Its Workers reported in 1955, *II Labour Law Journal* page 693. I consider that the management acted unreasonably in refusing to allow the employees to return to work on December 30th, and that their action amounted to an unfair labour practice. It is clear that the Company had very little work to give its employees and the management appears to have taken this opportunity to get rid of its employees without paying them any relief'.

64. Ceylon Government Gazette 12,609 of 18th August 1961 p. 1756 at paragraph 32.
65. Ceylon Government Gazette 12,662 of 15th September 1961. This award was quashed by the Supreme Court in *Taos Ltd. Vs. Fernando* 65 New Law Reports 259, but on a different point.

In view of the fact that the Company would have to close down in the near future, the Court awarded, in lieu of reinstatement, two months' salary to each of the employees as compensation.

In *The United Engineering Workers' Union Vs. Ocean Foods & Trade Ltd.* the question was considered as to whether a claim for reinstatement by strikers should be refused on the ground that they had committed acts of misconduct during the strike. The Arbitrator stated:

> 'It has been held in a number of cases decided by Industrial Tribunals that assault incidents should not come into the picture when as a whole the question of relief is considered in the case of a strike. While the Company will be free to take disciplinary action against those individuals as have been guilty of acts of misconduct during the pendancy of the strike, I do not think the claim of reinstatement should be prejudiced on that account. Such a proceedure of framing charges against any particular strikers who the Management states were guilty of misconduct should be adopted in each case and punishment meted out after inquiry by a domestic tribunal giving each person a chance to defend himself'.

The present state of the industrial law relating to the employer's right to dismiss strikers in India and Ceylon may be summarised as follows:

(1) In India and Ceylon mere participation in a strike does not warrant any disciplinary action.

(2) In India mere participation in an illegal strike does not justify dismissal even if the standing orders provide for dismissal in such circumstances.

(3) In India participants in an unjustified strike may be liable to dismissal where the strike was not bona fide.

(4) In Ceylon mere participants of an illegal or unjustified strike are liable to dismissal. It is submitted, however, that whether this view is likely to prevail in the future is uncertain.

(5) Both in India and Ceylon employees who misconduct themselves during an illegal or unjustified strike or who instigate such a strike can be dismissed.

(c) *The Right to Wages for the Period of a Strike.* If in strict legal theory a strike terminates the employment relationship, no question of wages for the period of the strike can properly arise in law. The question of wages for the period of a strike is not, in some industrial law systems, decided on the basis of strict legal rights. In India, for instance, the right to wages for the period of a strike is dependent on whether a strike is legal and justified. Where the strike is either illegal or unjustified the strikers are not entitled to wages for the period of the strike.[66] Even in the case of a legal and justified strike,

66. *The United Commercial Bank Ltd. Vs. Kakkar* 1954 Labour Appeal Cases 498, *Caltex (India) Ltd. Vs. Their Workmen* 1955(2) Labour Law Journal 693 (strike pay refused since strike was illegal), *Dalmia Cement (Bharat) Ltd. Vs. Dalmia Cement Workers' Union* 1957(2) Labour Law Journal 56 at 59 (strike pay refused since strike was unjustified), *Dum Dum Aluminium Workers' Union Vs. Aluminium Manufacturing Company Ltd.* 1957 Labour Appeal Cases 136 (no strike pay since strike was unjustified and violent).

strike pay may be refused where the conduct of the strike is attended by violence and disorderly behaviour since the purpose of a strike is not the only material consideration in a claim for strike pay and the manner in which it is conducted is an important factor.[67] In *The Western India Match Co. Ltd. Vs. Wimco Mazdoor Union*[68] the Tribunal stated:

> 'Claim to strike pay is not authorised by law; for the strikers voluntarily courted unemployment. Strike pay is awarded only as a matter of social justice by industrial tribunals on account of the economic disparity between the employer and employees who are the parties adversely affected by the strike and in view of the fact that the suffering of the workers, though voluntarily undertaken will be harder to endure than the suffering of loss by the employer and hence requires sympathetic consideration, if the strike is undertaken for the betterment of the working class who have had till now unequal bargaining power'.

But from the fact that in its inception the strike was justified it does not follow that strike pay for the entire period of the strike should be awarded, and in this instance the Tribunal awarded pay only in respect of part of the strike since the Union was in some measure to blame for the prolongation of the strike.

According to industrial practice in Ceylon, no wages are paid for the period of a strike, whether it is legal, illegal, justified or unjustified. In *The Eksath Engineru Saha Sāmanya Kamkaru Samithiya Vs. The Ceylon Coconut Industries Ltd.*[69] the reasons for refusing to award strike pay seem to have been that as a general rule employees must forfeit wages for the period of a strike and the particular strike itself was conducted in an unseemly manner:

> 'As a general rule, employees choosing to strike must bear the evident consequences of their act, namely, loss in wages. The employees had carried on violent demonstrations and prevented the manager and the clerks from going out of the premises and indulged in acts of causing damage . . . There are no circumstances to show that the attitude of the Company was so unreasonable as to force the strike, and its continuance'.

The refusal to entertain a demand for strike pay in *The Colombo Harbour Workers' Union Vs. Colombo Port Operators Ltd.*[70] was based both on the general rule that strikers should bear the loss in wages and the fact that there was no good ground for declaring a strike. In *The Ceylon Press Workers' Union Vs. W. M. A. Wahid & Bros.*,[71] although the strike was held to be justified, the Industrial Court refused to award wages for the period of the strike. No reasons were given.

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67. *West Bengal Flour Mills Mazdoor Congress Vs. Hooghly Flour Mills Company Ltd.* X Factory Journal Reports 240, *P.S.N. Motors Ltd. Vs. Their Workmen* XXII Factory Journal Reports 192. In the latter case strike pay was refused as the strike had been accompanied by acts of violence and sabotage.
68. 1957 Labour Appeal Cases 322 at 331-2.
69. Industrial Dispute 5 Ceylon Government Gazette 11,058 of 1st February 1957 paragraph 32.
70. Industrial Dispute 9 Ceylon Government Gazette 11,068 of 15th February 1957 paragraph 38.
71. Industrial Dispute 76 Ceylon Government Gazette 11,645 of 23rd January 1959.

The question of wages for the period of non-employment occasioned by a strike was given detailed consideration in *The United Engineering Workers' Union Vs. Ocean Foods & Trade Ltd.* The Arbitrator quoted with approval the following statement of the Indian law by Patel:

> 'It is an accepted principle that where a strike had been occasioned by the employment of an unfair labour practice by the Management or where the employees have been willing to submit to arbitration to which the Management does not agree, it will be open to the Industrial Court to award pay for the strike period, provided however, the strike had been lawful in its inception and continuance . . . The workers no doubt suffer loss during the period of voluntary unemployment, but the relief of wages during the strike period is not a normal legal relief. It is granted on compassionate and equitable grounds. It is, however, invariably refused when the strike is forbidden by law or found to be otherwise unjustified. Also it is refused when it is found to be not bona fide or waged on extraneous consideration or where its purpose is not lawful or when it is conducted in a disorderly manner. It is not only the end but the means also must be reasonable and just. Claim to strike pay is not authorised by law for the strikers voluntarily courted unemployment. Strike pay is awarded only as a matter of social justice by Industrial Tribunals on account of the economic disparity between the employer and the employees who were the parties adversely affected by the strike and in view of the fact that the suffering of the workers, though voluntarily undertaken will be harder to endure than the suffering of loss by the employer, and hence requires sympathetic consideration if the strike is undertaken for the betterment of the working class who had till now unequal bargaining power. Hence simply because the strike is found to be justified to some extent, to begin with, the workers need not be awarded pay for the entire period of the strike'.

In this case the period of non-employment consisted broadly of:

(*a*) The period of the strike. The strike itself was held to be legal and justified.

(*b*) The period after the strike was terminated when the employer refused, unjustifiably, to re-employ the strikers.

The Arbitrator accepted the general rule that voluntary unemployment gives no right to wages, save that this normal rule could be departed from in exceptional cases. He awarded, as a measure of social justice, half the wages the employees would have normally earned had they been in employment. This sum, however, did not cover the period of the strike itself but covered only part of the period that the strikers were out of employment from the time that the employer unjustifiably refused to re-employ the strikers. This case, therefore, is no authority for the proposition that strikers are entitled to wages for the period of a strike. Indeed, it is significant that no wages were awarded for the period of the strike although the strike was held to be justified and the employer's conduct throughout blameworthy.

Similarly, in the *Ceylon Press Workers' Union vs. E. Chithambaram, Proprietor, Silver Crown Printers*[72] no wages were awarded for the period of the strike. Four months' wages were awarded for part of the period commencing from the date when the employer unjustifiably refused to re-employ the strikers on the termination of the strike. In other words, the wages awarded were not for any period of the strike but for part of a period covered by an unjustified lock-out by the employer.

Political and General Strikes:

The legality and justifiability of political and general strikes constitute one of the most controversial aspects of the entire strike problem. The reason is that a political strike generally seeks to bring pressure on the Government in respect of a non-industrial matter while a general strike causes hardship to the community and may often have political overtones. In Ceylon the fact that the protections in the Trade Unions Ordinance are only in respect of a strike in contemplation or furtherance of a trade dispute suggests that purely political strikes are outlawed.[73]

A strike may be political in three senses.[74] It may be a purely political strike where the aims are exclusively non-occupational. It may be political in the sense that its aim is the defence of certain occupational interests but it becomes political because the State intervenes. Or it may be political in the sense that its aim is the defence of the employees' long-term occupational interests which are affected by State decisions such as investment and wage policy.

Many writers have pointed to the practical difficulty of distinguishing between political and other strikes since the political, social and economic factors are often so inextricably linked, while others have even sought to justify political strikes. Thus *Robert Gubbels* says:[75]

> 'The growing tendency for the State to intervene in economic and social matters has the consequence that in many cases in which occupational interests are involved it has a part in the decisions taken. In other words the head of the undertaking alone no longer holds the key to occupational problems. Even in sectors where its role (direct or indirect) is most limited, the State has always considerable indirect power over wages'.

The history of strikes and threatened strikes in England reveals that strikes for political ends have been more frequent than is generally thought.[76] Many of the problems common to political strikes are well illustrated by the history of the General Strike in England of 1926 when the Trades Union Congress called out its members on strike in sympathy with the mine workers who were on strike as a result of the attempts of the mine owners to reduce

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72. Ceylon Government Gazette 14,818 of 5th September 1968 p. 546.
73. *cf.* the principle in Australia that a strike to influence a country's economic policies is unjustified—*Waterside Workers' Federation Vs. Commonwealth S.S. Owners' Association* 10 Commercial Arbitration Reports 2 (workers refusing to load ships with flour for export until the domestic price of flour declines, unjustified).
74. See Robert Gubbels, The Strike: A Sociological Analysis in *Industrial Relations: Contemporary Issues, Op. Cit.* pp. 75-77.
75. *Op. Cit.* p. 75.
76. See V. L. Allen *Trade Unions And The Government* (Longmans, London, 1960) Ch. 10.

wages and increase working hours. By and large, the industrial claims receded into the background when the Government placed the issue before the public as a purely constitutional one. In the House of Commons *Mr. Baldwin* expressed the Government's point of view in the following terms:[77]

> 'Stripped of all accessories, what was the position in which the Government found itself? It found itself challenged with an alternative Government . . . when you extend an ordinary trade dispute in this way from one industry into a score of most vital industries in the country, you change its character . . . I do not think all the leaders when they assented to ordering a general strike fully realized that they were threatening the basis of ordered government, and going nearer to proclaiming civil war than we have been for centuries past . . . it is not wages that are imperilled, it is the freedom of our very Constitution . . . '.

This was soon followed by a debate on the legality of the General Strike. Sir John Simon said that every trade union leader was 'liable in damages to the utmost farthing of his personal possessions', while Justice Astbury in *The National Sailors' Union Vs. Reed*[78] described the General Strike as illegal and as not being entitled to the protection of the Trade Disputes Act of 1906. Sir Percy Winfield and Sir Frederick Pollock supported Simon's views, while Professor Goodhart[79] disagreed. The unions maintained that the strike was legal because its objectives were industrial, its purpose being to support the coal miners in their efforts to resist wage reductions and that if the miners were defeated lower wages would be forced on workers in other industries. It is significant that none of the unions sought to justify the strike on the assumption that it had political objectives. The success of the Government propaganda was one of the many reasons for the failure of the Strike.[80]

V. L. Allen,[81] dealing with the lesson to be learnt from the General Strike in England, makes the following comments:

> 'As soon as sympathetic action has been threatened, the Government has found justification for taking precautionary measures without provoking public protests. It has been able to talk of constitutional threats without appearing to be a blatant distorter of facts. The more widespread is the support which is promised to the workers in direct dispute, the more easily can the Government turn an industrial dispute into a political challenge. The General Strike gave the clearest possible illustration of this process of distortion. Even if the Trades Union Congress had maintained an efficient propaganda service to focus attention on the miners' grievances, it could not have countered the Government's contention that the strike was a threat to its authority. If a General Strike has any meaning at all it is as an instrument to coerce the Government, blatantly and without compunction. It has no meaning as a method of protest.

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77. *Hansard*, vol. 195, cols. 70, 71, 72, 3rd May 1926.
78. 1929 Chancery 536.
79. A. L. Goodhart *Essays in Jurisprudence and the Common Law* Ch. 11.
80. For the history of the Strike in general and the reasons for its failure see V. L. Allen *Op. Cit.* pp. 190-200.
81. *Op. Cit.* p. 215.

This is also true of lesser degrees of sympathetic strike action directed against the Government. Unless Government workers want to jeopardize their chances of success in disputes with their employer, they must be prepared to strike alone'.

Some Problems in Relation to Public Servants[82]:

When considered in relation to public servants employed by the Government, the question that arises is whether the same freedom to strike accorded to employees in private undertakings should be made available to public servants. In this controversy, two conflicting claims come up for consideration—the claim of public servants that they also must have the right to obtain better conditions of employment by strike, if necessary, and the State's claim that a strike by public servants is a usurpation or infringement of State sovereignity. It is in this connection that the fact that the right to organise for trade union purposes and to bargain collectively derive their efficacy from the right to strike becomes relevant. It is the existence of the right to strike which guarantees that an employer, whether the State or otherwise, will bargain in good faith. But this is not to say that in every case the right to bargain collectively must be backed by the right to strike, for there are sometimes other considerations which must receive priority, e.g. the security of the State. Thus the question is whether there are any special considerations justifying the removal, in whole or in part, of this sanction in the case of public servants.

A strike in public service cannot be equated in all respects to a strike in the private sector. Though its methods may be similar or even identical, its role is essentially different. In the sphere of private enterprise the strike is an economic weapon and it is the two contending parties who bear the major burden of resultant economic loss. It is a trial of economic strength. But by and large, bearing in mind the essential nature of most government services, economic loss, inconvenience and hardship resulting from a strike in the public sector, are borne by the public. Therefore, the transplantation of the strike weapon from private to public service entails different consequences. Further, a strike in the public service may have a hidden political motive or at least may have political consequences in that it may enable a party not in power to take advantage of the situation even though such was not the intention of the strikers. It is significant that while the International Labour Organization Convention No. 87 relating to Freedom of Association is equally applicable to private and public employees, Convention No. 98 relating to collective bargaining has no application to public servants engaged in the administration of the State.

On the other hand, in the public service there is less equality in the bargaining position of the parties. While the same measure of freedom accorded to employees in the private sector to disrupt the continuity of services cannot be made available to public servants since the functions performed by government are by their very nature essential, yet, to impose 'blanket' restrictions on the right to strike on the ground that the services provided by the State are essential would probably unjustifiably exclude most government employees. Further, even in the sphere of private enterprise there are many employees engaged in essential services (e.g. doctors and nurses in hospitals) but they

82. The term 'public servants' here does not include the employees of the semi-government Corporations in Ceylon.

enjoy a great measure of freedom in regard to organization, bargaining and strikes. In 1955 the American Bar Association criticized the government in the following terms, for lagging behind private industry:

> 'A government which imposes on other employers certain obligations in dealing with their employees may not in good faith refuse to deal with it own public servants on a reasonably similar favourable basis, modified, of course, to meet the exigencies of the public service. It should set the example for industry by being perhaps more considerate than the law requires of private enterprise'.

This is particularly relevant when one considers that in this respect the government plays a dual role—on the one hand as an employer and on the other as the sovereign authority which lays down the law relating to employer-employee relations. In most developing countries such as Ceylon the government is usually the largest employer, so that its actions and attitudes affect a great many people. But from this one must be careful not to conclude that every strike against the government as employer is a strike against the government as sovereign entity.

The argument that the right to strike would adversely affect the principle of government as sovereign entity would be justified only if the right to strike is unlimited. The extreme view that acceptance of employment under the government implies the surrender of all rights of association and strike for the protection of occupational interests inasmuch as public employees are the agents of the sovereign in implementing government policy is quite out of place in the context of modern industrial relations. The argument that to allow a strike on wage and other policy matters is a diminution of state authority is no longer valid. It is practicable and necessary to make a transition from the old system of unilateral determination of terms and conditions of employment to the modern pattern of collective bargaining, with its consequences, while at the same time preserving the right of the State to ensure that the government is carried on and that its ultimate authority remains in Parliament. Further, wages and salary are so fundamental to an employee's efficiency and satisfaction in service that there is no justification for an entirely unilateral determination of them. In this connection it is relevant that in some countries wages and salaries of public servants are negotiated through wages boards on which there is joint representation, and, whose decisions are later adopted by Parliament in the form of legislation or by arbitration.[83] A total denial of rights is always likely to lead to more dissatisfaction which may be reflected in a more disruptive form than strikes. A reasonable concession of rights is more likely to awaken public servants to their responsibilities and obligations towards the government and society at large.

The problem, then, is to maintain a balance between these extreme views. There are certain employments which are so essential or are bound up with the security of the State as to justify the prohibition of strikes, e.g. Armed Forces, Police and Judges. In others the imposition of limitations may be justified. It is easy to conceive the consequences if all the railway signalmen went out on strike without any notice while on the job. In such cases it may be reasonable

83. See *Labour Management Relations In Public Industrial Undertakings In Asia* (International Labour Organization, Geneva) in The Labour Management Series No. 31 p. 31 et seq.

to suggest that a strike must be preceded by negotiation and notice. We have seen that both in England and Ceylon prohibitions and restrictions exist on the right to strike in essential services. They have generally been regarded as reasonable restrictions.

It is of paramount importance that in those cases where the right to strike is excluded or restricted there should be adequate and effective alternative machinery through which public servants may have their grievances redressed. What these methods should be must necessarily depend on the industrial relations structure of the particular country. In this respect, public servants in Ceylon do not have adequate methods, other than the strike, through which they may have their grievances redressed. Even the strike weapon may become ineffective where public sympathy and support is against the strikers. This usually happens where the particular branch of the public service is notoriously inefficient. In the public more than in the private sector, the success of a strike often depends on public support, which in turn depends on its public image. It has been well said that 'a dispute between the Government and its employees is a struggle for the support of public opinion'.[84] The success of a strike where the government is the employer depends on public opinion, particularly where the government is a democratic one. The factors that determine public opinion would vary from country to country.[85] Whether the public service is efficient or not, there is no justification for excluding from its reach all machinery for the settlement of their grievances. Inefficiency may sometimes result from frustration flowing from the absence of satisfactory methods for the solution of their problems or from sub-standard conditions of service. Government servants in Ceylon are in a sense in this position. The various proceedures under the *Industrial Disputes Act* (1950) for the settlement of industrial disputes are not open to government employees.[86] Nor are there other satisfactory proceedures available to them. It is natural, therefore, that they should compare themselves unfavourably with private sector employees in this respect. Inadequate methods of resolving disputes are hence the cause of many work stoppages which may otherwise be avoided.

Where the right to strike is accorded to public servants, the strike must necessarily be for the protection of their occupational interests. Political objects must be wholly excluded, because loyalty to the State is the first condition of employment in the public sector. Our Trade Unions Ordinance (1935) goes even further in this matter when it enacts[87] that the Registrar of Trade Unions shall not register any trade union of public servants unless the rules of the union provide, inter alia, that the union shall not have any political objects or political fund. It follows that if the right to organize is denied to a union of public servants where the rules do not preclude political objects, there can be no right to strike in pursuance of such objects.

A somewhat more controversial matter is whether unions of government servants should be prohibited from federating with organisations of private employees, though they may federate with unions of other public employees.

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84. V. L. Allen, *Op. Cit.* pp. 215-6.
85. V. L. Allen, *Op. Cit.* p. 253: 'In Britain people believe in a system of selecting and controlling a Government rather than in a Government as such. Consequently they react against anything which is likely to damage the system and thus they protect the Government from unconstitutional pressure, such as strike action'.
86. Section 48.
87. Section 21(1) (c).

Though our Trade Unions Ordinance[88] (1935) requires the rules of a trade union of public servants to provide that the union shall not be affiliated to or amalgamated or federated with any union, whether public or otherwise, this restriction is observed more in the breach in so far as it prohibits federations with unions of public servants. The reason for such a prohibition is easy to see. A public servant should not be allowed to place himself in a position where he would be obliged, by virtue of his affiliation to another body, to follow the dictates of such other body when he himself has no dispute with his employer in regard to his own employment. Federation with organisations of private employees is likely to involve public servants in the policies and actions of outside bodies and thus endanger the continuity of public services and undermine their impartiality.

Another problematical issue is the question of Government intervention when a strike takes place in the public services. The question is not the power to intervene, which any Government has at any time. In fact, the right to outlaw a strike is part of a Government's many powers and no amount of objection can take it away. The problem revolves round the desirability of intervention other than by negotiation, the form such intervention should take and the timing of the intervention. The answers largely depend on the circumstances of each strike, its purpose and the categories of employees involved. As a general rule the State has a greater ethical right to intervene to terminate a strike than a private entrepreneur. The question of the form of the intervention does not admit of any general rules, though one might say that arbitration by a body consisting of representatives of both sides with an independent umpire may often be desirable. As to timing, the State would always be conscious that a strike in the public sector would generally affect society as a whole, so that the public interest must take priority over the interests of the strikers. Thus after the Second World War Britain's economic problems were such that any strike which interrupted trade or production invariably had national consequences, with the result that the Government was compelled to intervene by invoking the Emergency Powers Act. It follows that if a dispute is referred to a third party for settlement, the strike must end or else become illegal with the possible consequence of dismissal. In Ceylon it cannot be otherwise, since a strike in a private undertaking becomes illegal if continued after the reference of the dispute to an Industrial Court, Arbitrator or Labour Tribunal. This again raises another issue of a practical nature. It is one thing to outlaw a strike, another to enforce it. The inability of a Government to enforce such a provision even in extreme conditions such as war can be seen from the strikes in England during the two World Wars.[89] *V. L. Allen* states:[90]

> 'The evidence from strikes during both wars shows that workers were not unduly influenced in their use of the strike weapon either by the statutory regulations governing strike action or by the fact that because of that legislation and the conditions of wars they were, in effect, striking against the Government'.

88. Section 21(1) (b). This together with the requirement in the same section that unions of public servants must limit their membership to workers in specified departments or sevices or workers in specified categories, may be one of the many reasons for the multiplicity of trade unions.
89. For which see V. L. Allen, *Op. Cit.* Ch. 9.
90. *Op. Cit.*, p. 141.

The rather inconclusive note on which this part of the study has concluded is by no means surprising, for a distinguished authority in the United States summed up his study on the whole question of government as employer and the rights of public servants as follows:[91]

> 'Socialization highlights the problem of the civil rights and freedom of organisation of government workers. It does not change its nature . . . Yet it still remains the duty of government to see to it that the public services operate for the benefit of the whole public. It is out of the inevitable conflicts inherent in this situation that the problems of employer-employee relations arise in the government service. Fundamentally these problems are a phase of the perennial conflict between authority and liberty in a free society. The issue admits of no final solution but only of working arrangements which leave intact the basic claims of each party. If government presses its sovereign authority to its logical end, it may destroy freedom. If the employees of government fully exercise their collective pressure in their own behalf, they may undermine the public security upon which freedom rests. The life of a free society depends upon the maintenance of freedom and authority in delicate balance. The preservation of this balance depends in turn upon mutual restraint on the part of both government and its employees founded upon the recognition of the fact that in real life there is neither complete liberty nor absolute sovereignity'.

(*To be continued*)

91. Sterling D. Spero *Government As Employer* (Ramsen Press, New York, 1961).