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An Analytical Study of the Role of Collective Bargaining and the Strike in Industrial Disputes in the United Kingdom

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Abstract

The word "collective bargaining" alludes to the idea of workers working as a group. A single labourer is forced to accept any job offer given to him since, in the majority of situations, he is extremely poor having no savings, and needs to work quickly to prevent himself and his family from hunger. He typically makes disastrous deals. The circumstance is different, though if the same worker is one of numerous workers who are unified with one another. Together, they consult and provide each other with counsel. They either accept or reject a body. In these situations, people stand to gain not only increased security but also higher earnings. The company recognises that the arrangement is unavoidable and must accept its terms or risk losing the workers completely. Because he knows who to deal with and that the workman's leaders will oversee the remainder, he too benefits somewhat from this system. Furthermore, employers are shielded from unfair rivalry amongst them on pay and other employment-related issues. These agreements, which were first created in England during the industrial revolution, have progressively spread to many other industrialised nations. They cover every aspect of employment conditions, including pay, work hours, holidays, allowances, discipline, bonuses, gratuities, leave workload, layoffs, and workplace hygiene. There is, in the expression "collective bargaining" the idea of the workmen acting collectively. If an individual workman seeks employment, he must accept any terms upon which it is available, for he is almost always poor; he has no reserves at all, and saving his family and himself from poverty and malnutrition is a top priority. He usually makes a poor deal. The position is different, however, if the same workman is one of a large number of workmen, who are all united among themselves. They all confer and hold counsel with one another. They refuse or accept in a body. Under such circumstances, they have the prospect of better wages and moreover, much greater security. The

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employer considers the arrangement as unavoidable since he must accept their terms or completely do without the workers. He, too, has a certain amount of edge under this system, for he knows whom to deal with; the leaders of the workers will control the rest of them. Employers are moreover protected against unfair competition with each other in the matter of wages and other conditions of employment. Such arrangements evolved with the Industrial Revolution for the first time in England and have gradually been developed in many industrial revolutions for the first time in England and in many industrial countries: they govern all questions of conditions of employment—pay, work hours, benefits, holidays, discipline, bonuses, gratuities, time off, workload, layoffs. Industrial hygiene, etc. Any revision of these conditions of labour, whether for the group or for the individual, will have to be agreed to by the employer on the one hand and the workmen as a group on the other. As this system involves bargaining by the workmen collectively, whether there is peace or dispute in the industry and whether the dispute is to be settled by the method of conference and conciliation or by adjudication and award- this system is called "collective bargaining". With the above idea in mind, this research is conducted to know the flourishing concept of collective bargaining vis-a-vis the strikes and its development and acceptance in statutory laws and endorsement in judicial pronouncements. This study has examined the development of the concept especially in the field of labour and industrial arrangements basically in the United Kingdom from where the concept transmits to the world over.

Keywords: Strike, Lock Out, Collective Bargaining, Industrial Action, Industrial Dispute, Commission on Industrial Relations, Extraneous Party, Disciplinary Offence, Industrial Conscription.

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Introduction

Collective bargaining is the process through which a company or companies and a group of workers come to an agreement on the terms of employment. The institution serves as a tool for industrial organisation as well as a safeguard for the interests of wage workers. Usually in collective bargaining, two parties are involved one or both of which are associations of people working jointly to discuss and negotiate a deal.

The use of Collective bargaining and the preservation of labor unions are now practically inseparable. The extent to which collective bargaining is successfully used determines the success of unionism, and the history of collective bargaining is inextricably linked to the history of organised labour.

The actual conduct of collective bargaining only approximates the norm of free agreements between equally interested and equally powerful parties. The interests of the two groups are unlike, the concern of one being with the expense of production, and the other with the means of livelihood.

Contrary to the employers, who are organized for production and profit-making, the labourers are associations that exist specifically for the purpose of bargaining. Collective bargaining only becomes an instrument of industrial order through the trade agreement, which is included in the employment contract. The trade agreement, which acts as a creed or code outlining how jobs and workers should be combined in manufacturing is growing slowly and inconveniently**;** the ongoing negotiation process is the strategy utilized to create and maintain the employment relations system. The General understanding is primarily concerned with wage rates; it is easily extended to the times and methods of wage payment, hours of labour compensation for overtime, the protection of life and limb, payment for dead work, penalties for rule violations, and hiring and dismissal[2].

This research is conducted to know how all the issues involved in industrial disputes; the relations between workmen and the employer, and the other industrial problems have been tackled by the United Kingdom with success for many decades past. If one considers to what extent the trade union movement has benefited workmen in other countries, one is indeed impressed with its achievements and its vast potential in the United Kingdom.

As the United Kingdom is an industrialised country, this paper limits itself to the industrial workers' right of association as trade unionism and this researcher is not going to deal with agricultural workers. The problems and issues arising out of agricultural workers' right to

[2]*The Encyclopedia of Social Science*, Volume 3, p. 628.

association and the devices and strategies to organise them are in themselves a vast subject matter of study and do not fall within the aims and objectives of this study.[3]

The law can adapt to change in ways that may not be readily apparent in the fact of legal doctrine. While radically altering their societal roles; the Legal concepts can remain in the same form. The law can adapt to change social circumstances without necessarily changing its form or structure. Keeping these lines in mind the researcher undertakes this research.

Methodology

The present study is purely based on the doctrinal approach of research. It has equally focused on the qualitative method of research. Apart from secondary and published documented data, some unpublished data has also been collected through various sources and analysed accordingly.

To make the study more meaningful and policy-oriented, available literature and studies have been consulted and reviewed apart from this, an open-ended discussion has also been equally considered and incorporated in the present study. The secondary data is being interpreted and analysed while the critical appreciation of pertinent literature has also been ensured. Books and other references as guided by academicians have been primarily helpful in giving this paper a firm structure. Websites, dictionaries, and articles have also been referred, just to throw out light on the meaning of the topic.

Meaning and Definitions: Collective Bargaining

The term 'collective bargaining' means and is applied to those arrangements under which wages and conditions of employment of workmen are settled by a bargain between employers or associations of employers and workmen acting through their union.[4] Since the Webbs[5] first used

[3]For the problems of agricultural labourers and the strategies to organize them, see, Aziz, A., *Organizing Agricultural Labourers in India: A Proposal, Calcutta* 1980.
[4]In the expression 'collective bargaining', the word 'collective' does not refer to the employer, even if there are two or more employers involved in a particular bargain; it is a collective bargain because the workmen are collectively represented therein; such representation may be by their union, or it may even be some workmen as representing all of them.
[5]Webb. S and B., '*Industrial Democracy'* (1897) Part 11, Ch. 2. The first use of the term 'collective bargain' is generally agreed to have been by Webb in the '*Co-operative Movement in Britain,* 1891.

it, it has been usual to describe the system of industrial relations in the United Kingdom as 'collective bargaining'. Thus, the Industrial Relations Handbook has it:[6]

The word "collective bargaining" refers to agreements between employers or associations of employers and workers' organizations where pay and working conditions are negotiated and agreed upon.

The Encyclopaedia Britannica[7] defines 'collective bargaining' thus:

"*In its broadest meaning, 'collective' refers to the discussion about working conditions between a group of employees and an employer and group of employers. The employees' reliance on the employer for employment diminishes their bargaining strength when an employer is negotiating with a group of his own employees, and as a result, collective bargaining is more usually understood to be negotiations between one or more trade unions and an employer or group or association of employers. Trade union organisation gives the workpeople greater strength to provide means for the expert presentation of demands by skilled officials not dependent on the employers for their jobs. Further a union has funds and means of obtaining information outside any one undertaking and can secure for the workpeople at any one form the support of their fellows in other forms*."

Encyclopaedia Americana cites the American Federation of Labour as "*insists upon the equity of workers in their right to bargain collectively with employers through representatives of their own choosing*". The Encyclopaedia continues: *"Industrial history demonstrates that collective bargaining is the way that industrial relations advance. The principle that everyone should have a say in choices is the basis for the practice of collective bargaining. The American Federation of Labour never allows workers ability to engage in collective bargaining with their employers to be denied*"[8]

The following are the terminologies used by Ludwig Teller in his "Definition and General Nature of Collective Bargaining"**:**

"Although the collective bargaining agreement has been interpreted in a number of different

[6]Published by the Ministry of Labour, Great Britain, at p. 18.
[7]*Encyclopedia Britannica* (14th Edition), Vol. 12, p. 299.
[8]*The Encyclopedia Americana*, Volume 1, pp. 520-1.

ways, its fundamental structure is well known. It can be broadly characterized as an agreement that governs the terms and circumstances of employment between a single employer or an organization of employers on the one and a labor union on the other hand"[9].

Such an agreement can take the form of a book or a brief summary of wages and working hours; or, more typically, a detailed rulebook, in the greatest minuteness, every condition under which labour is to be performed, and touching upon such subjects as strikes, lock-outs, seniority, apprentices, shop conditions, safety devices, and group insurances. The term 'collective' as applied to the collective bargaining agreement will be seen to reflect the plurality, not of the employers who may be parties thereto, but of the employees therein involved. Once more, the word "Collective bargaining" is only used to refer to negotiations between a legitimate labour organisation and an employer or group of businesses.

Negotiating with a company-dominated union is thought to be just another name for individual bargaining. The collective bargaining agreement reflects decades of efforts to advance labour equity by recognizing the principles that underlie collective bargaining in its various provisions. Indeed, a climax for labour action can be found in the collective bargaining agreement.[10]

The 'Importance of Collective Bargaining' is the head-note of a paragraph in Labour Law Cases and Materials by Smith.[11] The paragraph reads as follows:

"*No one who is aware today will contest the importance of collective bargaining in American industry, and very few will contest that its importance is increasing.*"

Annually over 75,000 establishments adopt and amend collective agreements fixing wages, hours, job rights, and working conditions for some 15,000,000 workers.[12]

Bargaining has become a fundamental component of industrial management in locations where there is unionism. It includes both the routine administration of agreements and these recurring negotiations on fundamental concerns.

[9]Ludwig Teller, *Labour Dispute and Collective Bargaining*, Volume 1, Section 154.
[10]Ludwig Teller, *Labour Dispute and Collective Bargaining*, Volume 1, Section 154.
[11]Smith, *Labour Law Cases and Materials*, Second Edn. p. 633.
[12]See Dunlop, Collective Bargaining, (1949), 14.

"*Collective bargaining is crucial because it has significant economic and other effects and because it directly and negatively affects a large number of individuals. This must be clear from even the tiniest reflection. The union has become a key factor in a widening array of company choices*".

The owners' and managers' previously total control over industrial property has been greatly reduced and qualified by the necessity to provide worker representatives a role in decision-making. One of the most crucial concerns of our day is how to establish rules for how that task will be carried out. This sharing of power should also include admitting accountability **"***in a way that will serve both special and public interests. Responsible bargaining presupposes that acceptable and accepted criteria can be developed in the light of which disputes can be resolved consistently with the various social interests involved*."

The terms of collective agreements are, by force of circumstances and economic laws, observed even by those employers who are not actually party to them and also by those workmen who do not belong to any trade union. Collective bargaining is now standard practice across all industries.

Development of Collective Bargaining Concept

This method is in vogue in the United Kingdom, the United States, Australia, and New Zealand as these countries have tackled industrial problems with success for many decades past. If one considers to what extent the trade union movement has benefited workmen in other countries, one is indeed impressed with its achievements and its vast potential. It is said that the great American trade union leader, Samuel Gompers[13] was once asked, "*What does the Labour Movement in America stand for?*" He answered succinctly "More". The answer is very significant, for it shows that it is the purpose of the movement to keep on an unceasing struggle for better terms and better conditions.

When George Meany served as President of the American Federation of Labour, the largest labour organisation in the contemporary 'Free World', he penned an essay titled '*What American*

[13]This is a great name in the history of the Labour Movement. This American Leader played a Prominent part in the proceedings which culminated in the enactment of the Chapter XIII (Labour) in the Treaty of Versailles, 1918. See, Rustamji, R.F., *Introduction to the Law of Industrial Disputes, 1967, p. 25.*

Labour Wants.'[14]Quotes the above anecdote and then he says: "*We aspire to an ever-rising standard of living by which we mean more free time and a broader cultural experience in addition to more money*".

"How can we obtain more? Despite the fact that its system may be flawed in many specifics, the United States has chosen a flexible approach to raising the level of life while preserving freedom".

It is a technique of free decision-making and voluntary group bargaining that takes place outside of governmental restraints. And it is through the give-and-take of collective bargaining that we seek to achieve our goal.

It is feasible to establish the fundamental idea that a union exists to advance the interests of its members. Things like a company's investment strategy, the choice to produce a new product, or the intention to build a new plant, which does not immediately affect workers– the union cannot challenge. But where management decisions affect a worker directly, the union will interfere.

A union will fight back when, for instance, a hat firm rejects union standards and unilaterally interrupts the lives of thousands of employees (by moving to a new location). Management does not have the right to demand less than a living salary as a condition of continuing to operate a corporation just because it carries the management responsibilities. Workers shouldn't be forced to foot the bill for poor management decisions because effective management prevents their facility from aging and becoming outdated.

The range of topics up for negotiation is flexible. Currently, several unions are looking for financial stability through a fixed annual salary. Maybe the term "guaranteed" is misleading. Very little can be "guaranteed." A worker simply wants to "regularize" his pay and ensure a yearly income so he can plan his spending and create a budget. To illustrate how the movement grew from more to more, he gives the following examples.

"In the long run, we'll push for decreased hours so that the job may be spread out and workers have more leisure time. A 30-hour workweek is in the works".

[14]George Meany's article, '*What American Labour Wants*' in the Reader's Digest of July, 1955.

According to George Meany, "*Our party believes in an economic system based on prosperity at lower rungs of the economic ladder*." He further says with regard to the future:

"*The American of the next 25 years may be even less familiar to us than the America of 25 years ago, given the inventiveness of its people and the potential of technology*. *But technological advancements by it cannot address the major socioeconomic issues. These are moral concerns, not technological ones, and wisdom questions, not scientific ones. I believe that in a free society, the voluntary cooperation of labour and management may help us get a long way toward finding a solution*".

Such is the arrangement which is called 'Collective Bargaining', and such are its vast potentialities.

The Right of Collective Bargaining in the United Kingdom

We have already seen that the relationship between trade unions and employers' associations arises principally in the process of negotiating and applying collective agreements, and the rules established by these agreements form a considerable part of the framework within which managers and workers deal with each other. As already mentioned, it has been usual to describe the systems of industrial relations in the United Kingdom as 'collective bargaining'.

The distinctive feature of the system of industrial relations in the United Kingdom until recent times was that the State remained aloof from the process of collective bargaining in private industry. The parties are left free to come to their own agreement. The Donovan Report (1968) began its discussion of the present system of industrial relations in the United Kingdom with the words:

"*There are two industrial relations systems in Britain. The formal system, as represented by official institutions, is the one. The second is the unofficial system produced by managers, shop stewards, employees, trade unionists and employers' associations. The recommendations of the Royal Commission on Labour of 1891 provide a description of the formal system's underlying principles*[15].

[15] Halsbury, 2nd Edn. Vol. 6, para. 436.

Powerful employers' organizations on the other side and powerful trade unions on the other have been the means of bringing the representatives of both classes together in conference, enabling each to appreciate the position of the other and to understand the circumstances under which their joint understanding must be conducted... We have cause to think that the progression of events will lead to a more predictable and steady period of time. The 1917 Whitley Committee pursued the same problem. They believed that in order to guarantee a long-term improvement in the relationships between employees and employed, it was imperative that both employers and employees have the appropriate organizational structures.

Since the organizations on both sides of the segment are so weak, the informal system is grounded in reality. Employers' associations and the main union organization are both weaker.

The Royal Commission on Labour compared the industry-specific collective agreement, which forms the basis of the legal system, to a regular and carefully thought-out treaty. It is assumed that each side can ensure that its own citizens uphold the treaty. Outside assistance might be possible, but only if the two sides are unable to come to an agreement. The government then has options to assist, including setting up an inquiry, arbitration, or conciliation.

So, normally there is no duty on the employer, as in the United States of America, where, since 1935, the collective bargaining process is controlled by law to bargain at all.[16] This abstentionist attitude of the state has reflected a belief that it is better in the long run for the law to interfere as little as possible in the resolution of issues relating to salary and working conditions that may arise between employers and employees.

The Parliament believes that voluntary collective bargaining is the best method to address these concerns. From time to time, however, certain steps have been taken by Parliament in the interests of the community to encourage, support and promote collective bargaining and to assist where necessary in the settlement of disputes by conciliation and voluntary arbitration.[17]

[16]As already mentioned, the industrial Relations Act, 1971, however, imposes a duty on the Employer to recognize a sole bargaining agent for the purpose of collective bargaining.

[17]As for example, Fair Wages Resolutions of the House of Commons, 1891 and 1946; The Conciliation Act, 1896; Trade Boards Acts of 1909 and 1918; The Contracts of Employment Act, 1963, s.49; The Industrial Training Act, 1964, s.16; The Redundancy Payments Act, 1965, s.62; The Prices and Incomes Acts of 1966 to 1968. For Statutory provision made in times of national emergency for a form of compulsory arbitration, see

Legally Binding Collective Agreement

The Industrial Relations Act, 1971, however, has made a new provision for recognition by an employer of a 'sole bargaining agent', i.e, an organisation of workers that has the exclusive right to negotiate with the employer in respect of particular employees.[18] The Act provides for an 'agency shop agreement' to be entered into between one or more employers and one or more trade unions, in which parties must be registered unions and employer or employers' associations. A registered union may use the statutory procedure towards a compulsory agreement but would have to show that the employer was unwilling to enter into a voluntary agreement. An employer, however, may not make such an application to suit himself but may only do so where one or more trade unions desire to enter into an agreement.[19]

Unregistered organisations may agree to a voluntary sole bargaining agreement, unlike the agency shop. The statutory machinery cannot be invoked by such an organisation, but the application can include unregistered organisations of workers, provided they have become registered before it is necessary to apply for a ballot to be held.[20]

Whereas, under the agency shop procedure, no express provisions are made for pauses for consultation aimed at a voluntary agreement, it is plain that this procedure can be halted at almost any stage to allow such a settlement. Several express references are made to this,[21] and in any event, no ballot will be held unless one of the parties specifically requests it within six months of a favourable report by the Commission on Industrial Relations (C.I.R.).

A voluntary agreement is, however, less secure from revocation, since an application for revocation may be made at any time and need only be supported by one-fifth of the workers in the unit.[22] A compulsory agreement may only be revoked upon an application supported by two-fifths of the workers in the unit and the application can only be made after two years from the date of the C.I.R. Report in favour of establishing the agency. Either type of agreement could, however, be revoked by agreement between the parties.

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the Conditions of Employment and National Arbitration Order 1940, which was allowed to exist to a limited degree by the Industrial Disputes Order, 1951.

[18]The Industrial Relations Act, 1971, Ss. 44-50.

[19]Ibid, Ss. 11-16; See also Rideout, '*Statutes' in M.L.R*. Vol. 34, No. 6, November, 1971, p. 665.

[20]Ibid, S.49.

[21]Ibid, Ss. 45 (3) (4) and 47

[22]Ibid, S. 51(2).

The existence of a compulsory order has, however, a more significant advantage. Not only does it become an unfair industrial practice to take 'industrial action'[23] in connection with the question in issue once a formal application has been made; but after the order of the N.I.R.C. (National Industrial Relations Court) is made, it is an unfair practice to use such means knowingly to induce an employer to bargain with some other organisation than those designated, or not to take all such action as might reasonably be expected of an employer ready and willing to bargain with the agent.[24]

A union, whose sole agency has been revoked by the statutory process, cannot have either a voluntary or compulsory sole agency in respect of any of the descriptions of workers included in that agency for at least two years from the date of the report of the C.I.R. upon revocation ballot.[25] There is no prohibition upon an employer continuing to bargain with such a union, so long as he does not afford it exclusive rights. If a registered trade union, which had not been a party to the revoked agreement, applied within this time, it might obtain either a voluntary or compulsory agreement but, in respect of the latter, the N.I.R.C. could, in its discretion, decline to consider any such application made within two years of a previous application having been under consideration.[26]

With regard to the contractual enforceability of collective agreements, they are, at present, not legally binding in the United Kingdom. This is, however, not because the law says that they are not contracts or that the parties to them may not give them the force of contracts, but because the purpose of collective agreements is to create gentlemen's agreements or treaties, which express what are considered to be fair wages and conditions of employment. They are the terms on which labour and management co-operate for the carrying on of the industry. Their purpose is not to create a legally binding agreement. The question, nevertheless, arises as to how far they are or can be matters of legal obligations.

It is true that this lack of intention to make legally binding collective agreements or the policy that such agreements should remain outside the law is one of the characteristic features of the

[23]Throughout this note the term 'industrial action' means calling a strike or organizing, promoting or financing a strike or other irregular action short of a strike, or any threat to do so. When appropriate, it also includes instituting, carrying on, organizing, procuring or financing a lockout, or threatening to do so.
[24]The Industrial Relations Act, 1971, Ss. 54(4) and 55(3).
[25]Ibid, S. 53.
[26]Ibid, S. 46 (2) (a).

systems of industrial relations in the United Kingdom; but it is not, as already said, due to law. It may be possible to go so far as to agree with Judge Learned Hand who, in *Hotchkiss v. National City Bank,* said:[27]

"*In actuality, a contract has nothing to do with the parties' personal or individual intentions. A contract is an obligation that the law imposes as a result of some of the parties' actions usually words that are used to express a well-known intent*."

It is, however, accepted that the test to be applied is objective. As Chitty has it:[28]

"*---The offeror may not plead that his offer was not seriously intended if a reasonable man would have regarded the offer made to him as one which was intended to create a legal relationship*".

In fact, the cases go further than this. Agreements are classified either as 'regulating business relations' or regulating social engagements[29] and conclusions are drawn from the classification rather than from the intention of the parties. In Edwards v. Skyways Ltd., Megaw,J., said[30]

"*It is clear … that there are cases in which law recognises that an agreement, in other respects duly made, does not give rise to legal rights, because the parties have not meant for the impact on their legal relationships to occur. Due to the nature of the subject matter, the law frequently excludes the agreement from having any legal ramifications when it pertains to domestic or social relationships or transactions as in the case of Balfour v. Balfour[31]. Where the subject matter of the agreement is not domestic or social but related to business affairs, the parties may, by using clear words, show that their intention is to make the transaction binding in honour only, and not in law; and the court will give effect to that expressed intention*…"

It is, therefore, clear that the rules of law derived from the concept of contractual intention are remote from the actual intention of the parties. The only intention required is an 'intention to

[27]*Hotchkiss v. National City Bank,* 209 Fed. 287, at 293.
[28]Chitty, *Law of Contracts,* 2nd Edn., Art. 42. The proposition is supported by a reference to *Carlill v. Carbolic Smoke Ball Co.* (1893) 1 Q. B. 256.
[29]Per Bankes, L.J., in *Rose and Frank Co. Ltd. v. F. R. Crompton & Brothers Ltd*, (1923) 2 K.B. at p. 282.
[30]*Edwards v. Skyways Ltd., (*1964) 1 All E.R. 494 at pp. 499-500.
[31]*Balfour v. Balfour,* (1919) 2 K.B. 571.

agree' i.e. *consensus ad idem.* The legal consequences of the agreement depend primarily upon the 'subject matter', and there is little doubt that a collective bargain would usually come within the category of 'business affairs' rather than 'domestic or social' matters.

No English decision has, however, been given directly on the enforceability of a collective agreement.[32] The fact that legislation during both World Wars[33] has provided for the terms of such agreements being made legally enforceable is an indication that apart from such legislation, they would not be enforceable. Also, in the various reports of the Commissions on trade unionism and industrial relations, the view has been generally accepted that collective agreements are only gentleman's agreements. In fact, the reports have recommended that they should be legally enforceable. The Minority Report of the Royal Commission on Trade Unions of 1867 and the Report of the Royal Commission of 1891[34] both made this recommendation. The same recommendation was also made by the Royal Commission on Trade Disputes of 1906. This Commission suggested that damages be allowed for breach of a collective agreement and that unions should be allowed power to enforce obedience by their members to the terms of such agreements. No legislation was, however, passed to bring this recommendation into being.

The Industrial Relations Act, 1971, however, following the Report of the Donovan Commission, reverses the existing law by creating the presumption that collective agreements made in writing after the commencement of the Act are intended to be legally enforceable contracts unless they contain an express provision to the contrary.[35] The same applies to decisions, duly recorded in writing, of any joint representative body established by or under a collective agreement for regulating terms and conditions of employment or determining any matter for which a procedure agreement, as defined in Section 166 (5) can provide.[36] It is clear that this will include the jointly agreed minutes of such a body or agreed notices of its decisions, which are subsequently affixed to the company's notice board. It would not include, for example, minutes taken by management

[32]The New Zealand case of *Beattie and Co. Ltd. v. Duncan*, (1922) N.Z.L.R. 1220, appears to be the only case in which a collective agreement has been enforced. In that case the Court took the view that 'the union acted as agent for its members. Though legal difficulties may prevent a union entering into a contract as an agent for its future members, no such difficulties exist when the union is an agent for the present members.'
[33]For example, the Munitions of War Act, 1915; the National Arbitration Order, 1940 (op. cit) made under the Defence Regulation, 58AA of 1939.
[34]1867 Report (Final Report made in 1869); 1891 Commission, 5th Report, 115 (Report submitted in 1894).
[35]The Industrial Relations Act, 1971, S. 34.
[36]Ibid, S.35.

for their own use. They would not be a written record 'by or on behalf of that body'.[37] The word 'body' implies some formal composition and so contractual enforceability does not extend to a discussion between a foreman and even if such everyday discussions are provided in collective agreements.

These provisions should not, however, lead to the conclusion that every such agreement is conclusively presumed to be directly enforceable. The presumed intent of the parties may, as in all intended contracts, fail for want of certainty. The critical clauses of many British collective agreements must be subject to this objection at the present time.[38]

It is submitted that organisations of workers, in particular, have good reason to fear contractual enforceability, for not only is a breach of an enforceable agreement an unfair practice, but so also is a failure by a party to such an agreement to take reasonable steps to ensure that those acting or purporting to act on its behalf, or all its members if it is an association, observe the agreement. The party must also take reasonable steps to ensure that such persons do not continue action in breach of an agreement and that no such further action is taken.[39]

Constitutional Guarantee and Collective Bargaining

In the United States of America, the right of employees to organise themselves for the purpose of dealing with an employer was recognised as early as 1922, in view of the helplessness of a single employee to deal on a footing of equality with his employer.[40] In 1937, the right of employees to organise and select their representatives and to bargain with employers through such representatives was upheld as a fundamental right.[41] It has been held that, in the absence of a special public interest in an industry, provision for compulsory arbitration to settle labour disputes would be a violation of the guarantee of 'due process'.[42]

On the other hand, it has been ruled that the constitutional right of employees to congregate, talk about, and create plans for advancing their self-interest in Jobs can be viewed as a constitutional assurance that no one will be hired or retained unless they participate in the assembly or consent

[37]Ibid, S. 35(4).
[38]Rideout, 'Statutes', op. cit., p. 668.
[39]Ibid.
[40]*American Steel Foundries v. Tri-City C.T. Council*, (1922) 257 U.S. 184 (209).
[41]*National Labour Relations Board v. Jones*, (1937) 310 U.S. 1.
[42]*Wolff Packing Co. v. Court of Industrial Relations*, (1923) 262 U.S. 522.

to its rules.[43]In other words, the right to form a trade union does not include a right to exclude non-union men from employment.[44] Hence, a statute that prohibits an employer from discriminating against non-union workers does not violate the freedom of collective bargaining or of assembly.[45] Nor would the freedom include a right of union workers to combine to use their joint power to prevent sales to non-union workers, which constitutes a restraint upon the freedom of trade,[46] even though such a combination might actually help manufacturers, consumers, or the public in general,[47] unless, of course, the law against restraint of trade expressly grants the exemption in favour of trade unions.

Right to Strike and Lock-out in the United Kingdom

With regard to the law relating to strikes in the United Kingdom, we need to consider certain historical aspects of the law on the subject and the interplay of statutes and cases. When, at the beginning of the 19th century, the industrial revolution was in progress and the workers were becoming very much alive to the necessity of defending their standards, three things joined to make combinations of workers and anything like strike action totally illegal and criminal, wage-fixing, the Judges, and the Combination Acts. The Judges interpreted the law and the statutes that Parliament has passed. Some of the interpretations led to renewed demands for fresh statutory protection, as in the *Taff Vale* case and the Trade Disputes Act, 1906. The law relating to 'peaceful picketing' gives us a particularly good example of the development of the law and the impact of the 1906 Act, establishing a right for the new industrial labour movement to conduct the effective industrial activity. But the protection of the right to strike developed between that time and the enactment of the Industrial Relations Act, 1971, applies to any persons acting in furtherance of a trade dispute. A person has the right to strike i.e, to withhold his labour so long as he does not commit an unlawful act, such as a breach of contract, a tort, or a crime.[48]

The Courts in England – like collective bargaining – have come a long way since 1900.

[43]*Lincoln Federal Labour Union v. N. Iron Co.,* (1949) 335 U.S. 525 (531).
[44]*Whitaker v. State of Carolina,* (1949) 335 U.S. 525.
[45]*American Fed. Of Labour v. American Sash Co*. (1949) 335 U.S. 538.
[46]*Giboney v. Empire Storage Co.* (1949) 336 U.S. 490 (495).
[47]*Fashion Originators' Guild v. Federal Trade Comm*. (1941) 312 U.S. 457 (467).
[48]Halsbury, 2nd Edn. Vol. 6, para. 436.

In the Crofter Case, 1942, Lord Wright stated that "*the rights of the employer are conditioned by the rights of men to give or maintain their services*." The notion of collective bargaining must include the ability of workers to strike. In 1908, American Union Leader Samuel Gompers declared, "*It is our goal to avoid strikes, but I trust that the day will never come when the workers of our country will have so completely lost their manhood and independence that they will give up their right to strike*"[49]. He was echoed by the English postal workers' leader, Mr. Ron Smith (by 1969, Director of Personnel on the British Steel Corporation Board) who declared in 1964 to his members: '*If you give up that right, you give up the right to call yourselves free men*'.

To protect such a right is not, of course, to approve or disapprove of its implementation in any particular withdrawal of labour. It is to recognise limits to the rights to strike and to lock out, which measure the strength, which each party can, in the last resort, exert at the bargaining table. Happily, bargaining does not usually come to that last resort. But the strength of a trade union is bound to be related to the extent to which its members can withdraw or curtail their labour. It is, in this respect, worth noting that although 'strikes' take the limelight; there is a gradation of 'workplace sanctions', from the 'go-slow' to 'working without enthusiasm'. The same is true of management; it can at one end, press down the 'margin of tolerance' about working rules at the workplace (as when the Post Office warned telephonists in 1970 that anyone who struck would not be offered overtime work for six days after returning) and, at the other, lock-out workers (a weapon of industrial action not wholly dead, as was proved in the two-month national lockout of shipbuilding draughtsmen in 1967, when the union paid £250,000 in benefits to members). The employer's power to lock out has been limited only by the need to give appropriate notice for dismissal or risk an action for breach of contract by each employee. In the last hundred years, the liberty to take strike action has had a more varied fortune.[50]

We have also had occasion to look at different types of civil liability; conspiracy, inducing breach of contract, and intimidation, around which the liberty to strike action in Britain has revolved in the interplay of statutes and case law. The decision in *Rooke's* case also provided a means of outflanking the protection given by the 1906 Act, whenever there was a strike or threat

[49]*Crofter v. Veitch*, 1942 A.C. 435.
[50]Wedderburn, K.N., *Worker and the Law*, 2nd Ed. (1971), p. 340.

of a strike in breach of contract of employment, which, whether there was a 'non-strike' clause or not, could amount to intimidation, actionable at the suit of a third party, and even make trade union officials organising strike parties to a conspiracy and thus vulnerable to legal action. The decision was followed by the enactment of the Trade Disputes Act, 1965, the object of which was to restore the law to what it was believed to be prior to the decision in *Rooke's* case, pending a full examination of the position of trade unions by the Donovan Commission.

As has been mentioned, the Industrial Relations Act, 1971, has repealed the Trade Disputes Acts of 1906 and 1965 entirely, and has created a new kind of civil wrong, the 'unfair industrial practice' to modify the old immunities in respect of organising industrial action in contemplation or furtherance of an industrial dispute. Inducing a person to break a contract, other than a collective agreement, in contemplation of furtherance of an industrial dispute is an unfair industrial practice, but registered organisations are granted immunity.[51] A person, who is found to have committed an unfair industrial practice, may be ordered to pay compensation to the complainant.[52]

The Act defines a "strike" as the cessation of an industrial dispute, regardless of whether the workers involved are parties to the dispute, whether or not the stoppage violates any of their employment terms and conditions, and regardless of whether it takes place before or after the workers' employment has ended their employment;[53] and an 'irregular industrial action short of strike' is defined as '… any concerted course of conduct (other than a strike) which, in contemplation or furtherance of an industrial dispute, is carried on by a group of workers, with the intention of preventing, reducing or otherwise interfering with the production of goods, or the provision of services, and, in case of some or all of them, is carried on in breach of their contracts of employment or in breach of their terms and conditions of service.'[54]

[51]The Industrial Relations Act, 1971, S. 96.
[52]Ibid, Ss. 101 (3) (b) and 106.
[53]Ibid, S. 167.
[54]Ibid, S. 31(4).

It is an unfair industrial practice for any person, including any organisation of workers, to call a strike or to organise, procure or finance a strike or any other irregular industrial action short of strike; or to threaten to do so in violation of the restrictions provided in the Act.[55]

Contract of Employment & Strike

As regards the contract of employment, it is provided[56] that a strike, after due notice by or on behalf of an employee of his intention to take part in any strike, is not, unless otherwise expressly provided, to be regarded as a breach or repudiation of the contract of employment, unless the strike is in breach of a restriction on strike action, either expressly or by implications, from a collective bargaining agreement, or elsewhere contained in the contract of employment.

This section's sole goal is to prove beyond a shadow of a doubt the Court of Appeal's majority ruling in Morgan v. Fry. It doesn't matter to the liability of an unofficial unregistered organisation or a leader calling a strike, so long as it or he gives due notice.[57]

The tone of the later part of this provision suggests that the draftsmen of the Act thought that the question of implication of terms from a collective agreement was or would quickly become, much more settled than is at present the case. At least it can be said that unofficial strikes without proper notice will always be unfair industrial practices. It should be noted that section 147 says nothing about the giving of notice before any other irregular industrial action, which, by definition, involves a breach of contract. It seems, therefore, that all unofficial action of this sort is an unfair industrial practice. Additionally, of course, the action taken may knowingly induce a breach of a great variety of commercial contracts.[58]

Similarly, it is an unfair industrial practice for any employer or persons acting on behalf of an employer to institute, carry on, organise, procure, or finance a 'lock-out'[59] or threaten to do so, in violation of the restrictions provided in the Act.[60]

[55]Ibid, Ss. 13(2), 16(2), 33(3), 54(4), 55(4) (6) and (7).
[56]Ibid, S. 147.
[57]See, 812 H. of C. Official Report 365, per the Solicitor-General.
[58]Rideout, op. cit., p. 674.
[59]'Lock-out' is defined in S. 167 as meaning 'action which, in contemplation or furtherance of an industrial dispute, is taken by one or more employers, whether parties to the dispute or not, and which consists of the exclusion of workers from one or more factories, offices or other places of employment or of the suspension of work

Taking industrial action in contemplation or furtherance of an industrial dispute in order to further any existing unfair industrial practice is itself an unfair industrial practice, whoever does it.[61] The original words 'aid and abet' have been amended to 'further', so the accessory after the fact has become, perhaps more appropriately, something like a joint tort-feasor.

Dismissal of an employee, because of his exercise of the trade union rights contained in section 5 is itself an unfair industrial practice on the part of the employer, for which a complaint lies to a tribunal, which will deal with it like any other unfair dismissal. It is also provided that dismissal will be unfair, if the selection was made, because of the exercise of those trade union rights.[62] The same is true of the provision that a failure to re-engage persons dismissed at the beginning or during a lock-out is to be judged by the reason for that failure.[63] It is interesting, however, to observe that it is not specifically made an unfair industrial practice to take industrial action to secure the reinstatement of a dismissed employee, even if a complaint is currently before a tribunal or the tribunal has found the dismissal to be unfair. It follows that, save in the excluded employments, the common law right to dismiss an employee without cause but with proper notice virtually ceases to exist.

Finally, by Section 98 of the Act, it is an unfair industrial practice to take industrial action against an extraneous party to a dispute with the purpose, or the principal purpose, of knowingly inducing him to break, or not to perform a contract other than a contract of employment. Either the breaker or the other party to the contract may sue. 'Extraneous party' is not defined but four situations, which are not to be taken to create a person a party to a dispute, including that of being an employer associated with the employee in dispute, suggest that the term will be construed widely.[64]

Taking into account many other problems relating to strikes, there are some to which we must briefly make particular reference in this study. They are, first, the special legal position of certain groups of workers and, second, the problem of a 'general strike', such as that of 1926, which has

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in one or more such places or of the collective, simultaneous or otherwise effected termination or suspension of employment of a group of workers.

[60]The Industrial Relations Act, 1971, Ss. 55(8), 54(4) and 16(1).

[61]Ibid, S. 97.

[62]Ibid, Ss. 24(5) and 26(2).

[63]Ibid, S.25.

[64]Rideout, ip. Cit., p.675.

for its object anything other than the furtherance of a trade dispute within the trade or dispute in which the strikers are engaged, and which might disrupt the whole country, so that it is political in nature.

Certain groups of workers have long suffered special legal disabilities in regard to bargaining and conflict, for example, gas electricity and water workers. The Conspiracy, and Protection of Property Act, 1875[65] (extended in 1919)[66], makes it a crime for any worker employed in these industries wilfully to break his contract of service, having reasonable cause to believe that the consequences will be a substantial deprivation of the supply. The section covers any wilful breach, from a strike to a 'go slow'. It requires unions in these industries to give notice of termination of employment contracts before strike notice. Under the Industrial Relations Act, 1971,[67] these restrictions will cease to have effect.

Under the Police Act, 1919 (now the Police Act, 1964), it is an offence for anybody to induce or attempt to induce any member of the police service to withhold his services. Police were also forbidden to belong to any trade unions. They are the only employees of civilian status to suffer such severe restrictions. Members of the armed forces are in effect deprived of any liberty of strike action under the relevant statutes, and, although it is not expressly prohibited, they have no right to join a trade union.

Strike among Civil Servants

In the Trade Disputes and Trade Unions Act, 1927, civil servants were compulsorily segregated into separate trade unions, but that Act was repealed in 1946. A strike among established civil servants would, of course, normally be regarded as a 'disciplinary offence', within the code established under the umbrella of the Whitley Councils; but no special problem is involved in that. Although traditionally civil servants have rarely engaged in strike activity (which is to some extent a reflection of the better 'grievance procedure' in the public sector), their militancy is increasing. The early months of 1969 saw the first strike instruction issued by the Institute of Professional Civil Servants and in 1970 both the Society of Civil Servants and the Inland

[65]Section 4.
[66]The Electricity Supply Act, 1919, s. 31.
[67]See, S.133.

Revenue Staff Federation made arrangements to facilitate strike action.[68] The Act of 1971, however, has given a new definition of 'worker' so as to include Crown Servants in the new category of 'worker'.[69]

In France, the right of public servants to strike is guaranteed by the Constitution, subject to certain limitations. It was held in 1966 by the *Conseld'Etat* of France that the right of public servants to strike was a necessary weapon for the protection of their professional interests; it could be limited only for the purpose of maintaining a balance between professional interest and public interest; the right could be denied only where the presence of particular officer at his post was vital to the interests of peace, order and good government; regulations denying the right in an absolute, general and permanent manner to a large section of public servants was *ultra -vires* the constitution and void.[70]

The General Strike and Its Problem

The problem of 'general strike' in England is perhaps largely of historical importance today. The argument is still heard about whether the general strike of 1926 was lawful but unless industrial relations suffer a catastrophic setback the likelihood of a general strike in modern conditions does not seem great. In the middle of the general strike of 1926, *Astbury, J.* declared in court:[71]

"*The Trades Union Congress Council's so-called general strike is unlawful*," the statement reads further, "*The Trade Union Congress and other parties have no trade disputes and never will, and the country on the other, with the government*."

On the same day, *Sir John (later Viscount) Simon* stated:[72]

"*The so-called general strike of the Trades Union Congress Council is illegal*." Trade disputes between the country and the government and the Trade Union Congress and other parties do not and will never exist.

[68]See Wedderburn, op. cit., p.391.
[69]Under the Industrial Relations Act, 1971, S.167, a worker would be a person who works or
Normally seems to work either (a) under a contract of employment; or (b) under any other contract…; or (c) in employment under or for the purpose of government department (other than the armed services) in so far as any such employment does not fall within either of the preceding paragraphs.
[70]*Syndicat National Des Functionaires etc. v. Minister of the Interior*, Brussels Court of First Instance (Twelfth Civil Chamber), dated December 16, 1966.
[71]*National Sailors' and Fishermen's Union v. Reed*, 1926, Ch. 536, at 539-40.
[72]Cited by Wedderburn, op. cit., p.391.

The T.U.C., which had brought out nearly two million workers in support of the miners in their bitter struggle against wage reductions, which the coal owners enforced when a government subsidy was removed, declared:[73]

"The General Council makes no constitutional claims. The Council's major goal is to ensure that the miners have a fair quality of living. A labour dispute is going on at the Council".

In 1927 Professor *Goodhart* convincingly argued that this particular dispute and strike remained a 'furtherance of a trade dispute'.[74] The 'political' element had not displaced the industrial content and the statements of *Asthury, J*., and *Sir John Simon* have, as the years passed, acquired increasingly the colour of the context in which they were made.[75]

General Strikes were made unlawful, as such, by the Act of 1927, but since the repeal of the statute by the Act of 1946, they will become unlawful on the same grounds as any other strike. Although Professor *Goodhart's c*onclusion as to the legality of such a general or political strike as that of 1926 seems the preferable view, combinations to create violent disorders are, of course, unlawful, and furthermore, breach of contract of employment may unhappily add an element of illegality.

Under Defence Regulations, however, strikes may be declared illegal; but under the Emergency Powers Act, 1920, (amended slightly in 1964), though the Government can make a proclamation and then govern with special powers by Regulation,[76] if essential supplies are threatened for the community, the regulations must be forthwith approved and regularly renewed by parliament. There is also an express prohibition against 'industrial conscription', which prevents the British Government from using conscription to break strikes. The Act also expressly lays down that no regulation made under it 'shall make it an offense for any person or persons to take part in a strike or convincing any other person or people to join a strike in a nonviolent manner so, a peaceful strike cannot be declared illegal in time of peace, even though Government has the

[73]Milne Bailey, *Trade Union Documents* (1929), p. 346.
[74]See *Essays in Jurisprudence and the Common Law*, Ch. 11. See *D.P.P. v. Bhagwan* (1970) 3 All E.R. 97, H.L. (combination to act to the prejudice of the State not *per se* criminal).
[75]See Wedderburn, op. cit., p.392.
[76]Since 1945, such regulations were issued on five times, giving the government extensive powers, especially allowing them to use troops to run transport or move supplies. They were issued in 1948, 1949 and 1970 dock strikes, the 1955 railway strike and the seamen's strike of 1966.

power to take over the industry which is affected by a strike if the essentials of life are threatened by the strike.

Since the Act deals with emergency and general strike situations, it is arguably implied that such action is not necessarily always unlawful at common law. An addition to Government power was, however, made by the Emergency Powers Act, 1964, which makes the Defence Regulations of 1939 permanent and allows the armed services to be used without proclamation or consultation with parliament on 'urgent work of national importance'. The Government has moved in troops under what must have been these powers to offset the early effects of large strikes. Any extensive use of the powers is bound to result in demands for their repeal. Even in France, where it was once normal, the regular use of troops and conscription to break strikes has been discontinued. It ought not to begin in Britain.[77]

Conclusion

In conclusion, this researcher would like to quote the following statements, which have aptly brought out the general nature and effect of a strike or lock-out and the distinction between the two.

The strike itself is a step in the negotiation process. Each party's ability to negotiate on a financial basis is put to the test and each is forced to acknowledge the need for the other's contribution. The employees' savings vanish, the union treasury shrinks, and management suffers growing losses as the strike drags on.

Demands are reduced, concessions are made, and unthinkable compromises are eventually accepted. The economic pressure of the strike is the catalyst that makes agreement possible. Even when no strike occurs, it plays its part in the bargaining process, for the very prospect of the adversity that the strike will bring provides a thrust to compromise. In order to reach an agreement, strikes are a critical and frequently necessary part of the collective bargaining process. "*Lock-outs are sometimes referred to be the opposite of strikes. A lockout is a tool that the employer can use to force employees to understand his point of view and comply with his requests, just as a strike is a tool that the employees can use to enforce their industrial demands.*

[77]Wedderburn, op. cit., p. 395.

Labour has access to and frequently uses the weapon of strikes in the conflict between capital and labour, just as the employer has access to and can use the weapons of lockout.[78]"

Political freedom is necessary for collective bargaining to occur. Left to right, each dictator, as a first step in the consolidation of power, has sought to destroy free trade unions. We are dedicated to freedom, not only political but also economic, through a system of private enterprises.

We support the free market and the profit system. This system has produced significantly better outcomes for wage earners than any other social system in history, despite some flaws. In order to have a say in management, collective bargaining is not a viable option.

We do not want unions represented on the board of directors or in the active management of any company. However, it is difficult to say where a line can be drawn between the separate concerns of management and labour. Where once collective bargaining included largely wages, hours, safety conditions and later, hiring, firing and promotion, it now includes medical care, pensions and the like.

The free market and the profit system are something we support. Despite certain shortcomings, this system has resulted in noticeably better outcomes for wage earners than any other social structure in history. Collective bargaining is not an alternative to having a say in management.

However, if enough workers join unions and support union recognition, the law also gives unions the power to force even hostile businesses to recognize them. This is known as statutory recognition. The greatest method to obtain fair wages terms and conditions is through collective bargaining with a recognised union.

It is submitted that, in order to promote a healthy growth of trade unionism in any country like the United Kingdom, the policy of the Government, as well as the attitude of the labour courts and tribunals should be to allow a reasonable amount of liberty to bargain freely and to adopt such industrial action as is thought necessary by the parties for effective bargaining. Healthy trade unionism does not mean control by putting unlimited restrictions upon the right to take industrial action in the process of collective bargaining. The relevant provisions of the law should be so interpreted and applied as to promote co-operation and understanding between

[78]*Kairbetta Estate v. Rajamanickam*, (1960) 11 L.L.J. 275 (278) S.C., per Gajendragadkar, J.

capital and labour and to create an atmosphere in which the function of the union will be not only to fight with the management for better standards but also to contribute as an active partner, to the productivity and efficiency of the undertaking and of the national economy.

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