

Industrial Relations

An Institutional Analysis

Arpita Nepal, Koshish Acharya & shreeya Neupane



Published by
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Preface

As part of its efforts to raise economic agendas in Nepal, Samriddhi Foundation is committed to an annual analysis of constraints of economic growth of Nepal along with exploring policy options. This process termed as the 'Nepal Economic Growth Agenda (NEGA)' is an annual effort to identify short term as well as long term policy bottlenecks that hinder Nepal's economic growth. This research paper 'Industrial Relations: An Institutional Analysis' prepared as a follow up to NEGA 2012 is one of the six cross-cutting issues covered under NEGA 2013.

NEGA 2012 identified and discussed policy constraints in five growth sectors of Nepal viz. Agriculture, Education, Hydropower, Transport Infrastructure, and Tourism. Building on this research, NEGA 2013 focuses on identifying and discussing cross-cutting issues that affect the growth of all five sectors and also makes recommendations to address these issues. The goal of these analyses and papers is to facilitate the creation of a competitive and conducive business environment for Nepal thereby leading to economic growth and prosperity.

The six different issues studied under NEGA 2013 are Industrial Relations, Contract Enforcement, Anti-Competitive Practices, Foreign Direct Investment, Public Enterprises, and Regulatory environment for businesses. Each research paper has been prepared in consultation with individuals and groups who are experts or are involved in the particular field.

The six issues studied under NEGA 2013 have been presented as individual research papers that will be combined and presented as NEGA 2013 towards the end of 2013. This research paper on Industrial Relations was prepared by the team of Ms. Arpita Nepal, Ms. Shreeya Neupane, and Mr. Koshish Acharya.

Harmonious industrial relation is the basis of a thriving industrial structure. While conflict is inherent, conflict resolution mechanisms play a vital

role in ensuring a dynamic industrial setting. Recognizing the nature of industrial relations in Nepal, this paper focuses on conducting an institutional analysis from a tripartite perspective i.e. including institutional mechanisms of the trade unions, government, and employers that give rise to and help resolve industrial conflicts.

This paper delves into the various aspects that give rise to tenuous industrial relationships fraught with mistrust on all sides. Lack of accountability mechanisms within the trade union structure including the relative weakness of enterprise level unions in terms of negotiations, lack of grievance handling mechanisms in industrial settings and weak labor institutions created by the government, all contribute to the intense and antagonistic nature of industrial relations in Nepal.

Policy alternatives tried and tested by other countries with similar backgrounds have also been briefly explored in the paper. Specifically, Japan's post-war industrial relations situation and measures adopted, Cambodia's recent success in building its 'sweat-shop free' image and Australia's transition to creating an independent labor institution have been included to draw out lessons that may be relevant in the Nepali context.

Based on expert feedback and rounds of consultations, the paper concludes by pointing out certain areas that require broader institutional reform. The paper does not intend to take a position on any of the conflict issues and is solely focused on an analysis of factors that give rise to conflict in industrial settings and measures that are available for conflict resolution. While broader labor reform may be on the agenda, this paper also highlights marginal changes that may be more palatable given the current state of the political economy of Nepal.

Abbreviations and Acronyms

ANTUF	All Nepal Federation of Trade Unions
CoNEP	Confederation of Nepalese Professionals
DoI	Department of Industries
DoL	Department of Labor
FNCCI	Federation of Nepalese Chambers of Commerce and Industry
GEFONT	General Federation of Nepalese Trade Unions
ILO	International Labor Organization
NEGA	Nepal Economic Growth Agenda
NTUC-I	Nepal Trade Union Congress – Independent
OECD	Organization for Economic Cooperation and Development
SAVPOT	South Asian and Vietnam Project on Tripartism
US	United States

The Nepali year is based on the Bikram Sambat Calendar and is approximately 57 years ahead of the Gregorian calendar (2062/1/1=2005/4/14)

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1. When Conflict is a Problem...

Conflict is inherent to industrial relations. With the two main stakeholders, employers and employees, striving to meet diverse goals in a dynamic industrial setting, some degree of dispute is unavoidable. When dealt with constructively, industrial conflict can lead to growth and development as it highlights the otherwise obscure crevices in industrial organization (Olakitan, 2011). Even in Nepal, industrial conflict has, on occasion, helped expose the neglected issues of both social justice and economic efficiency. While conflict is inevitable in any industrial setting, and even conducive to development, unresolved and festering conflict can diminish an industry's productivity. The Nepal Economic Growth Agenda (Samriddhi, 2012) discussed at length five sectors integral to Nepal's economic growth. Industrial conflict affects the performance of all five sectors, consequently decelerating an already ailing economy. In addition, a turbulent industrial setting, among other factors, has compelled productive youth into seeking employment abroad, leading to a labor shortage in Nepal.¹

If conflict is indeed inherent to industrial relations, it is safe to assume some degree of industrial conflict exists in every workplace across the world. The infamy in Nepal's case has resulted from the inability of both employers and employees to agree and commit to acceptable terms of negotiation; government institutions also fail to respond when both parties are in breach of their commitment. Although a multitude of factors contribute to this failure to negotiate peacefully and effectively, institutional

1 Ghimire, Prabhakar (2013, March 8). Deepening Labor Shortage Hits Industries. Republica Daily. Retrieved from http://www.myrepublica.com/portal/index.php?action=news_details&news_id=51123

weakness on the part of unions, employers as well as the government can be identified as one of the most resolute obstacles in the negotiation process.

According to Olakitan, "...conflict results in wasteful use of human and material resources leading to low productivity, retrenchment, dismissal, and alienation." Although employers and employees are engaged in a tug of war, with one trying to maximize profits and the other wages and benefits, it will be difficult to meet either of these goals when essential resources are perpetually consumed in conflict. In their myopic struggle to outstrip the other, both employers and employees may end up foregoing longer term benefits.

2. Industrial Relations in Nepal

2.1 Facts and Statistics

Following are some statistics about the number of disputes and trade union representation that give us a general idea about the nature and characteristics of industrial relations in Nepal:

- As of December 2012, there were 104 newly registered enterprise level trade unions; 323 existing trade unions renewed their registration (Department of Labour [DoL], 2012)
- As of 2009, out of 219 industries in the country, 31.5% had no trade unions, 37% had one trade union, and 31.5% had 2-5 trade unions (Federation of Nepalese Chambers of Commerce and Industries [FNCCI], 2010)
- Trade union members constitute 8% of the labor force (Nepal-Labor Market Profile, 2012)
- In terms of membership, the All Nepal Federation of Trade Union (ANTUF) has the highest number of members (615,233) followed by General Federation of Nepalese Trade Unions (GEFONT) with 353,242, Confederation of Nepalese Professionals (CoNEP) with 200,000 and Nepal Trade Union Congress – Independent (NTUC-I) with 140,000 members (Nepal-Labor Market Profile, 2012)
- There were only 33 industrial dispute cases in the year 2007 which increased to 86 cases in 2008 and decreased to 53 cases in 2009 (FNCCI, 2010)

- In 2009, 11.4% cases were resolved through mediation with the help of labor offices while most of the other cases were resolved internally with the involvement of management and trade union representatives (FNCCI, 2010)
- In 2009, wage increment and payment of allowance (46.2%) was the main reason for industrial dispute while permanent status (14.3%) was the second most contentious issue (FNCCI, 2010)
- As of 2008, 96.2% of people employed (over the age of 15) were part of the informal economy (Nepal Labor Force Survey, 2008)
- In a survey of 219 industries only 16.4% were found to engage in collective bargaining (FNCCI, 2010)

2.2 Types of Disputes

One way of categorizing labor disputes is to separate between rights based and interest based disputes. The International Labor Organization (ILO) defines the former as a dispute over “compliance or enforcement of existing legal rights” and the latter as “demands for redistribution of economic resources through bargaining” (Bitonio Jr., 2008). The distinction between the two can sometimes get blurry, and while some countries explicitly point out these nuances in the labour law itself, others address both types of disputes through the same mechanisms and institutions. The Labor Act of Zimbabwe, for instance, has defined rights dispute as “dispute involving legal rights and obligations, including any dispute occasioned by an actual or alleged unfair labor practice, a breach or alleged breach of this Act or of any regulations made under this Act, or a breach or alleged breach of any of the terms of a collective bargaining agreement or contract of employment.”² The same act defines dispute of interest as “...one in which the claimant party seeks a benefit or advantage to which he has no legal

² Mazanhi, Isaac (2011, August 30). Labor Disputes: Disputes of rights versus disputes of facts. <http://www.newsday.co.zw/2011/08/30/2011-08-30-labour-disputes-of-right-versus-fact/>

entitlement; a dispute of right is one concerning the alleged infringement of a legal right, or the conferment of a benefit to which the claimant is legally entitled.” In Zimbabwe, since by definition a dispute of right directly pertains to a legal infringement, it is dealt with through legal or quasi-legal mechanisms and not through negotiation. Interest dispute, in contrast, is settled through negotiation and collective bargaining.

Nepal’s Labor Act, 1992 however, does not make a clear distinction between the two. Although certain clauses (Clause 72 to 74 in particular) pertaining to the legislative recourse in case of disputes implies the recognition of different types of disputes, a clear demarcation between rights based and interest based disputes has not been made in the Nepalese Labor Act, 1992. Perhaps at the time the act was formulated, the complexities of the contemporary industrial setting had not been envisaged. The case for separating the two disputes stems from the argument that different mechanisms are employed in resolving the two conflicts (Bitonio Jr., 2008). As a right dispute pertains directly to the laws and established standards and agreements, this type of conflict needs to be settled through enforcement and adjudication. When the demands of either employees or employers move beyond what is legally provisioned, the dispute spills into the territory of interest dispute. In this case, the dispute is settled through negotiation, conciliation, mediation, and arbitration.

During our consultations, experts representing different stakeholder groups mentioned that the dispute in Nepal is still largely limited to rights based disputes. Although disputes of this nature can, in theory, be swiftly settled through legal mechanisms, they end up being contentious and escalate into strikes, necessitating several rounds of negotiations and bargaining.

2.3 Current Nature of Negotiation

The relationship between employers and trade unions resembles a prisoner’s dilemma situation. Both employers and unions are distrustful of one another and unwilling to cooperate, fearing the other party may

take undue advantage. Unions submit escalated demands, expecting stinginess on the part of employers. Similarly, employers do not concede to even trivial requests, fearing it will lead to larger demands. The following graph detailing negotiation at a shoe manufacturing company is a striking example of the failure of both unions and employers to concede to mutually acceptable terms.

Figure 1: Negotiation at Kiran Shoe Manufacturer

Area	Demand for increase	Negotiation increased by	After 2 years
Tiffin allowance	Rs 15 from Rs 8	Rs 1	Rs 1
Night shift allowance	Rs 8 from Rs 4.25	Rs 0.25	-
Medical allowance	Rs 500 from 202	Rs 18	Rs 15
Bonus	annually 60 days	annually 40 days	annually 40 days

Source: *Enhancing Decent Work Agenda in Workplace*. GEFONT

Although not cooperating may be a good strategy in the short run, employers and unions need to work together in the long haul. In such a long term relationship, or to extend the game theory analogy, a repeated game, defecting is not the best strategy. Taking the shoe manufacturing company as an example, the union is demanding almost double the benefits the employees were initially receiving. The pittance that employers accede to paying is equally unacceptable. When both employers and unions refuse to meet at an acceptable compromise, the dispute prevails. With the goal of pacifying the union at least in the short run, employers consent to fulfilling their demands with no real intentions to follow through. In the absence of good faith bargaining, the vicious cycle of dispute and temporary reconciliation continues. In order to avoid such detrimental disputes and loss of productivity, in an infinitely repeated game like in industrial relations, cooperating is the optimum strategy.

Decentralizing the role of trade unions can address this problem to some extent. Although legally the power to negotiate with the management

and participate in collective bargaining is delegated largely to the enterprise level union, there have been mixed opinions on whether unions are truly decentralized. Greater opportunities for interaction between the management and plant-level trade union can aid in inciting better understanding and cooperation between the two parties, leading to longer term stability in the industrial setting. It can also reduce opportunities for external political interference.

3. Politics and Industrial Relations

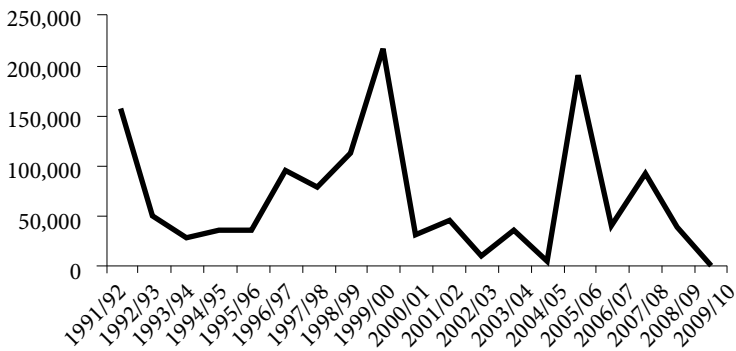
Trade unions, in their nascent stage, have had an inextricable link with political parties and movements in several countries (Taher, 1999). Nepal is no exception. With time though, a number of trade unions in other countries have witnessed an organic decentralization in structure and a move away from politics. Even in India, where labor movements and politics have shared an intricate relationship, independent unions are on the rise (Sarkar, 2008). In several OECD countries, rate of unionization itself has been declining over the years.³ Unionization in Nepal though has been increasing, and predictably so because industrialization is a much more recent phenomenon here than in developed countries. Employers contend what is problematic in the Nepali context is the degree of politicization of trade unions, which can compromise the unions' ability to voice legitimate employee related concerns and curtail industrial conflict. Unions, on the other hand, deny such allegations and instead assert that employers are responsible for bringing politics into the industrial setting.

Like in a number of other countries, trade unions and political movements in Nepal also have a shared history. One of the first big, reported instances of industrial conflict was in the Biratnagar Jute Mills during the autocratic Rana regime. The ensuing labor movement was headed by Girija Prasad Koirala and Man Mohan Adhikari, who went on to become influential political leaders in democratic Nepal. Consequently, this labor movement is recognized as the precursor to the Nepali trade union as well as democratic movement. Due to their political origin, trade unions have been faithful aides to their mother parties in times of need.

3 Rampell, Catherine (2009, November 5). Trade Unions' Decline Around the World. The New York Times.<http://economix.blogs.nytimes.com/2009/11/05/trade-unions-around-the-world/>

Owing to this relationship, historically labor strikes have been observed to be on the rise during periods of political instability. The figure below depicts periods of sharp increase in man days lost to strike. These periods correspond to intervals of heightened political instability: 1996 faced constantly changing leadership, 1997 to 1999 notes the beginning of the Maoist insurgency, 2005/2006 saw the rise of ANTUF and 2008/2009 was a general period of political transition.

Figure 2: Man Days Lost due to Strikes and Lockouts, 1991/92-2009/10



Source: Manandhar (2013)

Even in the present context, violent reactions from union members towards different enterprises and individuals have been making headlines. According to our consultations with experts, trade unions display increased militancy as a way of increasing membership by assuring members that their demands will be met by any means. This assurance is allegedly an added incentive for employees to join unions.

However, trade unions contend that acts of union militancy reported by the media is often unjustified, underscoring the negative bias among media persons when it comes to trade unions. According to the trade unions, the media should draw a clear distinction between individual criminal acts and union sponsored violence.

Similar to employers' contentions that trade unions are too involved in politics, trade union representatives also assert that employers use their political reach and connections as a leverage against dissenting employees. Unions contend that before even listening to the grievance of their employees, employers try to figure out the dissenting employees' political inclination and immediately call the relevant political head. The consequent estrangement between enterprise level employees and employers make everyday negotiations as well as collective bargaining extremely difficult.

Politics and Unionism have gone hand in hand in world history. Although political linkages and association are not a problem, in an unstable political environment like Nepal, this association can manifest itself in industrial disputes. During our consultations, both employers and trade unions agreed that established unions rarely created problems in the industrial setting. Often when a political party splits owing to changing political dynamics, the affiliated trade union has also been observed to split along party lines. This process requires reassertion of identity by both the split factions of the union. Many problems of industrial dispute arise as a result of this split, when smaller unions are trying to establish their identity. These smaller unions often resort to more radical methods of strikes and violence in order to validate their existence. The history of ANTUF and its recent split, leading to the creation of Baidya faction of ANTUF, as well as Figure 2 above anecdotally support this reasoning.

4. Trade Union Structure

Trade unions in Nepal, like in some other countries, are organized at three levels: establishment, association and federation. According to the Trade Union Act, 1992, an establishment level trade union requires at least 10 members, including at least 25 percent of the establishment's workforce. An association implies at least 50 establishment level trade unions, or 5000 agricultural laborers belonging to 20 districts with 100 employees in each district, or 5000 employees from establishments of the same nature. 10 or more associations make up a federation.

A reading of the Trade Union Act, 1992 reveals that in terms of their function and mandate, establishment level trade unions have about the same responsibility as other unions when it comes to everyday negotiations with the management. At least on paper, the task of collective bargaining rests entirely on the enterprise level union. Japan's largest trade union Japanese Trade Union Confederation (Rengo) has a similar three-tier union organization. The enterprise level trade union is in charge of all negotiations and consultations at the workplace. These unions come together to form industrial federations whose role is limited to exchanging information regarding industry-specific issues. The national center comprising industrial federations is in charge of responding to the legislative issues surrounding industrial relations.

Despite a similar three-tiered organization as well as legal mandate, decision making within Nepali trade unions is not believed to be decentralized. Given the distance between employers and enterprise level employees, employers find it easier to deal with higher level trade union officials or relevant political figures. Taking even trivial issues straight to the federation or mother party poses two problems. First, the distance between

employees and employers increases when they cannot talk through their problems transparently. Because of the strained relationship, even an issue as petty as installing a drinking water unit sparks dispute and strike.⁴ The understanding that both employers and employees are in a symbiotic relationship is entirely lost. Second, the widening gap between employers and employees allows room for party politics.⁵ Employees are sometimes oblivious as to why their trade union is calling for a strike and employers cannot confront their employees and get to the root of the problem. In the meantime, third parties take advantage of this information gap, and under the pretext of a labor dispute, incite the labor force to fulfill their own vested interests.

During our consultation with trade union representatives, a call for a strong industry level union was made, one in charge of bargaining on behalf of enterprise level unions. However, some experts voiced the opinion that the vast differences between different enterprises within an industry could make industry level bargaining extremely challenging. In addition, a lack of complete information regarding all of the enterprises belonging to an industry could result in bargaining terms that only certain enterprises and not others are able to fulfill. Instead, some experts argued a national level minimum wage should be established and any further dialogue and negotiation over this threshold should take place at the enterprise level.

4 Consultation with Anjan Dahal

5 Manandhar, Narayan (1998, December 24). Depoliticizing Trade Unions. The Kathmandu Post.

5. Government Institutions

Industrial relations is a tripartite relationship owing to regulatory requirements of labor and industry standards. Trade Union Act, 1992 and Labor Act, 1992 defines a framework of this tripartite relationship and has provisions for several dispute handling mechanisms. Following is the analysis of the provisions made by the government through formal institutions:

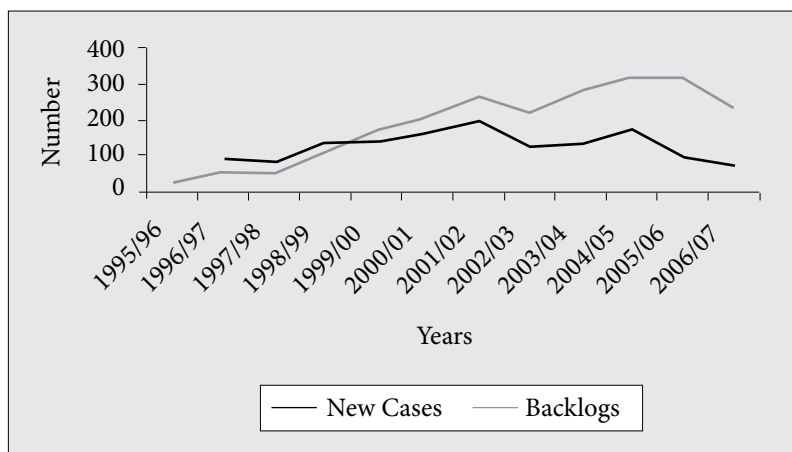
5.1 Weak Labor Institutions and Limited Alternatives to Dispute Resolution

According to the Department of Industries (DoI) there are 440 large, 1113 medium and 2999 small scale industries in the country employing a total of 412,813 people (Department of Industries [DoI], 2011). However, there are only 10 labor offices, scattered across different regions of the country in charge of ensuring the implementation of labor related legislation. There is only one labor court, and that too mired in pending cases.

Although the Labor Act, 1992 has provisioned for other similar labor institutions, our consultations with the ILO office in Nepal revealed these bodies to be grossly inadequate in addressing labor disputes. In addition to the labor offices, the law also stipulates the provision for labor officers (in charge of labor relations) and factory inspectors (in charge of examining the machinery and other technical aspects). The Act does not provide specifics on the total number of labor officers and factory inspectors required relative to Nepal's industrial setting nor does it stress whether they are required at every industrial zone. According to the ILO office in Nepal, lack

of sufficient labor officers has led to factory inspectors assuming both roles. The responsibilities of the two positions appear to have been consolidated into a single job description, that of the labor inspector. As of 2012, there were 12 labor inspectors across the country, with one labor inspector in charge of overseeing 1,380,000 employees; the ILO recommended ratio for developing countries is 1:40000 (Nepal-Labor Market Profile, 2012). With a background in mechanical engineering and no technical expertise in conflict resolution, all the labor inspectors were deemed ill-equipped to deal with labor dispute, even though mediation and conflict resolution has become an integral part of their mandate (Kylloh, 2008).

Figure 3: Trends in Labor Court Cases, 1995/96 – 2006/07



Source: Manandhar (2013)

The call for reform in labor laws as well as labor institutions has been going on for the past decade.⁶ Unfortunately, these attempts at reformation have been futile. Recently, trade unions and employers, after several rounds of discussions, submitted an amended version of the labor law. However, the Ministry of Labor and Employment has put forth an entirely different draft, the terms of which neither employees nor employers are satisfied with. In hindsight, earlier attempts at labor law reform appear to be endless

6 Manandhar, Narayan (2002, December 12). Labour Law Amendment.

loops of discussions, recommendations and discord. This endless process is similar to the process of labor reforms in Columbia where trade-offs had to be negotiated many times and smaller 'deals' helped ease the process of reform. The reform that was eventually implemented had significantly changed from the reform envisioned at the beginning of the process (Echeverry & Santa Maria, 2004). Columbia's success provides some hope for a country like Nepal going through similar turbulent times but the hope has to be restrained as Columbia's reform process was much wider and not limited to labor reforms only.

Jaded by the tiresome legal recourse and equally lured by easier ways of negotiating their terms, employees resort to strikes and employers to lock outs. Another alternative for dispute resolution that some employees and employers are opting for is mediation in the presence of lawyers representing both parties before going to the Labor Office. The labor law requires dissenting parties to go through the labor office before approaching an external mediator. Although seemingly more expensive than the "free" legislative recourse, practice of directly hiring a mediator implies the government prescribed legislative route may have other intangible costs, time being one, which ends up making private lawyers the more prudent option. If the industrial setting grows more turbulent, more of such alternative dispute resolution practices may be witnessed. Considering the inefficiency of the current labor institutions, independent bodies free from political interference and bureaucracy can aid in speeding up the negotiation and conflict resolution process.

Nepal Labor Act, 1992 has also made several institutional provisions for continuous dialogue between employers and employees, including the appointment of Welfare Officers at the enterprise level and the formation of Labor Relations Committee at each enterprise. However, both these provisions have not been implemented so far and the government's efforts in terms of Labor officers and Factory inspectors have been dismal as the latest Labor Market profile indicates (2012).

Nepal's institutional performance from the state's position as an enforcer of rules is reflective of labor market trends in low income countries

plagued by the lack of financial resources, conducive environments that produce better pay offs for better labor standards, and capable and adequately skilled staff to fulfill the provisions made by the law (Cho et. al, 2012). While the state is struggling to maintain the law and order situation in general and has severe problems with understanding and upholding Rule of Law practices, the situation in the labor market can also be interpreted as a reflection of this overall level of chaos.

6. Policy Alternatives

Is the situation abysmal? Certainly not! There have been several local innovations to resolve issues and international experiences (discussed below) demonstrate that industrial relations can improve due to various factors. There are several tried and tested policy alternatives that can be relevant to the Nepali experience.

6.1 Japan

Japan's earliest labor movement is reminiscent of the contemporary Nepali scenario, one wrought with strikes and discord. A review of Japan's trade union movement suggests that with time, the nature of trade unionism in Japan evolved from revolutionary to "business unionism," growing from forging an amicable understanding between employees and employers to negotiating minute details such as wage rates and benefits. This change did not come about over night, but instead was the result of a slow, organic process that accompanies years of industrialization.

According to Jeong and Aguilera, the three key actors – unions, employers and government – favor different kinds of union structure. Unions are more likely to prefer a centralized structure, with a horizontal collaboration between unions through which a strong collective voice can be ensured. Employers are likely to want a decentralized structure for basically the same reason. Employers may concede to a centralized structure when the government is able to control the unions and ensure stability. The government does not have an inherent preference for a certain kind of union structure and is likely to push for one which best fits the government's agenda in a given context. As unions are strongly opposed to

a decentralized structure, the state's ability to push for one depends on its "capacity and legitimacy" (Jeong & Aguilera, 2008).

Jeong and Aguilera narrate how pre-war unionism in Japan was centralized like in a number of Western countries, but post-war unionism took a different turn. The increasing inflation and an economy that appeared to be gearing towards a collapse were among the factors which led the state to institutionalize unions along enterprise lines. Faced by some militant union activists, the state was resolute in establishing Japan as a "fortress against Communism in Asia" (Jeong & Aguilera, 2008). To achieve this end, the government passed laws such as the 1900 Police Law and the 1925 Peace Preservation Law which attempted to curtail horizontal unionism indirectly, in contrast to Korean Laws which directly enforced enterprise level unions.

Employers also saw political, ideologically driven unions as the reason behind increased strike activity. Emerging as an important player in the global market, the country was faced with a growing pressure to increase productivity. To achieve this end, employers pushed for enterprise unions comprising of employees who were just as vested in the company's gains as the employers. Homegrown policies such as lifetime employment and seniority wage system, although under some scrutiny today, aided Japan's earlier days of enterprise unionism in cementing employee loyalty to their respective companies. The relationship between employers and employees precluded legislative recourse to collective bargaining, as both players grew inclined to mutual agreements without involving the government.

The Japanese industrial setting has received some criticism in recent years regarding the different treatment of permanent and temporary employees and the state's initial role in prohibiting horizontal unionism seems too militant in the world's current context. Japan's later focus on **empowering enterprise level unions and instilling a sense of ownership among employees** though is worth emulating.

Another unique characteristic of Japan's current industrial setting is the presence of a single, dominant federation, which limits the problems of inter-union rivalry. The rise of RENGO was an organic process and recommending a similar course for Nepal through legal intervention would be undemocratic. However, **inter-union rivalry** is indeed a significant problem in Nepal that needs addressing.

6.2 Australia

An interesting feature of the Australian industrial setting is the presence of independent labor institutions such as the Fair Work Ombudsman and Fair Work Commission, which have taken over most of the functions of the preceding labor tribunal called Australian Industrial Relations Commission. As these bodies were only established in 2009, they are yet to confront the test of time. However, in theory, these institutions, free from political shackles, are likely to provide the support essential in creating a harmonious industrial climate.

The Fair Work Ombudsman was a body provisioned by the Fair Work Act 2009. The responsibility of this independent appointee ranges from educating both employees and employers on their rights to investigating breaches of these rights and taking the respective cases to court. The Ombudsman mobilizes Fair Work Inspectors to assist in detecting breaches of rights.

The Fair Work Commission was also established through the Fair Work Act 2009. This body functions as Australia's national workplace relations tribunal. Its mandate ranges from mediating and arbitrating disputes to facilitating good faith bargaining and regulating industrial action.

While a complete replication of these institutions may not be applicable to the Nepali context, similar **independent bodies may**

provide for a more efficient conflict resolution alternative compared to the current tardy labor institutions. Instead of adding on to the government prescribed labor institutions, which have failed to deliver time and again, it might be worth exploring this alternative route. Our consultation with labor experts and related stakeholders revealed that the draft forwarded by employers and employees recommended the creation of such an independent commission. However, that was among one of the recommendations the Ministry scraped out in its new draft.

6.3 Cambodia

Cambodia's labor movement gained momentum in the 1990s, paralleling growth in the country's garment industry. Like other union movements, it too was, and still is, tied to politics and political parties. Although the labor law appeared to be clear on its provision for dispute resolution, implementation was ineffective, with Cambodian industries perpetually mired in strikes and disputes. As part of a bilateral trade agreement between the US and Cambodia, the ILO started the Labor Dispute Resolution Project in 2002. After a number of changes in the original project design, the Arbitration Council finally took shape in 2003.

The Arbitration Council is not a substitute for a labor court. The council first seeks to mediate the dispute and proceeds to arbitrate only when mediation fails. Even when arbitration takes place, parties first agree on whether or not the decisions will be accepted as binding. If either party is dissatisfied with the decision made by the council, they can take their case to any other court within eight days of the Council's decision. The Arbitration Council is mandated to make a decision within fifteen days. This period of mediation and arbitration is considered a "cooling off" period and calling a strike during this time is considered illegal.

In order for the Arbitration Council to be accepted as an independent and unbiased body by both unions and employers, its formal structure is kept separate from the Ministry of Labor. The Council is a statutory body

receiving its mandate from the labor law. The Ministry forwards non-conciliated collective disputes to the Council and the Council eventually reports back to the Ministry. Despite some interaction with the Ministry, the Council receives funding and support from non-governmental institutions. Another important concern was for the individual arbitrators to be unbiased. To achieve this end, the Council has a tri-partite structure, with the unions, employers and Ministry each nominating ten individual arbitrators. These arbitrators work only part-time and are called when a decision or award is to be made. For each case, an arbitration panel of three arbitrators is required. Unions and employers nominate one arbitrator each and these two arbitrators pick a third one.

The Arbitration Council is received by both unions and employers as an independent and efficient body, with a success rate of 80%⁷. As it is separate from any government or non-government institution, the Council is currently facing some funding hurdles.

One of the underlying success factors in Cambodia is also the external environment that increased pay offs for better industrial relations. Cambodia's Arbitration Council is a result of conditionality on the export trading agreement on garments with the United States. As exports from the garment sectors grew, there was an incentive for all the parties including the unions, employers and state to improve their industrial relations through dialogue and faster dispute resolution. In addition, there has been significant investment in Cambodia in labor inspection by donor agencies and even after the expiration of export quotas to the US, Cambodia maintains its 'sweat-shop free' image owing to the continued practice of labor inspection (Adler, 2007).

7 Henderson, Simon (May 22, 2013). At 10th Anniversary, Arbitration Council Faces Funding Shortage. The Cambodia Daily. Retrieved May 28, 2013 from <http://www.cambodiadaily.com/news/at-10th-anniversary-arbitration-council-faces-funding-shortage-25887/>

7. Key Constraints to Resolving Industrial Dispute in Nepal

Based on the structure of trade unions, employers and government institutions, current practices in Nepali industrial relations environment, and the overall political economy status of the nation, there are several key constraints to resolving industrial disputes in Nepal.

7.1 When political issues take precedence over workers' issues: Strong affiliation of trade unions with political parties widens the scope of the unions' agenda, leading to the accusation that political issues sometimes take precedence over employee related issues. Bringing political conflict into the work sphere has further wedged employee-employer relationship, precluding any opportunities for fruitful dispute resolution. As new parties emerge and new unions try to assert their identity, since the organized labor force is an important constituency for every political party in Nepal, industrial disputes leave the realm of peaceful negotiations and resort to unlawful use of force. Similarly, employers' use of influence over political leaders to subdue dissenting employees also deteriorates the employee-employer relationship. In addition, because of the multitude of unions that employers have to deal with, it is often futile to negotiate at the enterprise level. Instead, negotiations with key politicians can resolve the conflict in a more effective manner with lower cost.

7.2 Limited dialogue between employers and employees: Labor Act, 1992 has delegated enterprise level unions with much more authority and role in dispute resolution as well as collective bargaining compared to trade union federations. However, in practice, either because of the enterprise level employees' lack of capacity to negotiate with the

management or because of the employers' reluctance to work closely with its employees, third party intervention becomes inevitable. The consequent distance created between the management and its employees has led to an escalation of disputes even over trivial issues, and the widening gap has also created room for political interference. The fact that not many enterprises have a grievance handling mechanism only exacerbates this problem. So far, very few enterprises have invested in an organic mechanism for grievance handling suited to their needs. There are hardly any enterprises that have followed the provision of forming a 'Labor Relation Committee' as provisioned by the Labor Act of 1992.

7.3 Inter-union rivalry: The existence of numerous trade unions (in some cases even more than what is legally permissible) in a single enterprise has led to increased competition between unions to win over more members. While competition is necessary and even beneficial in ensuring that each union is providing adequate services to its members, violent manifestations of this competition affect the negotiation process. Different union members aligned to their own set of political ideologies do not agree with the collective bargaining and negotiation terms agreed upon by the management and the designated union representing the majority. Additionally, in a bid to gain more members, unions may turn a blind eye towards violent activities carried out by their members.

7.4 Difficulty in establishing an official trade union for collective bargaining: Although the law requires a single "official union" with a majority support to participate in collective bargaining, it seldom happens. There is some degree of confusion regarding the official trade union itself, with a single employee signing up for more than one union. Adding up the number of employees registered in each of the union sometimes exceeds the entire workforce in an enterprise. Since a trade union requires the support of 25% of its employees to register as an authentic union and since a single employee can legally be a part of only one union, the existence of more than four unions in a single enterprise also hints at a similar problem. When collective bargaining or any other kind of negotiation takes place with the "official" union, other unions refuse

to honor its terms, contending that the union which was part of the process was in fact not the official union.

7.5 Weak labor institutions and limited non-legislative recourse: The labor institutions and procedures established to curb conflict have not been able to deliver. If dissenting parties were to follow through with the process outlined by the labor law in calling a legal strike or lockout, it should, in theory, take around 66 days to actually execute a strike.⁸ This has led both employers and employees to call for illegal strikes and bandhs without even attempting to resolve their conflict through negotiation. Non-legislative recourse, such as hiring private mediators, is currently both infrequent and expensive. Additionally, right based disputes which can be easily addressed through the legal mechanism are also put in the throes of strikes and endless rounds of unsuccessful negotiations owing to the inefficiency of state based institutions and judiciary.

7.6 When implementation is the problem: As with every other issue in Nepalese economy, the problems in industrial relations also stem from the fact that existing policies and laws are not implemented properly. The lack of implementation will not simply go away by demanding more ethical behavior or a corruption free environment. The fact that existing laws and policies are not being implemented implies that the payoff to the involved parties from not following the law are higher than when following the law i.e. there are rents to be earned from the way the laws and policies are structured at the moment. This increases the cost of doing business and naturally pushes a majority of businesses to informality (*Similar to the Columbian case. See Echeverry & Santa Maria, 2004 for a detailed analysis*).

8 As per the provision in Labor Act, 1992.

8. Recommendations

Based on the analysis presented above, the following are some broad recommendations that target improving the institutional environment. While some of the suggestions are an overhaul of the policy environment, there are recommendations for marginal changes that may be more suitable given the current political economy considerations.

8.1. Increasing the benefits to having good industrial relations

Creation of an environment where better industrial relations have larger pay offs for all the stakeholders involved: A common factor in Columbia, Cambodia and Japan's effort at labor reform was the change in their business environment. All these countries were experiencing growth through economic activity expansion. This boom period (either through export markets or internal boom) increased the pay offs for all the parties and created incentives for them to engage in labor reform. As incentives in the economy change through growth, employees and employers both seem to agree on labor reforms and the state plays the role of a facilitator as this would induce higher revenue and better welfare for citizens.

Since improving the Rule of Law environment is a long term strategy that requires a concentrated effort from various actors in the government, one lesson that can be drawn from the reform efforts outlined above is the need to introduce small changes in the incentive environment for businesses. This can help in strengthening the Rule of Law. Thus, even for improving industrial relations, it seems imperative to improve the overall business environment and create opportunities for businesses to grow. This

could be done through export agreements, opening up previously untapped markets and through better economic diplomacy at least with India, in Nepal's case. Once again, instead of an overhaul of all economic policies, the Government of Nepal can initiate this effort by choosing one sector that has potential for growth. The positive consequences in this sector can be used to champion labor reform and improving industrial relations in other sectors. A better environment where businesses flourish can tip off the scales to make labor reform feasible by creating win – win situations for all the political economy actors. In Nepal's case, one sector that has shown potential for this in the past, and even today has better industrial relations than other sectors, is the hotel industry in particular.

8.2 Arbitration Council

Creation of an Arbitration Council as a body complimentary to the Labor Court: Unions, employers, and other stakeholders have been contemplating the creation of an independent labor institution in Nepal. The Labor Commission has been on the reform agenda several times. However, the current draft of Labor Commission envisions itself as the sole authority for dispute resolution thereby making the labor court redundant. It is no wonder that the Commission has not been approved by the government so far. This kind of vision essentially ignores one major stakeholder – the government – in the industrial relations setting. Therefore, it might be more feasible to move forward with an Arbitration Council rather than a Labor Commission in Nepal. In addition, commissions of this kind in Nepal have a notorious reputation of being redundant agencies that simply serve the functions of political nominations.

The dispute resolution process outlined by the Arbitration Council in Cambodia is quite similar to that mandated by the Nepali labor law. However, while the three person panel of arbitrators in the Arbitration Council has a reputation for being independent and efficient, the same cannot be said about the labor court; Employers find that the court's decisions are almost always biased towards employees and employees find strikes to be a much faster method of dispute resolution than going through

the tardy court procedures. An Arbitration Council like that in Cambodia would be structurally much lighter than a Labor Commission similar to other commissions in Nepal. As the typical commission is still largely a part of the government bureaucracy, it is perceived as being as inefficient as any other government body. An Arbitration Council, in contrast, with both human resources and finances separate from the Ministry, could be more efficient.

One concern that needs to be addressed is how this body can complement the Labor Court without making the court redundant. In Nepal, one way of preventing the duplication of functions of these two bodies could be to forward rights based disputes to the Labor Court and interest based disputes to the Arbitration Council. Another alternative could be to establish the Arbitration Council as a type of fast-track court which, in order to be financially sustainable, would charge aggrieved individuals a fee for its services. It would be up to the individual to either go through the Labor Court or the Arbitration Council. Another option could be to forward individual disputes to the Labor Court and collective disputes to the Arbitration Council. While the intricacies of this body's structure are up for debate, the need for such an institution cannot be denied.

One more function that the Arbitration council can take up is that of labor inspection. As with the Fair Works Commission in Australia, the council can house a labor inspection unit equipped with qualified labor inspectors who are then able to independently conduct inspection and bring violations to the notice of the council or the Labor court.

8.3 Dialogue

Continuous dialogue between employers and employees: Limited and sporadic dialogue between employers and employees at the enterprise level does not allow for an environment conducive to conducting and abiding by the terms of any kind of negotiation, including collective bargaining. Even though federation level trade union leaders often step in with the positive intentions of providing a service to their members, the unintended

consequences of such intervention can impede on both the employers' as well as the employees' ability to resolve conflict amongst themselves. On the other hand, employers' reluctance to directly communicate with their employees leads to similar problems.

One way to bridge the gap between employers and employees would be to create more opportunities for interaction, as was intended by the South Asian and Vietnam Project on Tripartism (SAVPOT) funded by the Norwegian embassy, with technical assistance from the ILO. This project, which was implemented in Nepal, India, Pakistan, Sri Lanka, Bangladesh and Vietnam, aimed at providing a platform for enterprise level employers and employees belonging to a single industry to share their problems as well as best practices.

Although employers and employees may have differing short term goals, they are not oblivious to the fact that neither of their goals will be realized in a state of perpetual industrial conflict. Through continuous dialogue, employers and employees can better understand not only one another's perspectives, but also be informed of other employers and employees who are dealing with similar issues. Donor agencies and organizations like the ILO, given their neutrality as well as technical expertise in negotiation and conflict resolution, would be in the best position to facilitate these dialogues.

In order to facilitate continuous dialogue, it is also important to encourage enterprises to have a grievance handling mechanism. Several incentives can be devised for this, including but not limited to public recognition for enterprises that have effective grievance handling units, incentive through taxes or through award and/or scorecard mechanisms.

8.4 Trade Union Elections

Timely elections and single union coverage at the enterprise level: The debate surrounding the official trade union can be addressed to a

certain extent by fair and timely elections at the enterprise level. Although ensuring elections are regularly and fairly held can be time consuming, the presence of a legitimate official trade union can make negotiations much more efficient and effective.

Although employees have the right to be politically affiliated to any party outside of their workforce, having a single union at each enterprise could aid in making negotiations, including collective bargaining, more effective. The issue with competing trade unions is unlikely to end anytime soon. Having a single union based on employee majority will eliminate inter-union rivalry. At the same time, employees can put the accountability of the union to test in the absence of multiple unions using one another as scapegoats. The official union can be voted on once every two years, so that employees have the power to vote for that union which is most efficient in addressing their concerns. Single Union Agreements, endorsed by enterprises in the United Kingdom, allow for both employers and employees to agree on a single union to represent the employees at a particular workplace. Such agreements sometimes include a no-strike provision. Some kind of a similar agreement or simply mutual understanding could be useful in Nepal.

The provision of regular elections would also address the identity assertion process of radical breakaway factions. If regular elections are to take place, these factions can prove their point during an election and assert their identity as a major player. While this does require a good rule of law environment, elections could be one way towards reducing violent forms of protests.

Funds for holding the elections are a major issue. In the Nepali case, a tripartite contribution from enterprises, labor unions and government can be raised for enterprise level elections. The first round would require additional investment in terms of setting up rules and adequate monitoring. This is one place where donor investments can yield productive results for the industrial environment of Nepal.

8.5 Accountability

Accountability on the part of both unions and employers: Although unions have no legal obligation to check their members' transgressions, employees are engaged in violent activities regardless of whether or not they are directed by the unions to do so. Even just a handful of such incidents paint a negative picture of the country's industrial relations and compound to eroding investor confidence. One reason why such incidents exist could be because of employees' perhaps unrealistic expectations that they will receive protection from the union. The unions' role is crucial in dispelling such myths.

One way that a union can make its members more accountable could be by suspending or revoking the individual's membership. Another alternative could be simply to condemn violence perpetrated by its members more actively. Even if a union has no legal mandate to be held accountable for its members' acts, some of the objectives of a trade union, as stipulated in the Trade Union Act, 1992 suggest there is room for unions to work towards creating a more peaceful industrial setting. For instance, according to the Act, some of the unions' objectives include aiding in creating an amicable relationship between employees and employers, increasing productivity, and encouraging employees to be "dutiful" and "disciplined." When a union member engages in militant activities, it compromises the unions' ability to fulfill all three objectives. Given that such acts not only tarnish unions' image in public but also prevent unions from fulfilling their core objectives, a more active role on the part of unions to minimize violence of its members could be valuable.

While employers demand accountability from unions, there is a similar call from the unions' side for employers to also keep one another in check. Like the unions, one of FNCCI's objectives is to encourage good industrial relations. To achieve this end, an organization like FNCCI can similarly check transgressions from its members. If a project like SAVPOT is initiated, employers' associations can play an important role in facilitating dialogue.

8.6 An additional issue: Timing and sequencing of labor reforms

While the debate on the right timing of labor reforms in developing economies is ongoing in academia, there is a lot of evidence that organic reforms are the most sustainable. Following this line, at the policy level, there needs to be a richer discourse on the timing and sequence of labor reforms. The timing and sequence of labor reforms determine the rate of industrial growth without which labor conditions cannot improve. While minimum wage laws define a basic minimum, the argument of productivity to be tied up with labor is a side of the story that needs to be considered. There is empirical evidence that shows developed countries were able to grow better by consider the timing and sequencing of labor reforms (Hall and Leeson, 2007).

9. Concluding Remarks

There is more than one factor contributing to Nepal's tempestuous industrial setting. As highlighted in the paper, some of these problems can be attributed to Nepal's relatively late induction into industrialization. Some changes such as establishing a cordial relation between employers and employees may develop organically in the years to come. In the meantime, some level of policy intervention can ease this turbulent transition. Some of the institutional reforms recommended in the paper can aid in creating an environment more conducive to peaceful and effective negotiations between employers and employees.

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Annexes

Annex 1: List of People Consulted for Industrial Relations: An institutional analysis

Name	Organization
Mr. Bishnu Rimal	President, GEFONT
Mr. Dev Raj Dahal	FES
Mr. Saloman Rajbanshi	ILO
Mr. Narayan Bhattarai	ILO
Dr. Narayan Manandhar	Industrial Relations Expert
Dr. Hemant Dawadi	Director, FNCCI
Mr. Sameer Thapa	Director, Silver Mountain School of Hospitality
Mr. Anjan Dahal	Lawyer
Mr. Pashupati Murarka	Vice President, FNCCI
Mr. Hansa Ram Pandey	Director, FNCCI
Mr. Laxman Basnet	President, NTUC
Mr. Padma Jyoti	Chairman, Jyoti Group
Mr. Ramesh Badal	GEFONT
Mr. Ram Chandra Paudel	Ministry of Labour
Mr. Ghanendra B. Shrestha	Executive Member, HAAN
Mr. Ajay Pradhanang	Immediate Past President, NYEF
Mr. Durga Lal Shrestha	Entrepreneur
Mr. Manish Agrawal	Vice Chairman, Employers Council FNCCI
Mr. Prakash Sharma	Project Coordinator, ILO
Mr. Raj Kumar KC	Department of Labour
Mr. Yubaraj Neupane	Office Coordinator, JTUCC

Samriddhi, The Prosperity Foundation an introduction

Samriddhi, The Prosperity Foundation is an independent policy institute based in Kathmandu, Nepal. It works with a vision of creating a free and prosperous Nepal.

Initiated in 2007, it formally started its operations in 2008. The specific areas on which the organization works are:

- i. Entrepreneurship development
- ii. Improving business environment
- iii. Economic policy reform
- iv. Promoting discourse on democratic values

Centered on these four core areas, Samriddhi works with a three-pronged approach—Research and Publication, Educational and Training, Advocacy and Public Outreach.

Samriddhi conducts several educational programs on public policy and entrepreneurship. It is dedicated to researching Nepal's economic realities and publishing alternative ideas to resolve Nepal's economic problems. Samriddhi is also known for creating a discourse on contemporary political economic issues through discussions, interaction programs, and several advocacy and outreach activities. With successful programs like “Last Thursdays with an entrepreneur” and “Policy Talkies”, it also holds regular interaction programs bringing together entrepreneurs, politicians, business people, bureaucrats, experts, journalists, and other groups and individuals making an impact in the policy discourse. It also hosts the secretariat of the ‘Campaign for a Livable Nepal’, popularly known as Gari Khana Deu.

One of Samriddhi's award winning programs is a five day residential workshop on economics and entrepreneurship named Arthalya, which intends to create a wave of entrepreneurship and greater participation among young people in the current policy regime.

Samriddhi is also committed towards developing a resource center on political economic issues in Nepal called Political Economic Resource Center (PERC) currently housed at Samriddhi office. It also undertakes localization of international publications to enrich the political economy discourse of Nepal. Samriddhi was the recipient of the Dorian & Antony Fisher Venture Grant Award in 2009, the Templeton Freedom Award in 2011 and the CIPE Global Leading Practice Award in 2012.

(For more information on the organization and its programs, please visit www.samriddhi.org)

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15. Foreign Direct Investment: Towards Second Generation of Reforms

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'Industrial Relations: An Institutional Analysis' is one among the six research paper series prepared for the Nepal Economic Growth Agenda (NEGA), 2013. NEGA is an annual constraints analysis performed by Samriddhi Foundation to identify, deliberate and offer policy alternatives to existing policy bottlenecks that hinder Nepal's economic growth.

After NEGA 2012 identified five growth sectors of the Nepalese economy viz. agriculture, education, tourism, hydropower and infrastructure, NEGA 2013 focuses on researching cross-cutting issues that affect growth in all these sectors and hinder Nepal's economic growth process. The cross – cutting issues covered by NEGA 2013 are industrial relations, contract enforcement, anti-competitive practices, foreign direct investment, public enterprises and regulatory environment for businesses.

This study on industrial relations is an institutional analysis with a tripartite approach and includes an analysis of government, employers and trade unions. Special emphasis has been given to identifying the institutional cause of industrial conflict, analysis of existing conflict resolution mechanisms, their shortcomings as well as policy alternatives that can harmonize industrial relations to produce a dynamic industrial setting.



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