LIMITATIONS UPON MANAGERIAL PREROGATIVES UNDER INDUSTRIAL DISPUTES ACT, 1947*[1]

Abstract

The power of an employer to get the employee work according to his command determines the success of any business or employer-employee relationship. While it is important to emancipate the employees from over exploitation of the employer, it is equally important to give the employer some amount of power in order to get the work done. This paper essentially tries to determine what managerial prerogatives are. It also tries to compare what 'is' managerial prerogative to what 'was' and what 'ought to be' managerial prerogative.

While defining managerial prerogative we do not follow any statute because managerial prerogatives are not derived from statutes they are inherent. While the managerial prerogatives can be limited by 'contract' and by virtue of 'operation of law' we are concerned only with the later. Also we are not concerned with the ocean of laws and regulations which limit the scope of managerial prerogatives we are strictly concerned only with the managerial prerogatives under the Industrial Disputes Act, 1947.

Hence we fundamentally try to resolve two questions i.e., whether the managerial Prerogatives have any limitations?" and "whether these limitations are 'Just' and in whose interest do these limitations operate".

Key Words: Managerial prerogatives, Industrial Disputes Act 1947, rights and duties of employer, limitations upon employee rights.

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INTRODUCTION

WHAT IS -MANAGERIAL PREROGATIVE

There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the contract of employment

Paul Davies & Mark Freedland,
Kahn-Freund's Labour And The Law 18 (1983).

The term 'prerogative' denotes a *right or privilege which belongs to a particular institution, group, or person*. The term is commonly used in labour law and constitutional law. [2] And Management/Managerial Prerogative according to Black's Law Dictionary is defined as the management *Exercising its discretion in certain areas without discussions with or the agreement of a union as an employer's or management's unqualified authority. The rights to (1) assign and direct workforce, (2) discipline employees for just cause, (3) increase / reduce workforce in support of the firm and based on available money, (4) decide products availability, price, method. Also known as management rights, they are not subject to negotiations and may be expressly stated as such in a collective bargaining agreement.*[3] While the acknowledgment of this right of the management has not changed much over the years, its regulation certainly has. Obviously there are no rights without limits, and the managerial prerogative has its limits as well. The limitations are set out by legislation, collective agreements, or an individual employment contract. However this paper discusses the change in the relationship, and how today the scope of the managerial prerogative has been in many ways 'limited', only with respect to the Industrial Disputes Act, 1947. The managerial Prerogative might be limited by many other legislations such as the The Minimum Wages Act, 1948or the Factories Act,1948 etc, however those are outside the Scope of this work

In a factory or in any organization where the relationship of employer- employee exists, both of them enjoy certain rights. While the employee has the right to get wages, the employer must certainly have the right to take action against the erring employee who indulges in

[2] John B Saunders (ed) *Words and Phrases Legally Defined Vol **3:** K-Q* 3 ed (1989) at 418.
[3] Bryan A Garner, Black's Law Dictionary, 9th Ed., 2009.

misconduct. The management rights seem to have arisen in part at least out of the old master-servant doctrine of common law.[4]

In the sphere of labour and employment, 'prerogative' is usually taken to refer to the 'right to manage' an organization.[5] It refers to the right to make decisions regarding the aims of the organization and the ways in which it will achieve these aims.[6] These decisions can be divided into two broad categories. The first relates to decisions about the human resources utilized by the organization.[7] Typically, but not necessarily, organizations will make use of employees to achieve their aims. Decisions will have to be taken as to the number and types of employees needed, their terms and conditions of employment, the termination of their employment, where and when and how they do their work, and the supervision of their work.[8]Under this relationship there are certain kind of rights and obligations flowing.

There are four recognized forms of rights and obligations flowing between an employee and an employer

1. Employer's right to select an employee.

2. Employer's right to pay wages or other remuneration.

3. Employer's right to control the method of doing the work, and

4. Employer's right of suspension or dismissal or transfer of the employee.[9]

An employer has the right to select an employee, so much is un-doubtful but does he also have the liberty to terminate his services as so and so when he wishes. The employer's right to select employee is his prerogative and this prerogative is unrestricted, so naturally the logical deduction

[4] John G. Turnbull, The Small Business Enterprise and the Management Prerogative Issue, Industrial and Labor Relations Review, Vol. 2, No. 1 (Oct., 1948), pp. 33-49.
[5] BTR Dunlop Ltd v National Union of Metalworkers of SA (2) (1989) 10 ILJ 701 (IC) at 705C.
[6] George v Liberty Life Association of Africa Ltd (1996) 17 ILJ 571 (IC) at 582E- F.
[7] Barney Jordaan 'Managerial Prerogative and Industrial Democracy' (1991) 11(3) Industrial Relations J of South Africa 2.
[8]Eml Strydom, The Origin, Nature and Ambit of Employer Prerogative (Part 1), 11 S. Afr. Mercantile L.J. 40 1999
[9] H.L. Kumar, Law Relating to Dismissal Discharge & Retrenchment, pg.8.

should be that he should be able to terminate the services of his employee as and when he chooses to do so. However there might be certain strings attached to termination.
It seems that the Industrial Disputes Act being pro labour legislation attaches certain conditions and procedures to be followed before terminating an employee. In certain situation it might seem that the employer looses confidence in the employee, or the relationship might be strained yet the employer cannot terminate the employee due to the limitations placed upon the managerial discretion.

So in short managerial prerogative can be said to be the employer's right to take decisions in furtherance of operational objectives and to determine how these objectives will be executed.[10] The extent and scope of the term are explained well by Brassey[11] who says that

> 'The law gives the employer the right to manage the enterprise. He can tell the employees what they must and must not do, and *he can say what will happen to them if they disobey*. He must, of course, keep within the contract, the collective agreement and the legal rules that govern him. But, even given these constraints, he still has a wide managerial discretion. He can decide which production line the employees should work on; whether they should take their tea break at ten or ten fifteen; when they may go on leave; and countless other matters besides. He can also decide what will happen to the employees if they do not work properly, if they go to eat early and so on. In short, it is he who, within the limits referred to, lays down the norms and standards of the enterprise. This - at least as far as the law is concerned - is what "managerial prerogative" entails, no more and no less.'

The managerial right means the force of the boss to manage the issues relating to the association and capacity of the endeavor meaning to accomplish its objectives, and all the more absolutely, to figure out the kind, the spot, the way, and the time of work procurement by the specialist pointing out thusly his work execution. It constitutes a vital wellspring of callings for the specialist allowing the one-sided determination of each portion not specified by the work contract or other wellspring of law.

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[10] EML Strydom 'The Origin, Nature and Ambit of Employer Prerogative (Part 1)' (1998) 11 *SA Merc L* 40 at 42.
[11] MSM Brassey et al *The New Labour Law* (1987) at 74.

The managerial privilege is not given nor specified by any specific authoritative procurement. It has been recommended that it is inferred from the management's energy onto the method of generation, from the business danger in regards to the operation of the endeavor or from the coordination of the specialist in the "work social order of the endeavor."[12] It is generally accepted that on its establishment lies the work contract, in particular that on the foundation of this agreement the laborer expects the obligation o take after the manager's directions in regards to the satisfaction of his undertakings.

The managerial prerogative lies in the lower rank of the sources forming the labor relationship. Its limits are derived not only from the labor contract, but also from the remaining sources of labor law. The managerial prerogative must not be worked out abusively. Its exercise, having a functional nature, should serve the objective interest of the undertaking and not the selfish interest of the employer exercising this prerogative in good judgment and according to the good faith principle the employer must consider, along with the interest of the undertaking, the interests of the workers, and also should respect the equal treatment principle. [13]

The need for some form of managerial prerogative is based on the fact that in any organization a mechanism must exist to co-ordinate the skills, effort and activities of its members so as to attain its goals.[14]

For the employer's ardent belief in its inherent right to manage to have lawful and thus enforceable effect, the concept of managerial prerogative must have its origins in law. This basis, according to Strydom,[15] is vested in the contractual relationship between an employer and an employee. The contract of employment provides the legal foundation for this relationship, with the element of subordination providing the employer with the lawful right to manage the employee and imposing upon the latter the concomitant duty to obey the employer's instructions.[16]

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[12] Kostas D. Papadimitriout, The Managerial Prerogative And The Right And Duty To Collective Bargaining In Greece, 30 Comp. Lab. L. & Pol'y J. 273 2008-2009

[13] Kostas D. Papadimitriout, The Managerial Prerogative And The Right And Duty To Collective Bargaining In Greece, 30 Comp. Lab. L. & Pol'y J. 273 2008-2009.

[14] Neil W Chamberlain & James W Kuhn *C*ollective Bargaining 3 ed (1986) at 66.

[15] MSM Brassey et al The New Labour Law (1987) at 74.

[16] EML Strydom 'The Origin, Nature and Ambit of Employer Prerogative (Part 1)' (1998) 11 *SA Merc L* 40 at 42.

CHAPTER 2

LIMITATIONS UPON THE EXERCISE OF MANAGERIAL PREROGATIVE

The employer regularly wishes to rearrange the terms of the laborer's work contract for different explanations, something that might be accomplished by practicing his managerial right. The practice of this right is confined, notwithstanding, as it is previously stated, by the contractual terms and the imposition to the worker of a unilateral harmful change of contract is not possible. The terms of the labor relationship cannot be modified unilaterally, without considering the law, the collective agreement, the internal labor codes, or the individual labor contract. This unilateral change is regarded as harmful when the worker suffers not only material damage but also ethical injury.[17] The conventional right of the employer to amend unilaterally the terms of labor should not refer to the substantial terms of labor (arbitrary variation of remuneration, etc.), because then the rules of labor law regulating the termination of labor contract would be violated.[18] This is very clearly laid down in Sec. 9A of the Industrial Disputes Act 1947, which states that

> 9A. Notice of change.- No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change,--
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> (a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or
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> (b) within twenty-one days of giving such notice:

This section has a proviso wherein notice is not required for effecting any such change if that change was effected in pursuance of any settlement/award or when the change is notified in this behalf by the appropriate Government in the Official Gazette. So one can say that even though the management has a prerogative it cannot be exercised at its whims and fancies, and certainly not unilaterally. And this goes without saying that any contract entered between the employer and the employee on the contrary is unlawful and therefore not valid in a court of law.

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[17] Kostas D. Papadimitriout, The Managerial Prerogative And The Right And Duty To Collective Bargaining In Greece, 30 Comp. Lab. L. & Pol'y J. 273 2008-2009.

[18] G. Leventis, The Change Of Terms Of The Contract Of Dependent Work 69 (1990).

It is not only the position under the Industrial Disputes Act, 1947 that the employer cannot change the conditions of service during the pendency of the dispute (Sec.33) it also provides under Sec. 9A of the Act that an employer cannot change any terms of the service unless he gives a notice of 21 days to the affected workmen. 'The object of this section is to prevent a unilateral action on the part of the employer changing the conditions of service to the prejudice of the workmen.[19] The essence of having such a provision is 'to afford an opportunity to the workmen to consider the effect of the proposed change and, if necessary, to present their point of view on the proposal' wherein such consultation would further serve to stimulate a feeling of common joint interest of the management and workmen.[20]

Now, as this section is a mandatory provision therefore, if any change in made in the conditions of service (Specified in Fourth Schedule appended to the Act) there is a requirement for the employer to serve the notice for atleast 21 days. If any change is made in the conditions of service applicable to any workmen in respect of any matters specified in the Fourth schedule without complying with the requirement of this section, such action shall be a nullity and void *ab initio*.

Not just in this case but in many other aspects such as transfer, retrenchment, dismissal etc. the powers of the management are limited. The question of transfer of workmen has been the subject matter of industrial adjudication for years. However employment being primarily a creation of contract its terms are modified only to the extent they are superseded by law, contract or award. The rights and liabilities of the employer and the workers in matters of transfer might, in this manner, be administered by this position that unless demonstrated unexpectedly and unless the transfer changes the character of job or ruptures employment conditions the employee has a right to transfer his employee. Transfer of an employee is considered to be a managerial right which however is subject to contract to the contrary. However, if the transfer is effected as punishment or as a consequence of victimisation or made not observing the relevant conditions in relation to transfer of Union office bearers or protected employees such transfers can be questioned. Subject

[19] Tamil Nadu Electricity Works Federation v. Madras State Electricity Board (1962) 2 LLJ 136 (Mad).

[20] Tata Iron & Steel Co. Ltd. v. Its Workmen (1972) 2 LLJ 259 (SC).

to these limitations the employers have a right to distribute work as they think fit and transfer is an incident of service. [21]

Sec. 9A could be said to be a provision seriously curbing the managerial prerogative, while it is true that it is necessary in the interest of employee that unilaterally the terms of employment cannot be changed it is equally important to note the fact for maximum utilization of the resources (services of the employee) it sometimes necessitates a change in the terms with immediate effect. Waiting for the 21 days time period is not always possible like *a change in weekly off-days from Sunday to Saturday on account of some restrictions being imposed on the use of electricity by the state government was held to be outside the ambit of section 9A*.[22]

However as opposed to this a completely different opinion was taken by the Court in *Tata Iron and Steel Co. Ltd. v. The Workmen* [23] wherein the weekly off days were temporarily changed from Sunday to Wednesday in one colliery of the employer company and to Thursday in the other on account of the shortage of the power supply. It was observed in this case that, "fixation of Sundays as weekly off days was founded on 'usage' and was treated as 'customary privilege', hence any change in such weekly holidays would fall within the expression 'change in usage' or 'customary privilege' as Sunday was a weekly rest –day had assumed importance for workmen 'due to long usage and other factors'. Therefore, it was necessary to give the notice as contemplated by section 9A for effecting a change in the weekly rest from Sunday to some other day

Therefore, the effect of the decision of *Tata Iron and Steel Co. Case* is that, even for a temporary change in emergency conditions, a notice under section 9A is required despite the fact that there might not be sufficient time for giving such notice in the circumstances of the case.

Similarly another provision of the Act which seriously poses a threat to managerial discretion is Sec.11A, which reads as

11A. Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen.

[21] K.N. Cheluvaiah V. Management, Bharat Heavy Electricals Ltd., ILR 1992 KARNATAKA 3404.
[22] *Workmen of Sur Iron & Steel Co. Pvt. Ltd. v. Sur Iron & Steel Co. Pvt. Ltd.* (1971) 1 LLJ 570 (SC).
[23] (1972) 2 LLJ 259 (SC)

> Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

The Labour welfare nature of the Industrial Disputes act, 1947 Act is seen in this section because this section greatly circumscribes the power of the Employer. The Judicial interpretation given to this section is no less wider, the courts have interpreted this section so widely that in *Vidya Dhar v The Hindustan Clopper Ltd*.[24] The court held that t

> The power under Sec. 11A is akin to the appellate powers. The competent adjudicating authority has jurisdiction to interfere with the quantum of punishment *even in cases where finding of guilt recorded by the employer is upheld* or in the case of no enquiry or defective enquiry.

Therefore no importance has been given to the subjective satisfaction of the employer. If an employer has found an employee guilty and has therefore in some manner imposed a sanction upon the guilty employee is it correct to say that the court has the jurisdiction to interfere with the sanction. Why can't the employ impose sanction as he sees fit, why is it necessary that the sanction and the guilt has to be proportionate. I don't find any reasonable excuse for such interference, or limitation upon managerial prerogative except the interest of the labour principle. Keeping in mind the fact that in India, unemployment is rampant and Labour force is not a shortage, this provision has been effectuated in order to prevent the employer from abusing his

[24] 1994 LIR 229 (Raj).

position of power. This intention of the legislature is made clear in *G K Sengupta v Hindustan Construction Co Ltd*[25], wherein the court held that

> Permission should be refused if the tribunal is satisfied that the management's action is not bona fide or that the principles of Natural Justice have been violated or that the material on the basis of which the management came to a conclusion would not justify an reasonable person in coming to such a conclusion.

A similar approach by the court in *Hindalco case* [26] and many other cases where the court overruled the managements decisions in order to serve the interests of the employee. Even some eminent scholars like Ludwig Teller [27] agree that the powers of the labour court are wide and so wide that '*it may involve the extension of an existing agreement or the making of a new one, or in general the creation of new obligation or modification of old ones, otherwise the courts usually concerns themself with interpretation of existing obligations and disputes relating to existing agreements*'. The Supreme Court has also agreed with this dictum and held in *Rohtas Industries Ltd. v. Brijnandan Pandey* [28] that

> A Court of law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The Courts reach their limit of power when they enforce contracts which the parties have made. An Industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair practice or victimization.[29]

Certain scholars[30] belief in the silencing of managerial prerogative which can be definetly seen to be fulfilled by Industrial Disputes Act,1947 (See Generally Sec. 9A, 11A, 33 and the variour provisions on Lay-off, retrenchment, closure etc.) Also the unfettered endorsement of the

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[25] 1994 LIR 550(Bom).
[26] Hindalco Workers Union v Labour Court, 1994 LIR 379 (All).
[27] Ludwig Teller, Labour Disputes and Collective Bargaining, Vol. 1, p. 536
[28] (1956)IILLJ444SC.
[29] Rohtas Industries Ltd. v. Brijnandan Pandey, (1956) IILLJ 444 SC..
[30] C Thompson 'Bargaining, Business Restructuring and the Operational Requirements Dismissal' (1999) 20 *II* 755 at 758-9.

constitutionally enshrined right of trade unions to engage in collective bargaining is an example of how managerial prerogatives are slowly silenced.

CHAPTER 3

THE JUDICIAL INTERPRETATION OF MANAGERIAL PREROGATIVES - WHAT IS, AND WHAT CAN THEY DO ?

There have been conflicting views of the court regarding this matter, while the courts initially were in favor of giving the management certain powers the same court later turned back on its dictum and had therefore limited the power of the management in many instances, there have been instances were due to certain procedural irregularities certain workers were saved despite their guilt or misconduct, the court infact reinstated a worker who was found playing cards during working hours and man other cases where the court has reinstated persons who were found by the management to be ineligible to work anymore for whatever purposes.

In *The Management of Hotel Imperial, New Delhi and Ors. v. Hotel Workers' Union* [31] the Court was mainly concerned with the right of the management to suspend a workman where the management had taken a decision to dismiss him but could not immediately give effect to such decision owing to the restriction imposed by Section 33(1) of the Act which required the management to obtain the permission of the Tribunal when a reference was pending adjudication before it. It was laid down that

> *The management should be deemed to possess the power to suspend an employee in respect of whom a decision had been taken to dismiss him but an application for permission had to be filed until the application for permission was decided.*

However the Court in *Fakirbhai Fulabhai Solanki v. Presiding Officer and Anr* [32] where the act of misconduct attributed to the appellant was that *he was playing cards along with two other workmen during the working hours of the factory*, and the he was given notice, disciplinary action was initiated and then dismissed but since he was a protected workmen an application

[31] (1959)IILLJ544SC

[32] AIR1986SC1168

under Sec. 33 has to be filed. However the application under Sec. 33 took unreasonable amount of time, and therefore the court did not follow the dictum laid down in *The Management of Hotel Imperial, New Delhi and Ors. v. Hotel Workers' Union* [33] but rather took into account the principles of natural justice and stated that if the Court had realized (*in the Hotel Imperial Case*) that such applications would take nearly six years as it has happened in this case their view would have been different. And therefore the court also ordered reinstatement of the worker with back wages. This kind of case tend to send a wrong message that even if the workmen has been negligent enough in his work he cannot be disciplined.

For the proper functioning of any institution it is necessary that the institutions employee be disciplined .And for that purpose it is necessary that the employer be given certain powers, however the judiciary obviously doesn't seem to be in favor of disciplining of workers by way of suspension or other means of punishment. Such limitation upon managerial prerogatives is a serious threat to the proper functioning of any institution.

The obvious conflict between both these came up before the court in *Ram Lakhan v. Presiding Officer & Ors.*[34] While right to place an employee under suspension pending disposal of the application under Section 33(1) is to be conceded to the Management on the basis of the decision in *Hotel Imperial's case* , the right of the employee to receive Subsistence Allowance during the period of such suspension has to be conceded to the employee on the basis of the decision in *Fakirbhai's case* and other decisions of this Court[35] wherein the employee has been held to be entitled to Subsistence Allowance during the period of suspension.

Whereas the Court in Hotel Imperial's case held that the since Management has no control over the disposal of application under Section 33(1) filed before the Industrial Tribunal and, therefore, if it has placed the employer under suspension, it will not be under any obligation to pay salary to the suspended employee for the period over which the application under Section 33(1) remains pending with the Tribunal.

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[33] (1959)IILLJ544SC

[34] AIR2000SC1946

[35] See Generally V.P. Gindroniya v. State of Madhya Pradesh and Anr, (1970)IILLJ143SC, State of Maharashtra v. Chanderbhan (1983)IILLJ256SC, O.P. Gupta v. Union of India and Ors. (1988)ILLJ453SC

However in *Ram Lakhan v. Presiding Officer & Ors the court* reiterated this and held that

> Just as the employer has no control over the disposal of the application under Section 33(1) of the Industrial Disputes Act, so also the employee has no control over the disposal of that application. Whether the employee would be retained in service or removed would be dependent upon the fate of the application. While the Management can afford to wait for the disposal of that application, it would be impossible for an employee who survives only on his salary to wait for the disposal of that application for an indefinite period. It would not be possible for him to sustain himself.

It is in this light that the right to receive reduced salary (Subsistence Allowance) for the period of suspension has to be read along with the right of the management to place the employee under suspension pending disposal of the application under Section 33(1) of the Industrial Disputes Act. Thus, the right of Management to suspend and the right of the employee to receive Subsistence Allowance are intertwined and both must survive together.

This reasoning of the court clearly shows the judiciaries pro-labour attitude, how could the it be justified that the management be forced to pay allowance to an employee who would have been dismissed for all purposes but for the pending of application under Sec.33, had this not been pending he would have been dismissed right away. This pending application makes him a suspended employee at least until the final approval is given who shall then be dismissed. *Therefore firstly the legislature has limited the prerogative powers of the management by way of Sec.33 and then the judiciary has further weakened the scope of this prerogative by saying that a employee is entitled to allowance until the application under Sec. 33 is disposed off.*

The ID Act, vide Sec. 33, provides that the employer shall not alter the conditions of service of the workmen to his prejudice during the pendency of the dispute between the employer and the workmen. The second part of the section prohibits the employer from discharging or punishing the workmen by discharge or otherwise for any misconduct connected with the dispute pending

before an adjudicating authority, as provided under the section.[36] *Thus Sec. 33 prescribes a regulatory mechanism upon the employer's prerogative to change the conditions of service or to dismiss or discharge the employee during the pendency of a dispute.*

[36] Tarun Jain, Employer's Prerogative To Change Conditions of Service: How Far Regulated, Social Science Research Network, Paper Id: 1195722.

CONCLUSION

Except in a one man undertaking, economic purposes cannot be achieved without a hierarchical order within the economic unit.

Paul Davies & Mark Freedland

Kahn-Freund's Labour and the Law 3 Ed. (1983) at 18

The Laws in most of the countries limit employer prerogative and provide job protection to employees by constraining the employer's prerogative to set the terms and qualifications for continued employment. For example, the National Labor Relations Act (U.S.A) prohibits employers from affecting an employee's employment, e.g., terminating an employee, because of the a workers pro-union sentiment. [37]

But perhaps India is unique in the world in requiring prior permission of the state in certain circumstances for lay-off, retrenchment or closure by an employer. The law relating to this subject matter has been under constant judicial scrutiny and has proved to be very controversial so far as the law seeks to interfere with the freedom of employer to dispose of his capital and labour as the employer wills.[38]

An employer has the freedom to select anybody according to his requirements but he does not have the liberty to fire a workman as per his will. After the introduction of the Industrial Disputes Act in 1947, this has become all the more difficult for an employer. Knowledge of the Industrial Disputes Act and also his rights and responsibilities is always in the interests of an employer. But those employers who care two hoots about the laws and their rights repent later.

The management prerogative issue, as it finds expression today, centers about the problem of who is to control the endeavors of an enterprise. The fact that an enterprise does not exist in vacuum, but operates in a framework of ever-changing institutional practices, makes it imperative to look at the concept of control in terms of its day-to-day setting. The notion of control has at least two interpretations: first, the idea of direction itself and, second, the manner

[37] Henry L. Chambers, Jr, Employer Prerogative and Employee Rights: The Never-Ending Tug-of-War, 65 Mo. L. Rev. 877 2000.

[38] I. Sharat Babu and Rashmi Shetty, Social Justice and Labour Jurisprudence, 2007, p.458.

in which the direction is exercised.[39]While earlier it meant the actual management today it means that person who is in control unfortunately the powers of the management have been limited to such an extent that the management is today struck in the rigors of law, both procedural and substantive and is at a cross road.

Dismissal is the biggest punishment which an employer can give to an employee. It is the termination of services by way of punishment for some misconduct or for unauthorized and prolonged absence from duty. The dismissal of any employee is easier said than done. The employer is bound to give an opportunity to the employee to explain his conduct and to show cause why he should not be dismissed. The general rule is that in this process, there should be no violation of the principles of natural justice which ensures that punishment is not out of all proportions to the offence.

In fact, there is no provision for summary dismissal. Before dismissal the employee may be placed under suspension and a proper enquiry is conducted to enquire about the misconduct of the employee. During the suspension the employee receives a subsistence allowance. The management's action must not suffer from vindictiveness and capricious attitude.[40] Undoubtedly, the management has power to direct its own internal administration and discipline; but the power is not unlimited and when a dispute arises, industrial tribunals/labour courts [41] have been given the power to see whether the termination of service of workman is justified and to give appropriate relief. In cases of dismissal for misconduct the tribunal/labour court actually acts as a court of appeal and even has the power to substitute its own judgment for that of the management.[42]

It is perhaps more useful, however, to describe the managerial prerogative as the sphere allotted to employers to make unilateral decisions on matters *not resolved by legislation, collective agreements, or an individual employment contract* The doctrine does not come into play-and legal questions are not raised-when the issue is already settled by one of these sources. The Court

[39] John G. Turnbull, The Small Business Enterprise and the Management Prerogative Issue, Industrial and Labor Relations Review, Vol. 2, No. 1 (Oct., 1948), pp. 33-49.
[40] H.L. Kumar, Law Relating to Dismissal Discharge & Retrenchment, pg.8.
[41] Minerva Mills Ltd. v. Arbitration Tribunal, 1949 (4) DLR 37.
[42] See Vidya Dhar v.Te Hindustan Clopper Ltd.,1994 LIR 229 (Raj).

refers to the prerogative-and considers its boundaries and limits-when neither of these sources determines whether a particular change to the *status quo* is allowed.

Sec. 33 of the ID Act, has been enacted into the statute with a twofold purpose. The Section shows the intention of the legislature to protect the interest of workers. It seeks to restrict and regulates the powers of the employer in awarding punishment during pendency of proceedings so that under disguise of managerial prerogative vindictive actions may not be carried. However the legislature completely conscious of the objectives of implementing restrain indeed, throughout pendency of transactions allows disciplining or concurs endorsement of the discipline by prescribing measures for looking for approbation or authorization as the case may be.

Thus the Sec 33 seeks to balance the interests of the stake holders in the organisation while awarding punishment during pendency. But in actual practice, over a period of time, what was intended to be given as a "Shield" to the workmen/trade unions has now bestowed upon them with a "Saw"[43] which shakes the very foundation of the management of discipline.

[43] S. Srinivasan, Evolution Of "Shield" Into A "Saw" – Sec 33 OF THE ID ACT, 1947,Industrial Revolution II,pg.1.Also available at http://www.irii.co.in/Jan12/EVOLUTION_OF_doc_by_Adv_Srinivasan.pdf (Last Accessed on 25/10/13 at 11.30 P.M).

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