

Iftikhar Ahmad Tarar*

Industrial Dispute in Comparative Perspective¹

Historical Progression

1-Position in the UK

Before embarking upon the anatomical analysis of the term ‘trade dispute’, it is expedient to cast a glance at the historical evolution of the definition in its chronological progression. Originally, the term was defined by having reference to the parties to it and the subject matter of the dispute. As far as parties to the dispute were concerned, law confined it to the employers and the workmen and the workmen and the workmen². As to the subject matter, it could be about offering employment, dismissals, and terms of employment or conditions of the labour of any person³. At the outset, the connection between the subject matter and the dispute was based on the words ‘in connection with’. This arrangement, it is submitted, remained in vogue till 1971- the year in which, as result of an amendment, the scope of industrial dispute was broadened by including therein suspension and termination of employment, allocation of work and procedure agreements. Another change, which was introduced in this piece of legislation, was that the ‘trade dispute’ was rechristened ‘industrial dispute’⁴.

The said law was replaced in 1974⁵. In the said law, the provisions relating to the parties to the dispute were recast as such but list of subject matter of the dispute was enlarged. Besides incorporating the previous areas of subject matter of the dispute, it prescribed controversies relating to duties of job between the workers or their groups, matters of discipline within the establishment, issues of membership or non-membership of the trade union, comforts for the office bearers of the union and machinery for negotiations, consultation and other procedures for addressing the foregoing issues extending to the recognition of the right of the union, by the employers or their associations, to nominate workers in any negotiations or consultation.

Notwithstanding the fact that the Minister was not their employer, a dispute between the Minister and any workers would also come within the purview of a trade dispute provided the same had been referred for consideration by a joint body on which the minister is represented or the disputes was about a matter which could not be settled without the minister exercising such power conferred by any law.

Similarly, for the purposes of this Act, any matters occurring off shore did constitute trade dispute. Sub-section 4 confers locus standi on the trade union or the employers’ association to anchor any cause of their members as a trade dispute. At the end, it has been explained that if any person or organisation does an act or makes a threat or demand against another which, if resisted by the opposite party, would lead to a trade dispute would also deemed ‘to have been done’ or made ‘in contemplation of a trade dispute’.

The Act, however, underwent rigorous amendments which brought about revolutionary changes in the substance of the definition of the trade dispute⁶. Resultantly, a more demanding test of relating the dispute to either wholly or mainly to any of the prescribed matters was imposed⁷. After remaining on the industrial horizon for about eighteen years the said law was repealed and substituted by another⁸.

In new legislative scheme, unlike previous arrangements, the definition has been squeezed to a dispute between the employers and the workers. Rest of the definition is the facsimile of definition under

¹ The present work is, basically, revamped version of research work published in PLJ 2008 due to couple of reasons; firstly, after its publication two enactments have been introduced on the subject in Pakistan. Thus, the position has been changed to great extent and, secondly, PLJ was not a HEC recognised journal.

*Iftikhar Ahmad Tarar is an Assistant Professor in the University Law College, University of the Punjab, Lahore, Pakistan.

² Section 5(3) of the Trade Disputes Act, 1906

³ Ibid

⁴ Hadmore Productions Ltd v Hamilton [1982] IRLR 102

⁵ Trade Unions and Labour Relations Act, 1974

⁶ Section 18 of the Employment Act, 1982

⁷ P v National Association Schoolmasters/Union of Women Teachers [2003] IRLR 307

⁸ Trade Union and Labour Relations (Consolidation) Act, 1992

preceding enactment. Moreover, in sub-section 5 the scope of the term worker has also been described-an arrangement which was missing in previous law. Now, the term worker with reference to a dispute embraces a worker who has been recruited by an employer or a person and who has ceased to be so provided that his employment has been terminated as a result of such dispute or his cessation of service has paved the way to dispute⁹. Since the promulgation of statute law, the definition of trade dispute has been subject to numerous amendments. However, the pivotal role of the judiciary has been instrumental in interpreting its limits. A cursory view of the definition reveals that it has following characteristics.

DISPUTE:

The term dispute has not been defined in the Act and it is submitted that it has never been defined in any of the preceding enactments as well. In order to bring any difference between the employer and the workmen under the umbrella of industrial dispute, the existence of a dispute has been stated to be sine qua non. A dispute does resonate in case a difference of opinion does exist between the employer and the workmen¹⁰.

In this context, Paul Davis and Mark Reedland have aptly opined that the proper definition of 'trade dispute' has been a matter of concern, both to those seeking to implement a policy of abstention with regard to the law of industrial conflict and to those willing to follow a policy of restriction. In both sets of policies, they add, the definition of trade dispute has to perform the role of demarcating in legal terms the proper sphere of Industrial Relations, marking it off from other areas of social and economic life¹¹. However, to qualify trade dispute there must be some 'purposive controversy'¹². On the contrary, a disagreement which is not a purposive dispute as between the immediate parties, but is purely an appendage to dispute between different parties, is not *per se* a separate dispute¹³.

It follows if a dispute is not on a trade issue, for example, threatening the violation of contract of employment, provided that the demands are not met, cannot turn it into a trade dispute¹⁴. Similarly, a union has no *locus standi* to transform a difference, having no nexus with conditionalities of employment, into a dispute related to such conditionalities by agitating that the employer was required to enter appropriate terms into the contract at the time of conclusion of the contract¹⁵.

PARTIES

The parties to a trade dispute are, now, workers on one side and their employer on the other side. Unlike previous laws, the disputes between the employers and employees and the disputes between workmen and workmen are no more subject of discussion under the law¹⁶. One purpose, *inter alia*, of this requirement has been stated to be the exclusion of industrial action against the government¹⁷. The countervailing result of the exclusionary aspect of the definition has been that besides bringing about anxiety amongst working class it has paved the way to academic debate as well. So, in this context, the definition of the worker emerges to be more restricted¹⁸. The thrust of the definition is that 'a dispute between workers and their employer' means a dispute between the employer and current workforce. Potential employment has been excluded from the purview of the trade dispute¹⁹. The proposition however, later on, found fortification from an erudite judgement of the Court of Appeal²⁰. Past employment could still become a trade dispute if the same had ceased to exist due to the dispute or if the cessation was one of the grounds paving the way to the dispute²¹. Similarly, an issue relating to the terms and conditions of workers not taking part in an industrial action was deemed to have come within the ambit of dispute²². Besides this, the unresolved issue of a union's *locus standi* to take up cause of the workers was still subject to uncertainties. So, it was unclear whether a union might stand in the

⁹ Section 244 of TULR (C) Act, 1992

¹⁰ Beetham v Triniland Cement Ltd. [1960] AC 132

¹¹ Labour Law: Text and Material 2nd ed. by Paul Davis and Mark Freedland pp.794

¹² Mercury telecommunication Ltd v Scott Garner [1983] IRLR 494

¹³ Ibid.

¹⁴ BBC v Hearn (1977) ICR 685

¹⁵ Universe Tankships inc Monrovia vs. ITWF [1982] IRLR 200

¹⁶ Trade Unions and Labour Relations (Consolidation) Act, 1992

¹⁷ Sweet & Maxwell's Encyclopaedia of Employment Law Vol.2 1982

¹⁸ Harvey on Industrial Relations and Employment Law Vol.3 N.2722

¹⁹ Ibid.

²⁰ University College London Hospital v UNISON,[1999] IRLR 31 CA

²¹ Section 244 (5) (b) of TULR(C) Act, 1992

²² British Telecommunication v. Telecommunication Workers Union,[2004] IRLR 158 and Encyclopaedia of Employment Law by Sweet and Maxwell Vol.2 pp.1982-83

shoes of a workman in the context of a trade dispute²³. A provision to the effect that a dispute involving trade union was to be treated as one to which workers were a party was present at the time of promulgation of previous law²⁴ which, subsequently, was repealed in 1982²⁵.

In this context, however, the opinion expressed by Lord Wright²⁶ that to hold that a trade union cannot espouse the cause of its members seems to be odious is sufficient to establish its locus standi. So, the pre- amendment situation as has been expressed by the courts in the cases like R v National Arbitration Tribunal, exp Keable Press Ltd²⁷, Beetham v Trinidad Cement²⁸ was that dispute espoused by a trade union was deemed to be a trade dispute between the employers and the workers. But, post- amendment scenario emerged to be unfavourable to trade union's locus standi to anchor the trade dispute.

Presently, if a trade union espouses a trade dispute on behalf of its members and not being 'for itself' as an organisation, it would be considered to be a trade dispute²⁹. So, puzzle of a trade union's status to champion the cause of the workers has been clarified in 1989³⁰. If there was a dispute, the court added, between the union and the employers, there was a dispute between those employees on whose behalf the union was acting and the employers. Albeit, the union did not act as an agent of its members so as to bind the members when negotiating with employers, it had authority to negotiate on its member's behalf and in their interest. In case of its failure to resolve the demands, the impasse was deemed to be a dispute not only between the union and the employers but between its members and the employers as well.

SUBJECT MATTER OF THE DISPUTE

Until 1982, a dispute had only to be connected with one of the acceptable subjects³¹. Under the new arrangement, the feud must be concerned, wholly or mainly, to one of the subjects enumerated under the law³², a list whose primary goal is to segregate the industrial grievances, to be anchored by the trade union, from political or personal grievances, a terrain outlawed for the union³³. These subjects fall into seven categories³⁴ in the following order:

a) Terms and Conditions of Employment

In order to bring a dispute within the ambit of industrial dispute it is imperative that it should be about one of the subjects enlisted under the statute³⁵ and terms and conditions of the employment is one of such subjects. In this context, the word 'employment' requires special elaboration and has been held³⁶ to be the employment defined and not confined to contractual relationship and "terms and conditions of employment" were, similarly, not confined to contractual terms and conditions but also included as were complied with by the parties in practice, or without ever being incorporated into the contract were either habitually or by way of common consent being observed³⁷. The phrase has been held to be a composite phrase devised to dispel debate as to the notion if something should properly be termed as 'term' or 'condition' of employment³⁸.

The phrase 'terms and conditions' has been so generously and liberally interpreted that the issue of change of the identity of the employer has also been considered to be such dispute pertaining to such the terms of employment within the boundaries of the law³⁹. Similarly, in a case⁴⁰ where the teachers refused to obey the instructions of the Incharge to teach a disruptive student, considering them to be unreasonable, the House of Lords held that holding it to be a dispute relating to terms and conditions of employment was inadequate. Terms and conditions of employment were what the dispute was about.

²³ Gillians Morris, Timothy J Archer, *Trade Unions, Employers and the Law* 2nd ed. 1993 pp 228

²⁴ Trade Union and Labour Relations Act, 1974

²⁵ Sweet and Maxwell's Encyclopaedia of Employment Law.vol 2 p. 1983

²⁶ NALGO v Bolton Corporation²⁶ [1943] AC 166

²⁷ R v National Arbitration Tribunal, [1943] 2 All ER 633 CA

²⁸ Betham v Trinidad Cement, [1960] 1 All ER 274,PC

²⁹ Harvey on Industrial Relations and Employment Law vol.3 N/1759-60

³⁰ Associated British Port v TGWU [1989] IRLR 291

³¹ Section 29(1) of the Trade Union and Labour Relations Act, 1974

³² The law of Industrial Action and Trade Union Recognition by John Bowers, Michael Duggan and David Reade, 2004 pp.79

³³ Labour Law 3rd ed. by Simon Deakin and Gillian S Morris p.913

³⁴ Labour Law 3rd ed by Simon Deakin and Gillian S Morris p.913

³⁵ Section 241(1) of the TULR (C) ,1992

³⁶ Hadmore Productions ltd and other v. Hamilton,[1982] IRLR 102

³⁷ Ibid

³⁸ P v National Association of Schoolmasters/Union of Women Teachers [2003] IRLR 307

³⁹ Westminster City Council v UNISON,[2001]

⁴⁰ P v. national association of Schoolmasters/ Union of Women Teachers, [2003] IRLR 307

So, the dispute about the reasonableness of the instructions was held to be a trade dispute relating wholly or mainly to the terms of service. In response to an argument advanced before the House of Lords that such terms mean the rules governing employment relationship. Such (rules) need not be taken in the contract, the House of Lords turned down the submission and reiterated that the phrase “terms and conditions” was a composite phrase contrived to ward off arguments over if some thing should properly be described as a ‘term’ or ‘conditions’ of employment. It doesn’t matter that it should be one or the other. Its use in composite form demonstrated the fact that the legislature intended to accord it broad meaning. It, undoubtedly, included not only the rule governing the employment relationship but their application as well. The parliament could not have, the House of Lords added, wished the immunities granted to the trade unions in industrial disputes to turn upon such fine distinctions. It was impossible, in that context, to chalk out a consistent distinction between a rule and its application to specific cases.

b) Termination of employment etc

Apprehension of future redundancies though not expressly stated in the extant law, but it has always been deemed to be an industrial dispute relating to termination or suspension of employment be it expression of ‘connected with’ of the Industrial Disputes Act of 1906 and 1971, or ‘relating to wholly or mainly’ of amended TULRA, 1974 and TULR(C) Act, 1992. Before the incorporation of amendment⁴¹, there emerged four leading cases on this issue in the UK.

First⁴², the baggage handlers at Heathrow had, under the apprehension of job losses, to the introduction by the Airport Authority at Heathrow of an aircraft handling company to provide ground handling services for airlines using the airport. An independent inquiry found that the worker’s fears of job losses were groundless, but on the evidence in the case there was a clear finding that these fears were genuine and widely entertained. In those circumstances the court held that to be an industrial dispute within the definition because the dispute related wholly or mainly to the termination of employment of workers, even though the redundancies feared laid wholly in the uncertain future and there had been no actual threat of a redundancy notice being issued. Secondly⁴³, the question of future redundancies came under judicial scrutiny in 1982. This time, the decision was about definition of trade dispute under section 29 of the 1974 Act. Members of the Association employed by Themes had refused to transmit the material produced by the facility companies owing to the fear that if, instead of programmes which Themes (their employers) was capable of producing itself, the programmes produced by such companies were transmitted, that might lead to redundancies at their own studios, the House of Lords held it to be a classic example of a trade dispute germinating out of apprehensions for job security in peak time unemployment. In such situation, their Lordships were of the view; the issuance of actual notices of redundancies was not the requirement to bring it within the net of industrial dispute. Such a notion was described to be absurdity. Thirdly⁴⁴, in another case, the issue of future redundancies was also at debate. The plaintiffs were endeavouring to sell computer systems and equipment to hospitals and the union of which the defendants were officials had instructed its members employed in the Health Service to have no dealing with the plaintiffs. The reason put forward was fear of job losses. Mr. Justice Goulding while applying the rule of General Aviation Services’ case dismissed a submission for an interlocutory injunction on the ground that the defendants were, in their defence, likely to prevail at the trial. The learned judge held that a dispute about job security, a dispute motivated in whole or in part by the fear of redundancy, was a trade dispute. Fourthly, in the case of Mercury Telecommunication Lt. V Scott- Garner almost similar views were expressed by the Court of Appeals. The union objected to the grant of licence to Mercury for running private communication system and construed policy of liberalization to pave the way to privatization of the industry. Resultantly, the union asked its members, who were in the employment of British telecom, not to connect Mercury’s Telecommunication system to British Telecom network. The court of appeal, reversing the finding of the trial court, held that not to be a trade dispute and added that the same was true in the light of the rulings in the cases of Hadmore Productions v Hamilton and Health Computing v Meek as the fear of future redundancies could relate to “termination of employment” within section 29(1), but those authorities were decided on the words of that section in its unamended form. The change of wording from “connected to” to “related wholly or mainly” was of immense importance and the amended sub-section now riddles the court with the duty to look to the predominant purpose. It was owing to this legislative change that the case of Mercury Telecommunication v Scott- Garner could not qualify as trade dispute. The court was of the view that the phrase ‘wholly or mainly relates to’ directed

⁴¹ Section 18 of the Employment Act, 1982

⁴² General Aviation Services v TGWU

⁴³ Hadmore Production Limited v. Hamilton and others, [1982] IRLR 102

⁴⁴ Health Computing Ltd v Meek

attention to what the dispute was about and in case, it was about more than one matters what it was principally about. In considering whether a dispute related wholly or mainly to any of the matters enlisted under section 29(1), it was necessary to take into account not only the occasion paving the way to break out of dispute but also the reason of its emergence as well. Therefore, on the basis of evidence before it, the court held that the paramount object of the action was to launch a crusade against the political decisions of the liberalisation of the industry and privatisation of British Telecom. Likewise, the matter of apprehensions of future redundancies was also debated in 1980⁴⁵. The Unions in Northern Ireland did not permit certain bread to be sold at less than 3 p under normal retail prices. The Unions instructed their members not to deliver bread to Crazy Prices Company, who were obtaining other bread from Ireland. Allowing an appeal against a restraining order, the Court of Appeals held that Hewitt was acting in furtherance of a trade dispute within the bounds of law. It was reasonably clear that when Crazy Prices (Northern Ireland) Company continued to undercut other retailers, competing supermarkets would almost certainly have had to follow suit and if some or all of them, including the plaintiffs, were to import substantial quantities of bread it would inevitably reduce the amount of bread baked and delivered in Northern Ireland. Termination of the employment of some of the workers engaged in baking and delivering bread would be very much on the cards. In this case, it is submitted, the court of appeal went a step ahead as compared to the cases of *General Aviation Services v TGWU*⁴⁶ and *Hadmore Productions Ltd v Hamilton*⁴⁷ by establishing that it was immaterial whether the defendants had surfaced their apprehension of future redundancies or not. The court was absolved of the responsibility of determining it⁴⁸.

c) Allocation of Work

As per law⁴⁹, distribution of work amongst the workers or their groups may be a trade dispute. Originally, demarcation disputes did come under the definition of a trade dispute⁵⁰, but, contrary to the recommendations of the Donovan Commission to retain it; the succeeding law⁵¹ removed such immunity⁵². In case of *Health Computing Ltd v Meek*⁵³ in response to a submission by the defendants that the dispute was also related to the distribution of duties between two groups of workers, i.e. the Workers in the NHS on the one hand and the employees of the plaintiff on the other hand, the High Court, in the context of Act of 1974, refused to interpret the expression ‘allocation of work’ widely. Moreover, in the case of *Hadmore Productions Ltd v Hamilton*⁵⁴, The House of Lords established the dispute to be unequivocally related to section 29(1)(c) which, undoubtedly, primarily directed to demarcation disputes between workers employed by the same employer was, by reasons of definition of ‘worker’ in sub-section (6), capable of extending to a dispute as to whether television programmes should be produced by employees of those television companies themselves, rather than by employees of facility companies. Similarly, the rule established in the fore mentioned cases got confirmation in another case in 1984⁵⁵. Defendant union, in the said case, took the plea that the dispute was within the ambit of trade dispute because that related to Section 29(1) (C) of the TULRA 1974 as amended i.e. allocation of work between groups of work. The House of Lords did accept the submission that the demarcation disputes would normally be deemed to be trade disputes where the workers were in the employment same employer. In the instant case, their Lordships held, the allocation of work relied on by the defendants was the allocation between the workers employed by *Dimbleby Printers Ltd* and workers employed by the TBF, the defence advanced by the defendant had no likelihood of success.

d) Disciplinary matters

e) Matters relating to membership or non-membership of a worker:

f) Facilities for officials of trade unions; and

g) Machinery for negotiation or consultation, and other procedures....

⁴⁵ *Crazy Prices Ltd v Hewitt*, [1980] IRLR 396

⁴⁶ [1975] ICR 276

⁴⁷ [1983] 1 AC 191

⁴⁸ [1980] IRLR 437

⁴⁹ Section 244(1)(c) of the Trade Union and labour Relations (Consolidation) Act, 1992

⁵⁰ Trade Disputes Act, 1906

⁵¹ Industrial Relations Act, 1971

⁵² *The Law of industrial Action and Trade Unions Recognition* by John Bowers, Michael Duggan and David Reade 2004 at 86-87

⁵³ [1980] IRLR 437

⁵⁴ [1982] IRLR 102

⁵⁵ *Dimbleby and Sons Ltd v The National Union of Journalists* [1984] IRLR 161

This generally includes the recognition of rights of the unions, by the employer of their associations, to represent their workers in negotiation, consultation or in carrying out of such procedures⁵⁶.

Likewise, sub-section 2 embraces that trade dispute which may crop up between the Minister and any workers notwithstanding the fact that Minister is or is not their employer. It is subject to two prerequisites: firstly, if the dispute is as to a matter being considered by a joint body including the minister is represented and secondly, if it relates to matters for which approval of the Minister is *sine qua non*.

OVERSEAS DISPUTES:

Section 244(3) of the TULR(C) Act 1992 pertains to the inclusion of a dispute within the arena of trade dispute notwithstanding the fact that the subject matter of the dispute is away from the British frontiers. In this respect, it has been stated that a trade dispute may exist irrespective of the fact that it relates to matters out side Great Britain but only so long as the individuals, whose actions are said to be in 'contemplation or furtherance of' such dispute are likely to be harmed by the aftermath of the dispute in respect of any of the areas under law⁵⁷. Pryn Perrins is of the opinion that the growth of the multinational company has posed problems for the union movement. Such an employer, faced with a strike at his plant in Germany, for instance, may react by switching production to Belgium or Britain. British union may, therefore, have direct interest in disputes, which occur overseas. For the Labour Party, it is insignificant, if the dispute pertains to matters occurring overseas or within the U.K. The Conservatives, however, insist that an overseas dispute can be a trade dispute only if those who take industrial action in this country are likely to be affected by the outcome of the overseas dispute in respect of one or more of the listed items, and that is now the law⁵⁸. But on the contrary John Bower, Michael Duggan and David Reade⁵⁹ do not seem to be too optimistic about the 'long arm' aspect of the trade dispute. According to them the utility of this provision to the unions is designed to be and is likely to be quite minimal. For example, a boycott of the employer by reason of, say, his South African connection is unlikely to be a valid trade dispute. Much action, they add, in support of overseas employees will be caught by the 'secondary action' provision in any event."

'In contemplation and furtherance of'

In order to be in even scale of immunity under the law from an action for torts of talking into breach of contract, interference with contractual obligations by using illegal methods, forcing to adhere to conspiracy or intimidation, it is peremptory that the act should be perpetrated 'in contemplation or furtherance of a trade dispute'⁶⁰. The phrase, conveniently dubbed 'the golden formula' by Wedderburn, has been hallowed by long use.⁶¹ The phrase 'in contemplation of furtherance of trade dispute' aims at placing a successive restriction on genuine industrial action⁶². It, firstly, appeared in 1875,⁶³ and remained in vogue till 1906. In that law, immunity from action for civil conspiracy to injure and inducing breach of contract of employment was bestowed upon the unions. But, later on, as result of judicial pronouncement⁶⁴, the legislature had to enlarge the scope of immunities. But, unfortunately, the immunities were repealed after six years of their restoration⁶⁵ but again reinstated and strengthened in 1974⁶⁶. Presently, with the promulgation of new law⁶⁷, pre-1974 situation prevails. The process of, it is submitted, attenuation and augmentation of the immunities is mainly attributed to the different colours of legislature. The legislature composed of the conservatives has been endeavouring to shorten the list of immunities and on the other side of the spectrum; the legislature constituted by the Labour Party has been striving to aggrandize it. However, despite these legislative contours it is suffice to say that if the protection is to be sought for acts done in 'furtherance of a trade dispute', the overriding motive ought to be the promotion of legislative objectives and unionists cannot

⁵⁶ Collective Labour Law by Gillian S Morris, Timothy J Archer 2000 PP.420

⁵⁷ The Law of Industrial Action and Trade Union recognition 2004 pp.91

⁵⁸ Trade Union Law pp.297

⁵⁹ The Law of Industrial Action and Trade Union Recognition 2004 pp 91

⁶⁰ Section 219 of the TULR(C) A 1992

⁶¹ Employment law 5th ed.by Gwyneth Pitt pp.359

⁶² Employment Law by Deborah J. Lockton 4th ed. pp 434

⁶³ Conspiracy and Protection of Property Act, 1875 as quoted by Employment law by Deborah J. Lockton 4th ed. Pp434

⁶⁴ Rooks v Barnard, [1964] AC 1125 HL

⁶⁵ Industrial Relations Act, 1971

⁶⁶ Labour Law and Industrial Relations in Great Britain by Bob Hepple and Sandra Fredman 1986 pp.242

⁶⁷ Trade Union and Labour Relations (Consolidation) Act, 1992

hide behind the statutory protection to pursue inapt aims⁶⁸. As to a question whether a particular difference amounts to a 'trade dispute' is a mixed question of law and fact but primarily one of fact⁶⁹ to be adjudicated objectively⁷⁰. As to the query whether a particular act has been done in 'contemplation or furtherance of a trade dispute', since 1906, the test has generally been subjective one⁷¹. However, dislike of the consequences of widening of the statutory immunities by the Act, of 1974 as amended in 1976 led the Court of Appeal, between 1977 and 1979, to desire to adjoin an objective element to this test in a variety of forms⁷². In this era, there emerged three obfuscator cases, which brought about stanting opinions on the industrial horizon. They were, firstly, *Beaverbook Newspapers v Keys*⁷³ in which Lord Denning MR architected the test of remoteness. According to the learned judge the help given to the party to the trade dispute must be direct. 'You cannot' said Lord Denning chase consequences after consequences after consequences after consequences in long chain and say every thing that follows a 'trade dispute' is in 'furtherance' of it. His Lordship, in another case,⁷⁴ chalked out the second test. In his opinion, the alleged act should bring about some practical repercussions in exerting pressure on the other side to the dispute. Acts executed, the judge added, to moral facilitation the party to the dispute whose cause is supported is of no consequence. Third test favoured by the judges of the first instance in the said case was that the act done must, the court added, be plausibly capable of attaining the objectives of the trade dispute⁷⁵. So, in the case of *Mac Shane and Ashton v Express Newspapers Ltd*⁷⁶ the House of Lords has overruled the doctrine of objective test and replaced it with the dogma of subjective test. In his edified judgement, Lord Diplock has crystallized the infirmities in the aforementioned judgements of the Court of Appeal that has been reluctant in having recourse to the subjective test for saving the innocent and disinterested parties from the potential damage.

His Lordship was of the view that whole gamut of terms prescribing limitation were alike in all decisions, but all of them were based on the assumption that the legislature could not have intended to widen the spectrum of immunity from an action in torts, as was evident, prima facie, from the wording of the sections 13 and 29, to participants of an industrial action. In common parlance, the words 'in furtherance' reflected the mental condition of a person who has done a particular act. In other words, an action devoid of mens rea would be protected under section 13(1).

Notwithstanding the presence of wisdom and the amount of damage to be caused to innocent and disinterested third parties, the House of Lords established that for claiming immunity, the element of honesty must be predominantly visible in the action of doer of the act. While commenting on the scope of "in furtherance" their Lordships purged it of certain impurities and were of the view that the parliament did not intend to provide blanket cover to the acts of an exacerbated bigot. Albeit, judgement delivered in the instant case happened to be a turning point for the reasons that it out rightly overruled all the tests adumbrated in preceding decisions and adhered to subjective test but exactly after one month and twenty four days of the decision in *MacShane's* case there emerged another⁷⁷. The Court of Appeal, once again, put in motion the objective test as yardstick for granting immunity and ignored the ruling of the House of Lords given in the *Macshane's* case under the thinking as if the House of Lords had not rejected the test of 'remoteness' in the *Macshane's* case.

The House of Lords brushed aside verdict of the Court of Appeal and reiterated that the Court of Appeal had failed in construing the law in the sense in which the House of Lords, in *Express Newspapers Ltd v MacShane*, had clearly construed and applied. In order to dispel the notion that the House of Lords had not rejected the test of remoteness (as expounded by Lord Denning) in the *MacShane's* case their Lordships reiterated with admirable clarity that in that case the House of Lords was not of interest to explore if the actual decisions of Court of Appeal in preceding cases were illegal. What the court, the judges added, has to see is the veracity of the tests devised in those case for determining the justification of a particular act allegedly to have been done in contemplation and furtherance of a trade dispute is legally justified or not.

⁶⁸ Selwyn's Law of Employment 13th ed. pp 559

⁶⁹ [1980] IRLR 437 and confirmed in *Mercury Communications Ltd. V Scott- Garner* [1983] IRLR 494

⁷⁰ Ibid

⁷¹ Labour Law and Industrial Relations in Great Britain by B.A Happle and S.Fredman 1986 pp 244-45

⁷² Ibid

⁷³ [1978] IRLR 34

⁷⁴ *Express Newspaper Ltd v. Mc Shane & Ashton* [1980] IRLR 35

⁷⁵ ibid

⁷⁶ ibid

⁷⁷ *Duport Steels Ltd v SIRS and Others, v* [1980] IRLR 116

The decision in MacShane's case had vehemently turned down the view hitherto developed by the court of appeals. Another test for appraising, whether a particular act was done 'in contemplation or furtherance of a trade dispute or not', was developed by the 'Court of Appeal'.⁷⁸ The court held that in order to establish if the act was within the scope of immunity provided by the Order was to be judged by the intention in acting and not the motive for the act or the effect, which it had. It was further held that the state of mind of the defendant was undoubtedly the critical factor in deciding whether the defendant was acting in contemplation or furtherance of a trade dispute. But, the presence of any hostility could only be relevant if it was so extreme as to negative any genuine intention to promote or advance the dispute against the person who was the object of hostility. So, the court added, the actions tinged by a bad or sinister motive or by mixed motives would not fail by reason of the motive to be an action in furtherance of a trade dispute if it otherwise came within the ambit of 'in contemplation or furtherance'. The views were further fortified in 1989⁷⁹. It was added that the purpose should not be confused with motive. The purpose of an improper motive was relevant only if it was so overriding that it would negative any genuine intention to promote or advance the dispute. However, there was only one possibility where the action would lose the immunity if it were established that the conduct of the defendant was actuated solely by a determination to express the ill will against the employer and not to promote a resolution of the dispute.

2-Position in Pakistan

The history of trade dispute dates back to 1929, the year in which the Indian workers got acquainted with first codified law on the subject⁸⁰. The term 'trade dispute' was couched as any dispute or difference between employers and workmen, or between workmen and workmen, which was connected with the employment, or with the condition of labour, of any person⁸¹. Although, the said definition was transplanted from an English Law⁸² but it turned out to be narrow in scope as it omitted to address the disputes between the employers and employees⁸³. So, it was not until 1938 that, as a result of recommendation of the Royal Commission of Labour, the scope of the definition was enlarged⁸⁴ by inserting therein the dispute between the employer and the employee⁸⁵. The next piece of legislation on the subject was inherited from Colonial Regime in 1947⁸⁶. The hallmark of the new law was that the amended definition of the "trade dispute" was recast as such in it and 'trade dispute' was rechristened as Industrial dispute⁸⁷. Thus, the term was defined by stating, firstly, parties to it i.e. employers and the workmen, employers and employees and workmen and the workmen, secondly, subject matter of dissension i.e. employment, non-employment, terms of employment, conditions of labour of any person⁸⁸. After getting independence in 1947 from the British regime, the Industrial Disputes Act, 1947 was enforced as such in Pakistan. The next piece of legislation on the topic was the Industrial Disputes Ordinance, 1959. In the said law, the definition of industrial dispute was *para materia* to its predecessor. But, almost after a decade, in the Industrial Disputes Ordinance, 1968, a slight deviation was demonstrated from the previous practice. Parties to the dispute and subject matter of dispute remained the same with addition of the words "conditions of work" had been inserted instead of words "conditions of labour"⁸⁹. So, in the new law instead of words "conditions of labour" the words "conditions of work" had been inserted.

The next piece of legislation on the subject was the Industrial Relations Ordinance, 1969. At the outset of its enforcement, the definition was recast as such from the preceding enactment, but in 1975⁹⁰, the words 'and is not in respect of the enforcement of any right guaranteed or secured to him by or under any law, other than this Ordinance, or any award or settlement for the time being in force,' were added to the definition. Incorporation of the said amendment, it is added, restricted the extent of the 'industrial dispute' and paved way to the bifurcation of the disputes into disputes of interest and

⁷⁸ Norbrook v King and Sands [1984] IRLR 200

⁷⁹ Associated British Ports v TGWU [1989] IRLR 291

⁸⁰ Trade Disputes Act, 1929

⁸¹ See section 2(j) of the Trade Dispute Act, 1929.

⁸² Section 8 of the (English) Industrial Court Act, 1919

⁸³ S.C. Srivastava, Industrial Relations and labour Laws, 4th ed. 2003. Published by Vikas Publishing House Pvt. Ltd New Delhi, p.148.

⁸⁴ Trade Disputes (Amendment) Act, 1938

⁸⁵ Ibid.

⁸⁶ The Industrial Disputes Act, 1947

⁸⁷ Section 6 of the Industrial Disputes Act, 1947

⁸⁸ Section 2 ibid

⁸⁹ Section 2 of the Industrial Relations Ordinance, 1968

⁹⁰ Labour Laws (Amendment) Act, XVI of 1975

disputes of rights- a segregation which hitherto was not onto the statutes in Pakistan. The broad message emanated from the said amendment was that only the issue of enforcement of any existing right was amenable to the labour court. After remaining in force for more than thirty years, the said law was replaced by another law⁹¹.

Under the said law, the term industrial dispute was defined on the previous pattern but with some deviation. Dispute between the employers and the employees were no more subject of discussion under the new law⁹². However, after remaining in force for about six year, the Ordinance was repealed by another law⁹³. In the said law, the definition of the term industrial dispute was cast in a bit different way and, inter alia, the dispute arising between the employers and employees had also been included in the inventory of industrial dispute⁹⁴.

The enactment turned out to be a transitory arrangement and after remaining in vogue for hardly more than a year, it was replaced by another law. The 2010 can be termed as exceptional year in the constitutional chronicle of this country owing to the approval of 18th constitutional amendment- a constitutional arrangement which has resulted in the abolishment of the concurrent legislative list. Under pre-amendment scenario, the subject of labour was in concurrent legislative list but under post-amendment arrangements, it has been devolved on the provinces.

It seems to be equally relevant to mention that, in Pakistan, unionisation is at two levels i.e. the union at plant level/local level and industry wise trade union/ trans-provincial union. Resultantly, separate laws have been made to cater for the requirements at respective level. Every province has made its own law to deal with the issues of unions at local level⁹⁵. On the contrary, separate law has been provided to deal with the affairs of the unions of trans-provincial nature⁹⁶. In the said law, the term has been defined on the pattern adopted under all the provincial enactments⁹⁷.

Under the new scheme, the term industrial dispute has been couched exactly on preceding pattern. So, from the perusal of the literature pertaining to industrial dispute in Pakistan, it surfaces that there has been variation in parties to the industrial dispute to the extent of terms of subject of 'industrial dispute'. After 1975, distinction between the disputes of interest and dispute of rights has been another feature of industrial relationing in Pakistan.

Conclusion

Despite having enabling statutory infrastructure, British parliament has not been demonstrating uniformity in legislation on this topic. On the other hand, in Pakistan, the parliament has also been following British footprints in providing legislation for the industrial disputes. In Britain, a lot of case law has been developed on various dimensions of the industrial dispute, but in Pakistan, the situation is not in line with that of Britain. Thin unionization in various segments of the economy may be stated to be the *raison d'etre* of slow growth of case law. On the contrary, in Britain, majority of the areas have been unionized and in such situation, expectancy of dissensions increases manifold. Last but not the least, In Pakistan, individual grievances cannot be taken up by the union as industrial disputes

⁹¹ Industrial relations Ordinance, 2002

⁹² Section 2 of the Industrial Relations Ordinance, 2002

⁹³ Industrial Relations Act, 2008

⁹⁴ Section 2 of the Industrial Relations Act, 2008

⁹⁵ Punjab Industrial Relations Act, 2010, Balochistan Industrial Relations Act, 2010, The Sindh Industrial Relations Act, 2013 and the Khyber Pakhtunkhwa Industrial Relations Act, 2010

⁹⁶ Industrial Relations Act, 2012

⁹⁷ Section 2(xvi) of the Industrial Relations Act, 2012