AN UNDEFINED PROHIBITION

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ABSTRACT

A 'Strike' is the last cry for any group or union, against the powerful, to voice their rights or disapprove to the existing conditions. From Gandhi to various trade unions, strike has been used as a tool to attain social justice. Advocates are a class which brings the actual implementation of constitutional, fundamental and legal rights when they are violated; and any attempt to stifle their voice would be an attempt to demean democracy. No provision in Advocates Act deals with lawyers' Right to Strike. Although, in many cases Supreme Court has held that if on the ground of strike a lawyer abstains from appearing in court in a case in which he holds a *vakalatnama* from a client, he is conducting a professional misconduct, a breach of conduct, breach of trust and a breach of professional duty. This paper seeks to define the limits of lawyers' professional obligations towards their clients as against their own rights and privileges. It intends to clarify the grey area under which in rarest of rare situations a strike by the lawyers' can be validated.

Keywords:

Advocates Act, Lawyer, Legal obligations, Professional ethics, Professional misconduct, Strike

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Our societies from ancient times have been divided into various factions. These factions were, and are what made the working of society smooth. From the very beginning of times, humans followed division of labor. In a democratic society it becomes important to maintain the right balance among these factions. Marxian theory brought in the concept of collective bargaining

by the employees against exploitative employers[1], bringing them at par with the employers, and thus a balance of power or at least a reflection of it is maintained. Strike became a powerful tool for collective bargaining in the period after industrial revolution. Along with this, it can also be appreciated as a tool of last resort for bringing an equilibrium to balance of powers among various factions in society. Strike has mostly been discussed with respect to employee-employer relations, however, that's not always the case. A glance at our long drawn freedom struggle shows that Civil disobedience movement, call for *bandhs,* strikes and boycott became important strategies of Gandhi to successfully bring Bruisers to their knees. Thus, throughout the history of human civilization, strike has been used to bring in economic, political and social justice. We can thus reduce the main objective behind strikes as a tool to maintain balance of powers.

THE UNDEFINED PROHIBITON- STRIKE

Strike, essentially is a phenomenon of cessation of work by a group of persons with an intention of exerting pressure upon other person(s) for securing some demand.

Just like the two faces of a coin, a strike has both negative as well as positive aspects. Strikes often result in loss of employment as well as income, as many employers being agitated by strike remove their employees or act in a more stubborn manner. Many a times it is seen that strike takes a pathetic form which may also lead to loss of lives and even destruction of property.

Banning has become an important element of our political culture. Anything which tends to become outside the purview of our control we try to either ban it or make a law suppressing it legally. However the common practice of banning something might not always have the results that we assume. Many a times when we try to prohibit some situations by banning them they come back in a much more agitated manner. A thing being banned doesn't mean it would cease to happen. It just means that the legal system's perspective will change its course.

But a strike is not as precarious as it appears. A strike creates awareness among the public or a part of society of the hidden ills in the functioning of a body or society as a whole. Moreover strikes are one of the most effective ways of communication when it comes to last resort and no other due process is available. Whenever strikes occur due to any reason they act as resource

[1] Adam Bischoff, *Karl Marx's View of Strikes,* (Aug. 20, 2017, 11:10 PM), http://homepages.gac.edu/~kranking/DigitalHistory/HIS321/HIS_321/Karl_Marx.html

pool for future instances as strikes are always an important source of information. Supporting strike in this context is not to promote libertarianism but to have a more sensible and balanced law making.

People often take strikes in a very fore shorted manner. But they don't see it through the perspective that strikes actually help us to look to the situation of a workman which might have been unnoticed if he didn't stand for his rights publicly. History has been a strong example that many times strike shows the actual strength of a faction who's right were often given a deaf ear.

Strikes are the insurrections of labor. There has come, in all emancipating movements, the taking up of the cause by disinterested outsiders. This, too, has happened to labor. It marks the step beyond the strike stage of the labor agitation, and that, too, is one of the benefits of strikes. Strikes mean progress.[2]

A RIGHT TO STRIKE IN INDIA

In India, the word 'strike' has only been defined under sub-section (q) of section 2 of Industrial Disputes Act, 1947 as,

> *"strike" means a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal, or a refusal, under; a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment;"*

In *All India Bank Employees' Association v. National Industrial Tribunal*[3] it was contended that the right to form an association guaranteed by Article 19 (1) (c) of the Constitution, also carried with it the concomitant right to strike for otherwise the right to form association would be rendered illusory. The Supreme Court rejected this construction of the Constitution as: *"to read each guaranteed right as involving the concomitant right necessary to achieve the object which might be supposed to underlie the grant of each of such rights, for such a construction would, by ever expanding circles in the shape of rights concomitant to concomitant right and so on, lead to an almost grotesque result*."[4]

[2] M.E.J. Kelley, *Strikes as a factor in Progress,* 164 THE NORTH AMERICAN REVIEW 24, 31
[3] AIR 1962 SC 171
[4] Anirudh Rastogi & Siddharth Srivastava, *Critique of the Supreme Court judgment on strikes,* 2 Issue 6 COMBAT LAW

However this position has been since changed. Under Chapter V of the Industrial Disputes Act, 1947 the employers have the right to lock-out and the employees have the right to strike subject to the due procedure mentioned therein. Along with this, Trade Unions Act, 1926, under section 18 and 19 provides immunity to trade unions from any civil liability in case of a strike. The judiciary in a number of cases have held that the workers though do not have a fundamental right to go on a strike; they have a legal right to resort to strike.[5] It is important to note here that advocates do not fall under the category of 'workers'.

AN ADVOCATES' RIGHT TO STRIKE

The Advocates Act under section 34 and section 49 provides power to High Courts and Bar Council of India (mentioned as BCI hereinafter) to make rules, respectively with respect to conduct of advocates. Even though BCI has not made any express rule regarding strike or boycott by an advocate, Apex Court has adjudicated on this several times stating that advocates don't have the right to go on a strike.

In the case of *Ramon Services Pvt. Ltd. v. Subash Kapoor*[6], Justice R.P. Sethi observed that,

> *"Persons belonging to the legal profession are concededly the elite of the society. They have always been in the vanguard of progress and development of not only law but the polity as a whole….. Generally strikes are the antithesis of the progress, prosperity and development. Strikes by the professionals including the Advocates cannot be equated with strikes undertaken by the industrial workers in accordance with the statutory provisions. The services rendered by the advocates to their clients are regulated by a contract between the two besides statutory limitations, restrictions and guidelines incorporated in the Advocates Act, the Rules made thereunder and Rules of procedure adopted by the Supreme Court and the High Courts… With the strike by the lawyers, the process of Court intended to secure justice is obstructed which in unwarranted under the provisions of the Advocates Act. Law is no trade and briefs of the litigants not merchandise."*

In *Husssainara Khatoon v. Home Secy., State of Bihar*[7], it was held that litigants have a fundamental right to speedy justice.

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[5] B.P. Ruth & B.B. Das, *Right to Strike: An Analysis*, 41 No. 2 (Oct., 2005) INDIAN JOURNAL OF INDUSTRIAL RELATIONS 248, 253

[6] AIR 2001 SC 207

[7] AIR 1979 SC 1360

A Constitution Bench of the Supreme Court in *Harish Uppal (Ex-Capt.) v. Union of India*[8], where the lawyers went on a strike, held that

> *"It is the duty of every advocate who has accepted a brief to attend trial, even though it may go on a day to day and for a prolonged period. He cannot refuse to attend court because a boycott call is given by the Bar Association. It is unprofessional as well as unbecoming for him to refuse to attend court…The advocates would be answerable for the consequences suffered by their clients if the nonappearance was solely on grounds of a strike call…an advocate is an officer of the court…Advocates have obligations and duties to ensure smooth functioning of the court…Strikes interfere with the administration of justice…It is held that lawyers have no right to go on a strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be giving press statements, TV interviews, carrying out of court premises banners and/or placards, wearing black or white or of any color armbands, peaceful protest marches outside and away from court premises, going on dharnas or relay fasts, etc… Only in the rarest of rare case where the dignity, integrity and independence of the Bar and/or bench are at stake, courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day. However, it will be for the court to decide…Therefore in such cases the President of the Bar must first consult the Chief Justice or the District Judge before advocates decide to absent themselves from the court…Courts must not be privy to strikes or calls or boycotts."*

The same was followed in the recent judgment of Supreme Court *Hussain & Anr. v. Union of India*[9] wherein it held that such avoidable interruptions should be prevented and the concerned authorities ought to find ways and means to tackle this menace. Consistent with the above judgment, the High Courts were given the order that they must monitor this aspect strictly and take stringent measures as may be required in the interests of administration of justice.

Thus in the present scenario advocates or the Bar do not have any right to call for a strike or boycott the courts. However when the apex court stated that it would turn a blind eye in the rarest or rare case doesn't make the strike's legal, it would still remain illegal.

These 'rarest of rare cases' whether they include the dignity, integrity and independence of the Bar and/or Bench, would be decided by the Court itself. Thus becoming the duty of President of the Bar to consult the Bench first.

[8] AIR 2003 SC 739
[9] Criminal Appeal No. 509 of 2017

In case of any strike, courts would have to proceed with judicial business during Court hours and it would be no ground for adjournments. Also, any loss to the client solely because of the advocate holding his *vakalath* was on a call for strike, the advocate would be personally liable to pay damages to the client.

Supreme Court prohibiting the right to strike by an advocate, recognizes that at the same time the advocates need to have a medium to voice their opinions and dissent. Thus it suggests that the advocates take alternative methods of protests and demonstrations rather than going on strike.

The grounds for such prohibition, as provided by the Apex court, is that advocates are a members of a noble profession and thus the society is justified in expecting an ideal behavior for them. By going on a strike, they breach their contract and professional duty to conduct the cases for which they are engaged and paid.[10] Strike by advocates can't be equated with strikes by other workmen. The Bar and the Bench both play a role, inseparable from each other in the administration and deliverance of justice and going on a strike by the advocates hampers this process, and violates their duty as an officer of the Court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilized society.[11]

There has been wanton use of this power (strikes and boycotts) by the advocates which was brought into notice by the Law Commission in its 266th Report (March, 2017). It found out that in the period of 2012-2016 number of working days lost on account of strikes by advocates was rampant through the length and breadth of the country with little variation in degree (Chapter VII). In the state of Uttrakhand, 455 days were lost i.e. 91 actual working days per year. Rajasthan lost 142 days. The case of Uttar Pradesh appeared to be worst with the average number of days of strike in its 8 major districts (Muzaffarnagar, Faizabad, Sultanpur, Varanasi, Chandauli, Amedkar Nagar, Saharanpur and Jaunpur) came to about 115 days a year. Commission could not find any convincing reasons for these strike or boycott of work in the courts. The reasons for strike or abstinence from work varied from local, national to international issues, having no relevance to the working of the courts. While reviewing the Advocates Act, it felt that the conduct of the advocates, directly as well indirectly affected the functioning of the courts, and thereby contributes to the pendency of cases.

[10] G.B.REDDY, PRACTICAL ADVOCACY OF LAW 221

[11] *In re:* Sanjiv Datta, Deputy Secretary, Ministry of Information and Broadcasting, New Delhi, 1995 AIR SCW 2203

ON THE OTHER SIDE OF THE IRRELEVANT BAN

Section 7(d) of the Advocates Act, 1961 states

> *"The functions of the Bar Council of India shall be—*
>
> *(d) to safeguard the rights, privileges and interests of advocates;"*

The Advocates Act, 1961 clearly states that it is the duty of the Bar Council of India to safeguard the rights of the Advocates who are registered in their rolls, but this is not the actual scenario. In many cases it is observed that the Bar has completely failed to comply with the rights they provided to the advocates.

Model Welfare Schemes of Part IX of the Bar Council of India rules provides scheme for granting financial assistance to indigent practicing advocates when suffering from serious ailment, it says that-

> *"These rules shall be known as "Rules for grant of financial assistance to Indigent Practicing Advocates suffering from Serious Ailment" and shall apply to all such Advocates practicing in the State."*

Even after providing for such a scheme it is seen that the Bar Council does not take any initiative to promote this idea. Most of the requests filed by the advocates are under process and are not followed up since a very long time. It is also observed that most of the advocates don't even know about the welfare scheme that is provided in order to aid them in various conditions.

Since many years the regular fees is being charged on the advocates still it was of no good to them. The basic object behind the implementation of the Act was good, but it could not be put forward correctly. On one side under Rule 40 of this scheme an advocate can be disqualified, and even lose their registration or the license to practice if he/she does not clear their dues, on the other side the policy which is governing them actually doesn't give any advantage to them. An insight into this shows how by the help of Advocates Act, 1961 the Bar has gained inalienable powers to govern a profession without any intervention. This is clearly depicted in the case of Welfare Fund Act where the new advocates are compelled to fund the membership and even levy a mandatory periodical fees. Due to this the advocates have to charge increased fees in order to buy the welfare stamp on the *Vakalatnama* which eventually increases the burden on the client to pay for something of which they aren't even a member. This is completely against the Section 27(2) of the Act which says that-

> *"The value of the stamp shall neither be the cost in a case nor be collected in any event from the client."*

In such a condition it is very evident that the BCI is itself not able to follow the rules which it has laid down for the advocates.

In the Advocates Act, 1961 at many instances the phrase 'professional misconduct' has been used and it has been linked to many severe punishments. Still we see that even when the BCI gives 'professional misconduct' utmost importance and clearly states that any advocate who is found liable of professional misconduct can be disqualified and even can go through a cancellation of registration of their names from the rolls still the Act remains ambiguous on defining what actually professional misconduct is.

Another important aspect in this discussion is the Right to Practice that is defined in Chapter IV Section 30 as-

> "*Subject to provisions of this Act, every advocate whose name is entered in the [1][State roll] shall be entitled as of right to practice throughout the territories to which this Act extends, — (i) in all courts including the Supreme Court; (ii) before any tribunal or person legally authorized to take evidence; and (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice."*

Generally Article 19(1) (g) of the Constitution of India giver the right to an individual to-

> "*to practice any profession, or to carry on any occupation, trade or business"*

Therefore being specific in context to the legal profession, every advocate has the right to practice in any kind of court and in any field they want to without any restrictions. This is one of the most basic and important right given to an advocate by the BCI in the Advocates Act, 1961.

It is seen that the BCI has proved to be a failure in safeguarding the Right to Practice that is given by the Bar themselves to the Advocates. Many a times it is seen that the Human Rights advocates have to face harassment and are hounded by the state agencies in many cases because eventually their work is against the bodies of the state i.e. the government or even the police.

It is very well stated in the Special Rapporteur that when lawyers provide services which are aimed at protecting the rights of their clients they actually qualify as human right defenders and as defenders of human right it is the duty of the state to acknowledge their service and protect the status of the advocates. But this is not the case in this situation.

The Committee on Freedom of Association and the Committee of Experts, the two supervisory bodies of International Labor Organization have laid down that in cases where the right to strike or a part of society has been called off or frozen by the government, in such a case some form of compensatory relief should be given to that part of society so that they can participate freely in order to resolve their disputes in an unaffected manner. In the case of strike ban for advocates we see that it is laid down in the Amendments to the Advocates Act, 1961 under Section 10 a new Section 9 B is inserted in the Act which introduces a Special Public Grievance Redressal Committee of Bar.

> *"*The *Special Public Grievance Redressal Committee shall inquire into any allegation or complaint of corrupt practices or misconduct against any office bearer or member of the Bar Council of India in discharge of his duties as a member of the Council, which is referred to it by the Council."*

Even if the Bar introduced a provision for the grievance solving of the advocates, it is of no comparison to the immediate effect that a strike used to have. Therefore if the Bar wants to ban strike then it should give a proper alternative with an efficient after effect just like a strike used to have.

It is observed from all the above mentioned instances that the advocates are kept at a very disadvantageous position with respect to their rights. At one side, the Bench inflicts a ban on their right to strike and on the other side, the BCI, which is supposed "*to safeguard the rights, privileges and interests of advocates;"* under the Advocates Act, fails in its duty to do so, as above proved. This creates a gross imbalance of power, going against the common law principle of equity.

RECOMMENDATIONS

On one hand we might win the conflict that BCI cannot impose a ban on the Right to Strike of advocates but we cannot ignore the fact that giving the advocates an absolute Right to Strike would be very perilous. In such a situation the mean path between the two is the best alternative possible. To devise this mean path the grey area present in this conflict needs to be clarified. The basic grey area was brought up after the case of *Harish Uppal (Ex-Capt.) v. Union of India*[12] where Supreme Court said that

[12] AIR 2003 SC 739

> *"…Only in the rarest of rare case where the dignity, integrity and independence of the Bar and/or bench are at stake, courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day…"*

Although this judgement very clearly states that strike is only possible in rarest of rare cases where the dignity, integrity and independence of the Bar and/or bench are at stake, but nowhere it is clearly defined as to which matters might lead to the aspect of rarest of rare cases involving the question of integrity dignity and independence of Bar and/or Bench. For this purpose Bench should legalise the aspect of strike and give advocates the Right to Strike so that they become eligible to raise their voices against any kind of issues. Now this legalisation cannot be absolute so we propose to put reasonable restrictions to it. These restrictions would not only limit the scope of strike by advocates but also give clarity to the grey area generated by the precedent judgements in case of *Harish Uppal (Ex-Capt.) v. Union of India.*

It is proposed that the following this judgment, any strike falling under the meaning of "integrity, dignity and sovereignty" of the Bar and/ or Bench, should be legalized. Such rarest of rare cases shouldn't be penalized.

Further, to provide safety valves, so that this provision wouldn't be misused by the advocates, the proposal of such a strike would have to first be approved by the ten most senior advocates of a given State Bar. These ten advocates would have to validate if the reason for the strike fell under the "rarest of rare cases". This provision is different from the present position of law whereby it will be for the court to decide if the strike is being carried on for the right reasons. The duty has been assigned to the senior advocates for a purpose. Just like "Like begets like", in the same way only an advocate can understand the need and issues of an advocate, practicing the same profession. Moreover an advocate would very clearly demarcate between a useful and a baseless strike.

This attestation by these ten advocates makes them accountable to the Court of law. If the attestation given by the advocates is free of any kind of influence and malice then the court can just hold the strike illegal and ask the advocates to stop it, if they feel it did not involve and essential question based upon integrity dignity and independence of the bar / bench. If on the other hand the court feels that the strike was based upon a valid theme then they can act as per their functioning and give directions along with finishing the strike.

If in any case it is felt and proved that the attestation given by the advocates was under influence or involved malice then an inquiry should be set up on the advocate/advocates and if the allegations are proved right then they should instantly be disqualified and their names should

be removed from the rolls. Herein also, the bench should be constituted of more than 1 judge. If the court found the strike to be illegal, the reasoning provided by these ten advocates to be arbitrary, they should be held accountable for it and be penalized as such the situation commands.

The purpose behind such regulations is that while regulating strike it's an absolute right of an advocate, considering their duties and obligation the justice delivery system. It just aims to make the process, for a call of strike, harder. It would further help in reducing the number of insignificant strikes because an advocate would attest a strike only if it affects him in a crucial manner and only if it stands right in the eyes of law, therefore, only the matters which need utmost care from law would be brought up and rest hence the issue of unwanted and useless strikes would be curbed.