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**Toward Better Protection of the Right to Bargain in Cambodia:
A Focus on Legal and Practical Aspects**

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ABSTRACT

The core purpose of this research is to find out more about the comprehensive legal protections of the right to bargain and better mechanism to handle cases of bargaining rights and other labor cases in Cambodia. This purpose is accomplished through a comparative study. The United States and Japan become two main case studies of this research. Legal and practical aspects to protect and promote the right to bargain in these countries are thoroughly examined.

Two main rights in collective labor relations are the rights to organize and to bargain collectively. Without the right to organize, workers are hard to achieve their demands through individual bargaining with employers. If the right to bargain collectively is diminished, the right to organize is also impeded. When the right to bargain is strongly protected, unions will fulfill its roles completely. More importantly, the only peaceful tool to represent interests of workers as well as to build industrial peace is collective bargaining. Respect the obligation to bargain in good faith is a core factor to make the right to bargain more effectively function. Protecting and promoting these two rights are crucial to ensure interests of workers and workplaces stability.

So far, workers enjoy their right to organize widely. In contrast, the right to bargain collectively can be executed in a very limited level. There are several reasons such as lack of willingness from employer and union to come to bargaining table, breaching the obligation to bargain by employers, and lack of clearer legal protection toward the right to bargain collectively. Also, ineffective of current dispute resolutions system is another dimension which contributes to instability in the workplaces and industrial relations.

As experiences from comparative countries namely the US and Japan, the rights to organize and bargain are fairly protected under the legal framework. In these two countries, certain harmful acts toward the rights to organize and bargain are prohibited. In addition, these prohibited acts are remedied by the same principle of unfair labor practices in these two countries. In Cambodia, there is yet legal provisions prohibiting acts harming the right to bargain. Therefore, this research argues that there should be sufficient and much

clearer provisions toward the right to bargain. Having such provisions will lead to proper application of the law into practice. In addition, having much clearer provisions will prevent further interpretation out of original meanings in the law.

In addition to this legal aspect, specific procedure to handle cases of unfair labor practice (ULP) was set up by American and Japanese laws. This specific mechanism helps distinguishing ULP cases from other labor cases. As practical matter in the US, the National Labor Relations Board was set up and authorized to deal with ULP cases. In Japan, the Labor Relations Commissions were set up and authorized to handle ULP cases. However, there is no such a specific procedure to handle ULP cases in Cambodia though this principle was introduced this principle currently in the draft TUL. In this regard, this research argues for clarification on jurisdiction dealing with ULP case in Cambodia.

Moreover, disputed parties in the US and Japan have limited power to decide on effect of decisions of competent authorities. In the US and Japan, the parties have no power by the law to choose for binding or non-binding awards. Instead, Cambodian legislation allows disputed parties to choose for binding or non-binding awards. This research argues that this legal provision becomes an obstacle toward speedy and effective dispute resolution mechanism.

The last sort for the parties in the dispute is going to court. Within this regard, this research stresses on the importance of a specialized labor court and reliable court system. Without such mentioned court, providing just and effective solutions for disputed parties would be difficult to achieve. All mentioned issues are collaborated separately in order in following chapters.

Chapter one serves as the introduction to the problems and describes what is occurring in the reality in Cambodia regarding the right to bargain collectively. The fact that the right to organize in Cambodia has been widely functioning does not mean that interests of workers have been effectively protected and promoted. In fact, the right to bargain has narrowly functioned. In reality, there is very small number of collective bargaining agreements concluded within many sectors especially in garment sector. This fact

seems to be strange while number of total unions increased to around 1,000 recently and yet there were around one hundred collective bargaining agreements in around 300 garment factories. This figure indicates that the right to organize and the right to bargain were not fairly functions. Therefore, understanding reasons and solutions for betterment toward the right to bargain becomes core task of this research.

Chapter two will examine further aspects of the right to organize and the right to bargain collectively. This chapter examines historical background of the rights to organize and bargain collectively in the world context especially under the International Labor Organization framework. Historically, workers were very difficult to form groups in order to protect its interests. Workers finally were legitimately organized by the law after quite long struggle.

The legal and practical situations of these two rights in Cambodia are also described within this chapter. Based on the study, legal approaches to protect these two rights differ between countries in this research. In the US and Japan, similarities are found for the fact that unfair labor practice (ULP) principle was employed to protect these two rights. In addition, these two rights were protected fairly in these two countries. In contrast, Cambodian case is quite different for the absence of ULP principle to handle acts abusing these two rights. Furthermore, right to bargain is narrowly protected under current labor legislation.

By nature, these two rights have very important characteristics in promoting industrial democracy. Accordingly, these two rights must go along with each other. In fact, the right to organize could not function effectively if unions were banned from speaking out on behalf of their members especially on matters to improve working conditions and living standard. Finally, the chapter illustrates the roles and importance of these two rights to uphold industrial democracy to sustain peace in workplaces and society as a whole.

Chapter three will examine the impacts of multi-unionism on determination of bargaining representatives. This chapter also includes comparative approach on this matter with other countries and that in Cambodia.

The right to organize is recognized and protected by the laws of these three countries including the US, Japan and Cambodia. Such a legal protection results in multiple unions in one workplace or enterprise. This multiplicity leads to complex in bargaining relations. Accordingly, in order to handle this problem, various approaches were adopted by these countries. An exclusive representative system in determining bargaining representative was found in the US context. A multiple-representative system for bargaining purpose was found in Japan. In Cambodia, a multi-approach including the most representative (MR) union, joint-union, and multi-union systems were found to handle this multiplicity. However, one system cannot absolutely fit in every country due to different circumstance of each country.

The concept of obligation to bargain in good faith can be found in detail here. This concept refers to further acts by both parties which helps improve workplace relations and prosperity. Employers and unions bear this obligation in the US case. However, this obligation is applied only to employers in Japan. Cambodia now is introducing ULP principle in the draft of Trade Union Law 2010 which includes this obligation. This draft imposes obligation in good faith on both parties namely employers and unions. The concept of bargaining in good faith requires good faith act of the parties in relations. However, this concept does not include absolute agreement from the parties. This obligation requires merely efforts from the parties to reach an agreement.

Finally, it wraps up by showing the relations of multi-unionism, bargaining representatives and obligation to bargaining in good faith towards those bargaining representative. Once legitimate bargaining representative is designed, employer has an obligation to bargain in good faith. In the US as well as in Japan, breaching this obligation will constitute an unfair labor practice. However, there is no such a provision of unfair labor practice act within current positive law in Cambodia. This chapter responds to the employer excuse of blaming complexity of the multi-union system as problem in workplace relations and avoiding bargaining with the unions.

Chapter four examines the legal and practical aspect toward the protections of the right to bargain. A comparative study with other jurisdictions including the US and Japan is conducted in this chapter to

uncover how these two countries treat the right to bargain collectively either in their legal or practical aspect. The case of Cambodia is also described within this chapter. This chapter responds to legal and practical reasons that impede effective functioning of the right to bargain collectively.

Within legal aspect, this comparative study indicates that legal protection of bargaining rights in the US and Japan is wider than that in Cambodia. In Cambodia, there is no provision prohibiting certain acts harming the right to bargain. In contrast, legal provisions in the US and Japan prohibit various acts impeding the concerned right along with remedial system.

In practical aspect, a specific procedure to deal with ULP cases in the US and Japan was set up. The National Labor Relations Board (NLRB) was designed to handle ULP cases in the US. In Japan, the Labor Relations Commissions (LRCs) were set up to deal with ULP cases as well. However, Cambodia is silent regarding competent authority to deal with ULP case. When there is no clearer provision this would constitute hardship in practice. In addition, disputed parties were provided wider power to decide on effect of decisions of competent authority in Cambodia. In contrast, disputed parties had no right to decide for binding or non-binding orders by the competent authorities in the US and Japan. Cambodian case leads to a barrier toward a speedy disputes resolution mechanism.

Chapter five is aimed at analyzing similarities and differences of legal and practical aspects toward the right to bargain in the two countries compared and that in Cambodia. This part attempts to analyze the way the US, Japan and Cambodia treat the right to bargain under the legislations and labor dispute settlement mechanism. Within legal aspect, Cambodia provides narrow protection toward the right to bargain compared to the protection of the right to organize. In addition, narrow protection with Cambodia legal framework compared to the US and Japan illustrated through insufficient legal provisions of this right. Finally this chapter provides some feasible recommendations for better solution through legal and practical aspects toward the right to bargain in Cambodia. This chapter includes as well suggestions for further studies on issues which are not comprehensively analyzed in this research project.

Chapter six wraps up the entire perception toward the right to bargain collectively in minimizing industrial strife.

ACRONYMS

AC:	Arbitration Council
BFC:	Better Factories Cambodia
CAMFEBA:	Cambodian Federation of Employers and Business Associations
CBA:	Collective Bargaining Agreement
C-CAWDU:	Coalition of Cambodia Apparel Workers' Democratic Union
CFITU:	Cambodian Federation of Independent Trade Union
FDI:	Foreign Direct Investment
FTUWCK:	Free Trade Union of Workers of the Kingdom of Cambodia
GMAC:	Garment Manufacturers Association in Cambodia
GSP:	Generalized System of Preferences
ILO:	International Labor Organization
ITUC:	International Trade Union Confederation
LAC:	Labor Advisory Committee
LRCs:	Labor Relations Commissions
MFN:	Most Favored Nations
MoL:	Ministry of Labor
NLRA:	National Labor Relations Act
NLRB:	National Labor Relations Board
RGC:	Royal Government of Cambodia
TUL:	Trade Union Law
ULP:	Unfair Labor Practice

CHAPTER ONE

Introduction

Overall views:

Cambodia has started from point zero to rebuild everything after civil wars in 1979. After the 1991 Paris Peace Agreement, this country changed from a planned economy to a market economy with the Constitution in 1993.¹ Cambodia does not depend on industrial potentiality, and history has indicated that much of the population continues working in the agricultural field. Based on its geographical position, Cambodia is a country which relies on agriculture with more than 70 percent of the workforces engaging in agriculture. These agricultural workers are rice farmers and most of them have been engaging in other supplemental works such as hunting, fishing or part-time employment to support their irregular incomes. Cambodia has made efforts to reestablish its standing in the world through economic growth over the last two decades. Year 1999 was a new period that Cambodia experienced its peace and achieved economic growth of five percent.² From time to time, Cambodia has been trying to integrate itself into the world community by becoming a member of ASEAN in 2000 and the WTO in 2003.

Since the 1990s, Cambodia has depended not only on agriculture but also industrial sector particularly the garment one for instance. This sector has attracted mass population especially those with low education. The sector has served as a major source for economic growth and as a core factor for macroeconomic stability and poverty reduction.³ All stakeholders including the government, international partners, civil society, employers, workers or unions have focused attention on this sector. In order to respond to the importance of this sector, the government should take further necessary measures to secure it accordingly. Peaceful industrial relations through democracy in the workplace are very important. In this sense, further legal measures to reach this goal must be defined comprehensively in legislation.

¹ Cambodian Constitution, 1993, art.56. "Kingdom of Cambodia adopts market economic system."

² US Bureau of International Affairs, Foreign Labor Trends: Cambodia, 2003, at.7

³ Mid-Term Review 2008 on National Strategic Development Plan 2006-2010, at.34

As a matter of fact, there are many aspects to be dealt with in order to keep peace and prevent further industrial strife. Industrial peace cannot be assured merely by imposing obligations on one side while freeing other side. Actually, all concerned parties must share their responsibilities to build up stability in the workplaces. On one hand, workers and unions should be aware of their roles and obligations within the whole labor relations. On the other hand, employers must respect the laws too. Another important dimension to secure industrial peace relies on the functions of all relevant authorities to make sure that the laws are properly implemented. However, the leading root for such good practice is based on legal provisions toward further aspects such as obligations of the parties in good faith in the industrial relations which must be comprehensive and practical. Furthermore, rights of workers must be secured by the laws in order to avoid clashes in the workplace. Among these, two core collective rights serve very decisive roles to reach the mentioned goal.

The right to organize and the right to bargain collectively function importantly to promote industrial democracy and interests of workers. These two rights have very close relations and are supposed to blend along with each other. In this sense, strong legal protection towards these two rights is needed. Without the right to organize, worker interests are obtained difficultly through individual efforts against employer. Practically speaking; moreover, having merely the right to organize protected by the law but not the right to bargain collectively makes little sense. In short, without the right to bargain, the right to organize could not completely function.

Legal protections towards these two rights can be found in most countries in the world though various approaches. These rights are also protected under the International Labor Organization (ILO) framework through its two main conventions namely C87 (Freedom of Association and Protection of the Right to Organize, 1948) and C98 (Right to Organize and Collective Bargaining, 1949). Cambodia also became a member of these two conventions on September 23, 1999. Accordingly, Cambodia bears an obligation to protect and promote these rights.

Current legal protection constitutes room for union pluralism to function in the labor atmosphere. Protection of the right to organize provides possibility of many labor unions in garment sector especially. Particular attention of labor rights in this sector is attributed to the fact that this sector became a focal point to test linkage between trade and labor right improvement by the United States. A bilateral agreement between Royal Government of Cambodia and the US was concluded in 1999. Under the agreed terms, Cambodia had an obligation to protect and promote worker rights as well as working conditions in this sector in order to exchange garment-export quota to the US's market. Since then, workers in this sector do enjoy their rights especially the right to organize as for the fact that the government has tried to find way out to satisfy its promises with the United States. As a result, such protections drive a way toward existence of many labor unions in this sector especially in one enterprise. Accordingly, this existence of multiple unions in one enterprise will uplift democracy in the workplaces. Worker rights and interests will be upheld effectively. In contrast; however, the reality does not reveal this assumption.

This dissertation focuses mainly on how labor unions protect interests of their members through conducting of collective bargaining. In addition, the study focuses on how the law regulates in order to protect the rights of workers. Another important part of this research concentrates on how to effectively handle cases of abusing the right to bargain because collective bargaining plays a very important and peaceful role in promoting worker as well as for the interests of enterprise. Through the collective bargaining process, employers and workers can learn more of each other's needs and difficulties. This process can produce mutual understanding between the parties and lead to very smooth relations in the workplaces. Therefore, in order to have these two parties to convene and to act in good faith within the bargaining relations is very vital for this purpose.

Up to 2008, there were 1,100 labor unions in and around the 300 garment factories. There were around three to four labor unions in one enterprise on average in one enterprise and for some cases, there were up to nine.⁴ This figure appears to show that there is one collective bargaining agreement in one enterprise

⁴ IR-PSWG, October 3rd, 2008. Available at: <http://www.cambodia-gpsf.org/downloads/IRProposedAgenda23Sept2008DraftEng.pdf> (last visit: October 25, 2009)

which means that there should be around 300 collective agreements. By contrast, there were only 43 collective agreements in 2006.⁵ Currently, there are around one hundred collective agreements including those made in other sectors other than garment one.⁶ This indicates that the number of collective agreements is really small and inappropriate to that of the total labor unions and factories. It is worth exploring the reasons behind and to correct it.

There are several reasons of such outcomes. First, one reason for concern is due to lack of willingness from employers and unions to negotiate. Second, the reason is due to abuse the obligation to bargain by employers. The act of disrespecting the obligation to bargain can be found in many cases in which the employer refuses to negotiate with legitimate representatives⁷, or refuse to discuss on certain subjects.⁸ The act of breaching the right to bargain can be found through the case in which the employer concludes new collective bargaining agreement with other persons without authority to do so (AC case: 22/04, Raffles Hotel le Royal v. Union of Raffles Hotel le Royal). In addition, employers have admitted that they are reluctant to conduct and conclude collective bargaining because they do not know which union is the right bargaining representative.⁹ Third, the ground is due to lack of strong legal protection toward the right to bargain collectively. Last, current dispute resolutions system is another dimension which also contributes to instability in the workplaces and industrial relations.

The breach of obligation to bargain in good faith has been occurred within industrial atmosphere. Such breach leads to unstable workplace relations and abuse of workers' right as well. For instance, refusal from factories to meet trade union representatives from the Coalition of Cambodia Apparel Workers' Democratic Union (C-CAWDU) after suspension of 1,823 workers without paying them due to compensation. Recent event attributed to non-existence of negotiation by the employers for a higher minimum wage led to large scale of strike which caused huge amount of loses for business as well as well workers. The act of refusal to

⁵ ILO Report on Survey of Industrial Relations in East Asia, 2006, at.33 (Khmer version)

⁶ Interview with an officer at Labor Disputes Department of Ministry of Labor (March 19, 2010). He asked to be unnamed.

⁷ Annual Survey of Violations of Trade union rights, ITUC, 2007. Available at: <http://survey07.ituc-csi.org/getcountry.php?IDCountry=KHM&IDLang=EN> (last visit: 25 October, 2009)

⁸ *Id.*

⁹ Dennis Arnold, *The Cambodia Experiment in Ethical Production: Dynamics of a "GMO Approach" to Promoting Labor Rights and Investment*, 2006, at.18

renegotiate by the employers is another dimension of the breach of bargaining obligation. Besides contributing to non-peaceful workplace relations, this breach of obligation bars workers to have their difficulties or demands voiced through their representatives.

Current circumstance provides that collective bargaining becomes more beneficial for workplace peace. Memorandum of Understanding (MoU) between employers' association and prominent union confederation and federations was concluded. According to this MoU, both parties agree that no-strike clause is acceptable. This clause controls the use of the right to act collectively by workers or using economic weapon during the life of collective bargaining. Both parties agree to have their problems first solved by all means set by the law or by their collective agreement. In this light, non-existence of CBA due to refusal to meet reps or other excuse will lead to industrial strife namely strike or demonstration which contributes to loss for all sides.

Problems:

Though many problems leading to small outcome of collective agreements are found, not all of them focused upon in this study. The research here will not discuss on unwillingness from the concerned parties to convene.

Looking into legal provisions regarding the above points, the employer in Cambodia bears an obligation to bargain with legitimate representatives under the current legislation.¹⁰ As mentioned, a very strong relationship exists between the right to organize and to bargain collectively. However, legal protection of these two rights is questionable while the right to organize is higher protected than that of the latter one. Certain acts by the employer are prohibited and sanctioned when it affects the right to organize. By contrast, there are no prohibited acts on an employer toward the right to bargain collectively.

These two rights are fairly protected under other jurisdictions in order to promote industrial peace. Within the legal aspect, the US and Japan unfair labor practice principles are found in dealing with this matter. In order to protect this bargaining right, there must be legal requirement imposed on concerned parties. For

¹⁰ Prakas 305/01, Clause 9,10&11

instance, the important element to protect and promote this right is the provision regarding the obligation to bargain (in good faith). Disrespect of this obligation will be handled through a specific mechanism and sanctioned by the court as the last resort. In this sense, the United States imposes such an obligation on the parties in the bargaining relations. At its outset, this obligation was imposed only on the employer but later also imposed on unions. In Japan, such an obligation is also required by the law to impose on the employer toward every single union in the bargaining relations. Offenders that disrespect the obligation, as legal treatment in these two countries, will bear legal consequences. Recently, Cambodia is on the course toward the adoption of the unfair labor practice principle and there are many discussing points toward more clarifications of this new approach.

For practical aspect, Cambodia still has an ineffective mechanism to deal with the cases of collective bargaining right if compared to that of other countries.¹¹ As a practical matter in other countries once the employer commits an unfair labor practice by the abuse the obligation to bargain in good faith, a specific and separate procedure will be employed. Disputing parties in these countries are not allowed to choose to be bound by the decision of competent authority. Moreover, once the employer disobeys the decisions of the competent authority, the court will order fines or imprisonment on violating party. The latter point is ambiguous in the case in Cambodia.

Therefore, more comprehensive and practical provisions along with effective procedure and enforcement mechanism are really needed to protect this right. Cambodia lacks of such provisions to protect and promote the right in question. In this respect, the effect of the Arbitration Council awards and the need for a very effective court are discussed in this study.

¹¹ Confusing labor dispute resolution mechanism is constituted after the introduction of the unfair labor practice in the draft trade union law 2010. The focal point is the abuse of the right to organize of individuals. Currently, it is the individual labor dispute that is beyond the discretion of the Arbitration Council. The draft law is vague regarding this mentioned individual labor case whether the case will be handled by the council or not. Experiences from comparative countries indicate that all kinds of ULP are handled through single institution either through the NLRB or the LRCs.

Research objectives:

The core purpose of this research is to find out more about the comprehensive legal protections on the right to bargain collectively in Cambodia. This paper will focus mainly on how the law treats this mentioned right. Discussion through legal requirement on the obligation to bargain in good faith will be conducted, especially legal consequences when the employer or union abuses this obligation. In short, this study aims at examining current legal protection as well as the mechanism to handle labor cases in Cambodia. Furthermore, the work attempts to look at legal theory of other jurisdictions regarding protection of the right to bargain and its practical experiences to promote this collective right.

Legal intervention plays very important roles in labor relations. Once stricter and more comprehensive provisions imposed with appropriate remedy to restore the situation, the employer or other persons will be more careful in his or her acts toward legal obligations. This legal approach will encourage the parties to step forward on the right track. If a person does not respect this obligation, then he or she will be convicted of acting illegal acts and the cases will be solved by the competent authority. Further remedies will be produced due to the acts of breaching the obligation to bargain in good faith especially through principle of unfair labor practice. Finally, if the offender resists obeying the order of the court, he or she will be fined or imprisoned or both.

Question and Hypotheses:

Along with the question on how to provide better protection on bargaining rights, this paper hypothesizes that without comprehensive legal protection imposed on the employer regarding the obligation to bargain, the worker right to bargain through their legitimate representatives will be hindered. In this respect, this study focuses on the importance of legal provisions toward acts of disrespecting the obligation to bargain in good faith. Furthermore, discussing on nature of decisions of relevant authority is worthy and the discussion is in need for effective enforcement mechanism to impose remedy on those who violates the laws and orders of competent authorities. Moreover, this thesis hypothesized that time to introduce unfair labor practice principle in protecting the right to bargain collectively as well as the right to organize is approaching. This unfair labor practice (ULP) principle will produce specific procedure in dealing with

ULP cases which mainly cover on abuse of organization and bargaining rights. This specific mechanism indicates particular attention toward these collective rights.

Accordingly, this study first argues that due to the absence of comprehensive legal provisions toward the breach of the obligation to bargain, the parties will have enough room to ignore their obligation in bargaining relations. In this sense, more protective legal provisions to protect this right are needed.

Second, this study argues that the current Arbitration Council in Cambodia cannot provide effective support toward the right to bargain as long as its decisions have a binding effect based on choices of the parties. Current labor dispute resolution mechanism still frees the parties especially the employers to play around with the law.

Finally, this study argues that as long as there is no effective enforcement mechanism through the court system, this will serve as a main factor undermining the effects of the decisions of the relevant authority dealing with this matter. An independent and reliable labor court will be needed in this sense.

Research methodologies:

In order to fulfill this purpose, a comparative study with other jurisdictions is conducted in order to compare the similarity and differences. The legal and practical aspect in the US and Japan are explored in this research paper because the right to bargain collectively is strongly and fairly protected there. Furthermore, these two countries have adopted ULP principle for a long time, especially the United States. As Cambodia is on the way to introduce this principle, exploring the experiences in applying this principle in these countries becomes essential to avoiding errors.

Research significance:

This dissertation is a research paper conducted in very detail on how to protect and promote the right to bargain collectively. A new approach of unfair labor practices toward the protection of this right is discussed here as well. Such study proposes to contribute to the outcomes for further academic research

through comparative studies along with recommendations regarding new approach of unfair labor practice principle. Furthermore, academically criticized research plays a very important contribution toward more protection and promotion of the mentioned rights. All the above mentioned points serve in the significance of this research paper.

Construction:

In order to fulfill the above purposes, this research paper is divided into six chapters to assist in organization of each of the related matter.

Chapter one serves as the introduction to the problems describes what is occurring in the reality in Cambodia regarding the right to bargain collectively. In addition, the first chapter presents the research question, research hypotheses, research objectives, methodologies and its significance.

Chapter two will examine the right to organize and the right to bargain collectively. Moreover, the chapter examines the historical background of the right to organize and to bargain collectively in the world context especially under the International Labor Organization framework. The legal and practical situations of these two rights in Cambodia are also described within this chapter as well. Finally, the chapter illustrates the roles and importance of these two rights to uphold industrial democracy to sustain peace in workplaces and society as a whole.

Chapter three will examine the impacts of multi-unionism on determination of bargaining representatives. This chapter also includes comparative approach on this matter with other countries and that of Cambodia. The concept of obligation to bargain in good faith can be found in detail here. Finally, it wraps up by showing the relations of multi-unionism, bargaining representatives and obligation to bargaining in good faith towards those bargaining representative in each case. This chapter responds to the employer excuse of blaming complexity of the multi-union system as problem in workplace relations.

Chapter four examines the legal and practical aspect toward the protections of the right to bargain. A comparative study with other jurisdictions including the US and Japan is conducted in this chapter to uncover how these two countries treat the right to bargain collectively either in their legal or practical aspect. The case of Cambodia is also described within this chapter as well. This chapter responds to legal and practical reasons that impede effective function of the right to bargain collectively.

Chapter five is aimed at figuring out similarities and differences of legal and practical aspects toward the right to bargain in the two countries compared and that in Cambodia. This part also attempts to analyze the way the US, Japan and Cambodia treat the right to bargain under the legislations and labor dispute settlement mechanism. Finally this chapter will provide some feasible recommendations for better solution through legal and practical aspects toward the right to bargain in Cambodia. This chapter includes as well suggestions for further studies on issues which are not comprehensively analyzed in this research project.

Chapter six is used to wrap up the entire perception toward the right to bargain collectively in minimizing industrial strife.

CHAPTER TWO

Organizing and Bargaining as Fundamental Rights in Collective Relations

The right to bargain collectively cannot go further without the right to organize practically. Therefore, exploring further aspects of both rights within its historical context, the ILO context as well as that of each comparative country is worthy.

I. Right to Organize

History has illustrated the need for workers to band together in order to strengthen their power vis-à-vis the employer in labor relations. The term trade union serves as a main form of workers' organizations in this sense.¹² Prior to success of being legally recognized, labor activists had been struggling very hard. Without their past efforts, workers could not enjoy their right to organize as the way they do today. Trade unionism is not only an incident of the contemporary step of capitalist industry, but it has also a permanent role in developing democratic states. Thus, trade unions cannot be viewed as temporary organizations to be dissolved when capitalism is terminated.¹³

1. Historical background of the Right to organize and its concept under the ILO framework

1.1 Historical background:

There are various theories regarding labor movements. Some theories proclaim that the labor movement was a process of grouping among workers as a result of capitalism. Therefore, worker associations formed in order to protect their rights and interests within the context of capitalism. And other theories proclaim that it was due to scarcity of jobs so that workers joined together to protect their rights to work. The extension of markets led to the growth and evolution of unionism and not a class struggle between

¹² Term of use: The word trade union and labor union are exchangeable used in general. However, in some countries, these two terms are used to refer to either employer's organization or workers' organization like in the case of Singapore. It was also used to refer to organizations of both employer and workers in the U.K in earlier period; yet it refers only to the organization of workers recently.

¹³ Simeon Larson & Bruce Nissen, *Theories of the Labor Movement*, 1987, at. 187

employers and employees. The labor struggle has centered on protecting skills, maintaining wages, and preventing unskilled from encroaching on the right to work.¹⁴ However, whether the former or latter theory is right is questionable. These two theories responded to the real phenomenon at the outset of labor movement. However, for the current circumstance, it might be the former one that much fits to the real attempts of workers to be formed. Capitalism produces more power for entrepreneurs in the industrial atmosphere. Capitalists have the very advantageous position either financial or intellectual power. These factors can provide the employers chances in exploiting workers through various aspects for instance worse off working conditions, exploiting workers incomes, and abusing workers rights. In order to respond to such unequal power, mere solution for workers to protect themselves is to form together. It was not so easy to peacefully be combined indeed.

The status of workers before and after the industrial revolution differed. Prior to the revolution, journeymen owned their tools after passing the step of apprenticeship, which often took years. After the industrial revolution, workers had to work with machines and this revolution caused difficulties for individual workers to own such machines. Thus, an unavoidable phenomenon of becoming dependent on other persons who owned those machines arose in history. Accordingly, journeymen then lost their ownership of their tools which they used to possess previously. In order to restore their situation, there were two possibilities. The first possibility was the use of bargaining approach and another one was the ownership approach. On the one hand, because individuals possessed little or no bargaining power under the new industrial system to achieve successful bargaining, this required collective action (workers' organization). On the other hand, due to a lack of financial support to buy machines individually, this also required collective action (employers' organization). Thus, both approaches seemed to necessitate collective action, and this became a factor leading workers to form unions.¹⁵

The first form of labor organization could be found through its informal groups which were developed once human beings live or work together.¹⁶ The combination played as role as the first form of organization

¹⁴ *Id.* at.131-132

¹⁵ E.edwaed Herman, *Collective Bargaining and Labor Relations*, fourth edition,1998, at.1-2

¹⁶ Larson & Nissen, *supra* note 13, at.14

chosen by workers in this sense.¹⁷ Trade unions emerged because of the opportunity in which workers sharing the same occupation can meet together and not from any particular institutional need.¹⁸

Regarding the birth of labor movement, the exact beginnings are hard to point. Such a desire for freedom, without any doubt, illustrates the civilization itself. However, the early part of the first Industrial Revolution in the eighteenth century in Western Europe could be a suitable starting-point.¹⁹

Whenever the discussion on the origin of trade union movement comes up, it could not forget to discuss its root in the Great Britain. The so-called “first industrial revolution” commenced in this England in around 1780. This evolution in society spread over onto the European continent.²⁰

In the first stage, trade unions formed among artisans, the shoe-makers, and tailors, building workers, weavers and they operated in small workshops or in their own homes.²¹ Guilds had been formed in the very beginning of labor movement history by independent craftsmen. Guilds were formed in order to control entry into the craft to ensure that the trade was not overwhelmed by numbers. The purposes of the guilds were to provide mutual aid to dependent and to control prices and to protect the quality of craft work by ensuring that only those possessed necessary expertise could take part in the craft. These reasons for the guilds resulted in requisite level of skills through apprenticeship and experiences as core characteristics.²² This form of worker organization did respond to the theory in which workers joined together to protect their jobs. This form indicated consciousness of job scarcity. Another form of worker association under a so-called term of society had been developed by eighteen-century journeymen.²³ This society was to provide mutual aid in the form of sickness or for widows and orphans. This society aimed at assisting those who were seeking a new job. The purposes were to exert pressure on the employers in order to protect their earning and to try to improve hours of work or push up wages. In this society, rational procedures for

¹⁷ *Id.* at.40

¹⁸ *Id.* at.188

¹⁹ Harold Dunning, The origins of Convention No.87 on freedom of association and the right to organize International Labor Review, 1998, Vol.137, No.2, at.150

²⁰ The Making of Labor in Europe, Edited by Bob Hepple, 2010, at.13

²¹ W.Hamish Fraser, A History of British Trade Unionism 1700-1998, 1999, at.2

²² *Id.*

²³ *Id.* at.4

setting differences could be found.²⁴ The theory of a labor movement, which rooted on workers' consciousness against capitalism, was revealed through this form of combination. Another form of earlier organization was under the name house of call. This house of call concept extended mutual aid for its members. Both employers and workers were required to register in order to make use of the service of this organization.²⁵

Finally, the modern trade union movement developed from the middle of the 19th century. The Amalgamated Society of Engineers (ASE) which was the result of a merger of several societies and which now the Amalgamated Union of Engineering workers, was founded on 6 January 1851.²⁶

Worker organizations and to a lesser extent employer organizations had substantially developed in size and competence throughout Western Europe by the mid-nineteenth century. At the time, the majority of organized workers were dominated in skilled trades. Therefore, workers were still struggling to accomplish their most basic aim which was the freedom of association without conditions.²⁷

It took another quarter century before unskilled workers started their movement. The reason for the slow start was partly due to existence of restrictive provisions, legal prohibitions on formation of trade unions in agriculture and among other certain occupations in many countries.²⁸ Until the end of the nineteenth century that mass unskilled workers were organized effectively by the "new unionism" of the 1890s. This new unionism was based on the socialist ideal of uniting every kind of workers namely skilled and unskilled workers into a single organization.²⁹ Another development of labor movement was that of white collar workers in the public sector. Organizations formed by specialist white collar workers have been increasing since the 1920s.³⁰

²⁴ *Id.* at.1

²⁵ *Id.* at.5. This house of call was run by an old member of the craft who could be expected to go out to search for available workers when employment was available.

²⁶ Bryn Perrins, Trade Union Law, 1985, at.10. This form was established to build more power among labors since it can provide higher guarantee toward labor movement. This form has created sense of strong solidarity among workers to protect their rights and interests.

²⁷ Dunning, *supra* note 19, at.152

²⁸ *Id.* at.151

²⁹ Perrins, *supra* note 26, at.10

³⁰ *Id.*

Struggle in the Labor Movement:

Existence of the labor movement entailed not only material betterment and job security; but also the extension of democratic principles at the workplaces.³¹ Workers had been facing against various barriers in combination process before its success. The birth of trade unions during its outset in the eighteen century was encountered hostility from both legislature and judges.³² Any attempts to interfere with “manufacture, trade or business in the conduct or management thereof” or to persuade workers not to take work or to strike were prohibited by the act.³³ Under the Combination Acts 1799-1800, any attempt by workers toward an agreement with the purpose of improving working conditions was an offence and imposed criminal sanctions. Those who called or attended a meeting for such purpose were convicted, and criminal punishments were imposed on them. Thus, the essence of trade union movement was hindered at the start. The doctrine of restraint of trade was imposed on unions during the early part of the nineteenth century.³⁴ Legal protection of unions against the doctrine of restraint of trade was found in 1871. This statute reflected the principle that unions were autonomous and should be free in determining and enforcing their own constitutions.³⁵ Later, unions were not criminal *per se* under the Combination Laws Repeal Act 1824, but after a series of strikes, the Combination Act 1825 rendered unions criminal except for the case in which the sole purpose of unions was to determine of wages or hours.³⁶

At the outset, the legal principle of non-intervention has been largely applied toward trade union with the exception in the areas of union political activities and mergers. However, the activities of unions have become subjects of external regulations. The external intervention can be found through the enactment of legislative protection against unreasonable exclusion or expulsion from a union where a closed shop was in operation. Within this regard, further requirements were extended. For instance, in 1990 restrictions on the

³¹ Larson & Nissen, *supra* note 13, at.186

³² Deborah j lockton, Employment law, 6th ed., 2008, at.411

³³ Fraser, *supra* note 21, at.10. The right to combine was prohibited under the Act of 1799 in the United Kingdom.

³⁴ Deborah, *supra* note 32, at.411. This was a major legal obstacle to unions for their act was illegal by the law if it was to improve working conditions for their members.

³⁵ Gillian S.Morris & Timothy J. Archer, Trade Unions, Employers and the Law, 1992, at.71

³⁶ Deborah, *supra* note 32, at.411

conduct of ballots were introduced. Accordingly, the scope for union autonomy in this sense has been considerably narrowed.³⁷

The U.S:

The first labor movement in the US was that of the shoemakers in Philadelphia which was formed in 1792.³⁸ The labor movement in the US also had experiences like that in the United Kingdom. There was a committed struggle from workers to legal recognition of the right to organize. Prior to legal recognition, the labor movement was treated under the doctrine of conspiracy for several persons joining to raise their wages.³⁹ An injunction was also a legal device to deal with labor disputes and it was ordered by a judge on the request of one party. During the 1930s, some important industrial States had issued their laws to restrict injunctions by the State courts.⁴⁰ However, though legal protections toward this movement the employer's attitude toward it in the US context was still acute.

At the very beginning stage of the labor movement in the US, employers maintained substantial arsenals of violent weapons or acquired them when a strike seemed likely to occur. Employers hired guards and they could use weapons in critical cases. In addition, professional strikebreakers were employed against strikers. A typical pattern was for the courts to respond with an injunction against the strike and for the governors to respond with the militia.⁴¹ The employers later on used new tactics to reinforce their opposition against unions. One was to eliminate the desire for unionization by treating their employees better. Another one was to take part in the labor movement. The so-called company unions were formed, financed and guided by employers.⁴² Due to the attitude of anti-union employers, there was a decline of union membership in this country.⁴³ There was argument by labor advocates that a number of both federal and state laws advanced conflict rather than promoting cooperation. An increasing number of employers ended up

³⁷ Morris & Archer, *supra* note 35, at.71

³⁸ Herman, *supra* note 15, at.13

³⁹ *Id.* at.36-37

⁴⁰ *Id.* at.37&41

⁴¹ *Id.* at.10. At that early stage, it was not only negative reaction from the employers; but also from the courts and governors.

⁴² *Id.* at.11

⁴³ Toshiaki Tachibanaki et al., *The Economic Effects of Trade Unions in Japan*, 2000, art.36

fighting unions through every available weapon.⁴⁴ The reason why the employers went against the union movement was because they focused on a clear distinction between management and employees.⁴⁵

Finally, the Congress later supported the labor movement by passing the so-called the Wagner Act 1935 whose official title was the National Labor Relations Act (NLRA). The core aim of this Act was to provide the right to organize to parties in the labor relations and to bargain collectively to legitimate bargaining representatives. Within this aim, the employees had the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.⁴⁶

Japan:

The labor movement in Japan was born during the last decade of the nineteenth century. The first leaders were a small band of intellectuals and “enlightened workers”. Most of them had studied in the United States where they experienced mixed feelings about Western industrialization. The outcomes of their studies and experiences abroad helped lift up the living standard of the Japanese working class. These intellectuals had come home with the latest techniques of trade unionism.⁴⁷

The founder of the Japanese labor movement was Mr. Takano Fusataro.⁴⁸ Though Takano had studied labor movement in America, he was not influenced by American unionism, and what he wanted was a stable union movement that could grow rapidly. Instead of an exclusive principle used by American

⁴⁴ Herman, *supra* note 15, at.67-70

⁴⁵ Toshiaki Tachibanaki et al., *The Economic Effects of Trade Unions in Japan*, 2000, art.37. Employers understand that it is natural for them to have management rights and to be quite distinct from employees, and to be less cooperative with employees in order to keep their management authority and benefit. Furthermore, due to the fact that the employers will offer higher wages to union’s members than non-union members, they are not happy about the presence of union in their workplaces. To avoid such extra cost they must spend on union’s members, several firms would adopt a policy which aims at abolishing a union, or they would feel that a new union should not be organized in a non-unionized firm.

⁴⁶ Section 7 of NLRA

⁴⁷ Robert A.Scalapino, *The Early Japanese Labor Movement*, 1983, at.1

⁴⁸ He was born in Nagasaki in 1868. In 1886, he went to San Francisco to undertake commercial studies. He had studied in America and Japan and Labor problems. He also had contacted with Samuel Gompers, president of the American Federation of Labor and the most prominent American unionists of the time. See Stephen E.Marsland, *The Birth of the Japanese Labor Movement*, 1989, at.46-49, for more detail about this labor founder, please read through p.46-61 of this book.

unionists, Takano instead adopted an inclusive principle.⁴⁹ Moreover, Takano perceived that strikes were things to be avoided for both ideological and opportunistic reasons. Final goals under Takano's leadership were higher production and a guaranteed supply of labor to the capitalist system. These goals would be diminished by strikes; that is why he was against strikes. Takano had applied cooperative approach with management to sustain labor movement and kept the strike weapon at arm's length.⁵⁰ However, the efforts of Takano and his supporters cannot be found wanting after WWII.⁵¹

Another prominent labor leader was Mr. Katayama who was against the cooperative approach used by some unionists. Katayama saw strikes as the true key toward social justice, recognition of the rights of the workers, and their proper treatment, and this ideology drove him to be considered as a radical and an outlaw in Japan. As a result of these two views, a major ideological split within labor movement that continues to this day. On one hand, there were the harmonists or moderates, who supported the capitalist system and against strikes. On the other hand, there were the radicals who sought the abolition of the capitalist system and supported strikes.⁵²

The situation of labor movement in Japan went in parallel with that of other countries. The fact that unionists were defeated for now and then was unavoidable phenomenon. However, through the struggle of Japanese working class, their movement was recognized and protected. Ultimately, the Article 28 of the Constitution of Japan guarantees the right to organize and to bargain collectively.⁵³ Furthermore, Japan is also a member of the ILO Conventions 87 and 98.⁵⁴ This legal protection is a legacy of the efforts of workers in the past.

⁴⁹ Exclusive principle is a rule that excludes workers without specified skills required by the group and it required apprenticeship for certain period. Inclusive principle does include every kind, skilled or unskilled, of workers as long as they have not close relations with management.

⁵⁰ Stephen E. Marsland, *The Birth of the Japanese Labor Movement*, 1989, at.155

⁵¹ *Id.* at.157

⁵² *Id.* at.155-156

⁵³ Japanese Constitution, article 28 states that "The right of workers to organize and to bargain and act collectively is guaranteed."

⁵⁴ Kazuo Sugeno, *Japanese Employment and Labor Law*, 2002, at.21

Characteristics of Unions:

A trade union is considered as a continuous association of wage earners for the purpose of maintaining or improving the conditions of their working life.⁵⁵ The main purpose of such an organization is to provide mutual aid to its members as already explained. This mutual aid plays a very important role in the day prior to the Welfare State. Through mutual aid and comfort, union members are provided moral support of comradeship and the security of belonging. In order to sustain this service, each member of the unions contributes a small subscription to fund an organization in order to afford employing specialist staff.⁵⁶ Mutual insurance was a core element of the union functions at the very beginning stage.⁵⁷ Some unions look after their members through help and advice on employment, health and safety at work, pensions as well as legal advice or legal aid upon their needs. In addition, the union can represent a member who has a grievance or who is subjected to disciplinary action and it represents a member before an industrial tribunal or the like.

Further activities of unions toward its members engage in educational activities such as training courses for negotiators, and for safety representatives, courses that offer ordinary members a basic education in industrial and economic affairs, or scholarships and bursaries to assist members who wish to undertake further studies.⁵⁸ A union plays a role as a great partner to the employer to produce prosperous workplaces. In this sense, the union is supposed to be kept informed, consulted over a whole range of issues.⁵⁹ As a result, the roles of trade unions evolved from where they interacted with their own members to one where they interacted with employers. Moreover, real unions have been acting as agents to assure justice in the workplace.

Workers can possess greater leverage and equality of negotiating power with the employer through their representatives. In addition, to act collectively enables the workers to secure better terms and conditions

⁵⁵ Larson & Nissen, *supra* note 13, at.188

⁵⁶ Perrins, *supra* note 26, at.3

⁵⁷ Larson & Nissen, *supra* note 13, at.186. Members were offered protection against personal affliction such as sickness, accident, and old age on the one hand, and the stoppage of income through unemployment, strikes, or lockout on the other. These benefits were a poignant reminder to the members of the benefits of trade union membership.

⁵⁸ Perrins, *supra* note 26, at.3-4

⁵⁹ *Id.* at.4. It included manning levels, changes in working practices and procedures, the introduction of new technology, productivity, products, prospects, manpower planning, redundancies, redeployment, capital investment, finances.

than that could be achieved through individual bargaining with the employer.⁶⁰ This right aims at restoring industrial relations and the right to bargain collectively which is considered as an important right which produces an effective system to regulate industrial relations between workers and employers.⁶¹

1.2 The Right to Organize under the ILO concept

A respect of human rights was perceived as a general interest by prescient thinkers only after the liberation of human ingenuity from feudal bonds and the emergence of industrial society. It took quite long time before it was enunciated internationally. In this respect, the International Labor Organization (ILO) played a central role.⁶² Due to the importance of the right to association the first ILO Convention relating with the right of association was adopted in 1921 “in agriculture”.⁶³

The right to associate is incorporated in both the United Nations International Covenants and the ILO Convention. The conventions serve as important aspects in the ILO framework. The right to organize was recognized by the ILO in 1948 with the Convention on Freedom of Association and Protection of the Right to Organize (C87).⁶⁴ This right was protected against further restrict legal requirement such as prior authorization. This convention served as strong tool for those who seek to pursue the vision of a world where the humanity and dignity of each person are fully respected.⁶⁵ The premier objective of labor movement was the need for workers to join together in order to defend and advance their collective interests. However, this convention No. 87 does not ensure this objective. What this convention does instead is to promote the recognition that workers can use their rights related to the establishment and the functioning of trade unions.⁶⁶

Within the preamble of the ILO Constitution, the “principle of freedom of association” is recognized in order to confront injustice, hardship and privation. In addition, the Declaration of Philadelphia (1944)

⁶⁰ Charles Barrow, *Industrial Relations Law* (2nd ed.2002), at.146

⁶¹ *Id.*

⁶² Dunning, *supra* note 19, at.128

⁶³ *Id.*130

⁶⁴ *Id.* at.139

⁶⁵ *Id.*127

⁶⁶ *Id.* at.149

confirms that the “freedom of expression and association are essential to sustained progress” (Article I (b)). This freedom then constitutes the fundamental principle on which the ILO is based.⁶⁷

The Universal Declaration of Human Rights also proclaimed that “Everyone has the right to freedom of peaceful assembly and association” (Article 20). Additionally, this declaration stated in Convention No.87 that “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorizations” (Article 2).⁶⁸

The right to organize can be functioned effectively if the civil and political rights incorporated in the Universal Declaration of Human Rights and other international instruments namely the International Covenant on Civil and Political Rights are recognized and protected. These principles should be considered as a common ideal that all nations and people should aspire.⁶⁹

Legally speaking, no one can prevent the employees or employers from forming an association to protect their interests or from being a member of a collective industrial organization. If any employment contract; accordingly appears to oblige an employee not to be or withdraw from his or her union, it is so-called yellow dog contract which is void.⁷⁰ Though the employer and worker organizations have different interests,⁷¹ they share the same aims towards the good function of economy.⁷²

Naturally, freedom of association has had a close link with freedom of expression, freedom of media, freedom of assembly and universal suffrage. After the abolition of forced labor, freedom of association stands as the second rank to protect workers.⁷³ This right to organize is not merely linked with economic issue; it links human right issues. The UN Declaration in 1948 on Human Right asserted that “everyone has

⁶⁷ *Id.* at.128

⁶⁸ *Id.* at.128

⁶⁹ Neville Rubin, Code of International Labor Law, Law, Practice and Jurisprudence, Vol.I, 2005, at.116

⁷⁰ Manfred Weiss & Marlene Schmidt, Labor law and Industrial Relations in Germany, 2003, at.163

⁷¹ While employers’ organization is for securing more benefits of employers, workers’ organization is for protecting the interests of their members that might go against employers’ interests somehow.

⁷² ILO Geneva, Organizing for Social Justice, 2004, at.7

⁷³ Dunning, *supra* note 19, at.138

the right to form and to join trade unions for the protection of his interest”. Hence, this right to organize is to be protected everywhere either nationally or internationally.

This right to organize is protected against every aspect of acts which interferes the effective use of this right. The ILO Convention C.98 clearly states that workers’ and employer’ organizations shall enjoy adequate protection against any acts of interference by each other or each other’s agents or members in their establishment, functioning or administration.⁷⁴

Through freedom of association, employees and employers can act nationally and internationally in an effective way through their representatives. These representatives are voices of the workers and employers in this respect.⁷⁵ Furthermore, these organizations are free to affiliate with any international organizations for further strength.

Core concept of the ILO toward the right to Organize:

The right to organize extends far beyond the simple right to join a trade union (or employers’ organization). This right includes the rights of workers’ and employers’ organizations to draw up their own constitutions and rules, to elect their own representatives, to draw up their own programs, and to take part in federations, national and international; and the right to do this without any interference from the public authorities. Thus, this convention serves very important element in protecting civil and political rights.⁷⁶

The nature of the provisions in convention No.87 should be applied to all workers and employers, but there are still some exceptions for the application of this convention.

⁷⁴ ILO Convention C.98, 1948, art.2

⁷⁵ Dunning, *supra* note 19, at.128

⁷⁶ *Id.* at.150

The right to organize without distinction whatsoever: Scope of the right to Organize:

Article 2 of the Convention No.87 states that “Workers and employers, without distinction whatsoever, to join organizations of their own choosing without previous authorization”. This article guarantees the right to organize toward both employers and workers. Provisions which undermine the right to organize of certain groups of workers⁷⁷ are incompatible with the expression in this ILO Convention. The principle of non-discrimination in trade union matters is designed and expressed clearly in this convention. The term of “without distinction whatsoever” which is used in this thesis refers to the protection against any discrimination based on occupation, sex, color, race, belief, nationally, or political opinion. This right extends its aims of protection not only on private sector of economy; but also to civil servants and public service employees.⁷⁸

However, within this point there is an exception applied to the armed forces and the police.⁷⁹ This is not the only exception within this language of the Convention. The justification of this exception is based on the basis of responsibility for the external and internal security of the State.⁸⁰ The issue of national security is at high risk and very dangerous if the armed forces go on strike. In practice; however, in order to determine whether workers belong to the military or to the police or civilians working in military installations or in the service of the army who should have the right to form a union is not easy. In this respect, workers should be considered as civilians in cases of doubt.⁸¹

Besides the above exceptional case, there are many categories of persons or occupations that are refrained from the right to organize such as public servants, fire service personnel and prison staff, executive and managerial staff, agricultural workers, workers in free export zones, seafarers and domestic workers.⁸² In

⁷⁷ Rubin, *supra* note 69, at.122. These certain groups of workers include public servants, managerial staff, domestic staff, or agricultural workers.

⁷⁸ *Id.* at.123

⁷⁹ *Id.* at.122

⁸⁰ *Id.* at.126

⁸¹ *Id.* at.127

⁸² *Id.* at.121-122

any case limiting the right to organize on the ground of race, nationality, sex, marital status, and age, opinion or public affiliation is incompatible with the right to establish or join occupational organizations.⁸³

Another exceptional case in which the right to organize does not applied is in the armed forces in Cambodia. In addition, many other categories of persons and occupations are also refrained from organizing. As the law provides, this right is applied to all personnel who are not governed by the Common Statutes for Civil Servants or by the Diplomatic Statues as well as officials in the public service who are temporarily appointed. Within the Cambodian labor law, the right to organize does not apply to many cases; for instances, judges, persons appointed to a permanent post in the public service, police personnel, the army, and the military police who are governed by a separate statute and so forth. Furthermore, personnel in the air and maritime transportation, without special legislation to deal with this right of this group, are not entitled to apply the provisions on freedom of union under this law. Unless expressly specified under this law, domestics and household servants are also entitled to apply the provisions on the freedom of union under this law.⁸⁴

The right to organize “without previous authorization”:

Once workers are required to obtain previous authorization before they can form organization, their right to organize is undermined. Such a requirement for taking steps prior to the establishment of the organization will hinder the formation of the trade union.⁸⁵ Providing competent authority to scan over the registration form does not differ from the act of previous authorization. In many counties, there is no requirement for prior authorization or specific formalities imposed on workers to form their groups. In most countries, certain formalities to form a group are set by the laws for instance registration of the concerned organizations.⁸⁶ Therefore, national regulations must not be equivalent to a requirement of “previous authorization” nor must then constitute barrier for workers to organize.⁸⁷ In this respect, further domestic legal requirements are allowed as long as it is appropriate to ensure the normal functioning of occupational

⁸³ *Id.*133-137

⁸⁴ Cambodian Labor Law, 1997, art.1

⁸⁵ This does not mean that the founders of an organization are freed from the duty of observing formalities concerning publicity or other similar formalities which may be prescribed by law. *See* Rubin, *supra* note 69, at.127

⁸⁶ Rubin, *supra* note 69, at.140

⁸⁷ *Id.*

organizations.⁸⁸ In order to compensate for such a requirement, or to provide better protection toward the right to organize in this sense, recourse to judicial authority against any refusal by the concerned ministry is set up.⁸⁹

It is compulsory for founders of organization to submit further required documents for registration in order to assure normal functions of the organization.⁹⁰ Cambodian labor law also provides that employers and workers have full right to organize without prior authorization.⁹¹ This is required for the founders of the organizations to submit their statutes and name list of those who are responsible for management and administration. The only requirement to register so that the organizations can enjoy the rights and benefits granted by this law is to submit their application to the relevant authorities.⁹² However, to be registered as an organization to represent their members is not that simple. Even though such provisions “without prior authorization” from the authorities, unions have to fulfill many requirements set by legislation. The review of the applications and other conditions set in the application forms to find if they are against the law is legally required. The Ministry of Labor (MoL) has to reply within two months after the receipt of the registration form or the organization is considered to be already registered. This provision exists to respond to unreasonable delays by the MoL in registering the union. In case there is change in the statute or management, this needs for new filling to update those changes.⁹³

The principle “of their own choosing”:

The principle of “of their own choosing” refers to freedom of workers and employers to set up organizations of their own which includes organizations of workers from different workplaces and different cities. Under this principle, workers are free to decide when they prefer establishing at any forms of basic

⁸⁸ *Id.* at.141. This might give more possible to interpret this language in accordance to each real circumstance.

⁸⁹ Neville Rubin, Code of International Labor Law, Law, Practice and Jurisprudence, Vol.I, 2005, at.142

⁹⁰ There are many advantages from being legally registered and that it is wise for labor leader to seek for the registration in Cambodia.

⁹¹ Cambodian Labor Law, 1997, art.266

⁹² Cambodian Labor Law, 1997, art.268. In this respect, it can be interpreted that workers could even form any organizations without registration with the authorities. In this case, those organizations could perform their activities in the workplaces. Yet, they cannot use the right to represent their members in grievances and bargaining provided by the law. That is the reason that all unions need to be registered with the authorities to be entitled further protected rights and benefits as being a legal organization.

⁹³ Cambodian Labor Law, 1997, art.268. A copy of the statutes and the list of names of those responsible for management and administration shall be sent to the Labor Inspectorate where the organization was established, as well as to the Office of the Council of Ministers, to the Ministry of Justice and to the Ministry of Interior.

organization such as an industrial or a craft union or else.⁹⁴ Workers are allowed to form more than one union in one enterprise as this principle implies since there is no limited number of organizations in specific sectors or workplaces.

Due to diversity of tendencies, workers and employers have the right to establish and join organizations under this principle “of their own choosing”. Such a principle does not intend to express any support either for the idea of trade union unity or for that of trade union diversity. The principle “of their own choosing” is designed to convey that workers and employers are free to establish new organizations. However, though this Convention does not intend to make diversity in trade union movement, the diversity of the labor movement naturally remain in all cases.

The attitude of the government attempt to impose single trade union organization is contrary to this principle.⁹⁵ Any provisions that prohibit the establishment of more than one trade union for a given occupational or economic category, in a given territorial area are not compatible with these principles of freedom of association.⁹⁶ A single union requirement for each enterprise, trade or occupation is contrary to this ILO principle.⁹⁷ In sum, any provisions that do not allow second union in an enterprise go in contrast against the principle “of their own choosing”.⁹⁸ Under the ILO framework, the right to organize is protected toward any group of workers or employers to form organizations in addition to the existing organization if they think this is desirable to safeguard their material or moral interest.⁹⁹

In this respect, the meaning “of-their-own-choosing” is also incorporated in the Cambodian Labor Law. There are four aspects regarding this language: 1/ the right to form, join, or not join as well as the right to withdraw from the union; 2/ The right to organize of individuals implies freedom not to join any workers’ union or employers’ association; and 3/ the right to withdraw at any time from those organizations.¹⁰⁰

⁹⁴ Rubin, *supra* note 69, at.157

⁹⁵ *Id.* at.156

⁹⁶ *Id.* at.157

⁹⁷ *Id.* at.158

⁹⁸ *Id.*

⁹⁹ *Id.* at.155

¹⁰⁰ Cambodian Labor Law, 1997, art.273

However, the meaning of the right to organize based on “of their own choosing” principle in Japan is a bit different from that in Cambodian context. Under the Japanese legislation, the protection of the right to organize only covers the extent that workers wish to form and to join. This right to organize does not cover the case in which workers do not wish to join any organization. Accordingly, once the employer and majority union conclude a union-shop agreement, the newly recruited workers must become members of this majority union during a specific period after being recruited. Any refusal to be a member of that majority union will become condition for further discrimination in the workplace through dismissal for instance.

In the US, the union security clause is also allowed to be incorporated in collective bargaining agreement which is known as closed-shop agreement. However, not all states allow such a kind of security clause. Though such union security, union-shop or closed-shop agreement, does affect the right of workers not to join, it is allowed under the ILO framework. Within this regard, the ILO provides discretion to each ratifying state to regulate the admissibility of union security clauses in collective agreement. This kind of union security does not constitute trade union monopoly system when it is allowed but not imposed by the law. The act of imposition will affect the freedom of association and will create such mentioned monopoly under the ILO concept. In this regard, any system banning union security in order to ensure the right not to join an organization is compatible with the convention.¹⁰¹

General exceptions toward the Right to Organize:

Under the convention relating to the Freedom of Association, there is no provision which allows the invocation of a state of emergency to justify exemption from the obligations under the conventions or any suspension of their application. Consequently, the exercise of trade union rights is seriously endangered by this emergency state. In this respect, the enjoyment of civil liberties that are vital for the exercise of trade union rights should be restricted only for extremely grave circumstance which constitutes a case of *force majeure*. Moreover, any limitation of these liberties is subject to the condition in which any necessary measures must be applied in an extent and in time to what it is strictly necessary to deal with the particular

¹⁰¹ Rubin, *supra* note 69, at.165

circumstance.¹⁰² In addition, any restrictions on the right to strike and freedom of expression imposed in the case of *coup d'état* against the constitutional government do not consider as a violation freedom of association on the ground that such acute event will cause troubles to the nation.¹⁰³

II. Right to Bargain

1. Historical background and its concept under the ILO framework

1.1 Nature and Importance of the right to Bargain

In order to protect worker interests from being seriously exploited, unions have employed an effective and sound method so-called collective bargaining. The concept of collective bargaining serves as a very crucial process toward industrial peace. As developed, bargaining subjects that were once the prerogative or management in the earlier stage became perceived as matters to be discussed or negotiated with a union.¹⁰⁴

The changes in the market structure and the industries played as leading factor towards collision between labor and the law. The circulation of finished products had been made often in distant region while it had been previously made for inventory and sold on the premises of a master craftsman. This evolving system facilitated by better communications required special skills and a supply of trained labor in order to continue producing goods. This fact became less feasible for journeymen to strike out their own shop successfully. In order to seek the way out from such evolution, journeymen began forming together to increase their bargaining power. The shoemaking industry in the United Kingdom provides an early example of the stage. Societies which had been formed in major manufacturing sectors were for higher wages.¹⁰⁵

¹⁰² *Id.* at.117-118

¹⁰³ *Id.* at.119

¹⁰⁴ Perrins, *supra* note 26, at.4

¹⁰⁵ Harry H.Wellington, *Labor and The Legal Process*, 1968, at.7

Nature of the right to bargain:

Collective bargaining is a vital tool to reduce industrial strife and it opens room for employer and workers to negotiate. Mutual understandings will be achieved accordingly by both parties. Moreover, collective bargaining plays as a crucial instrument to build up equality of bargaining power of the parties in the bargaining relations. In general, the employer has much power in the bargaining relations. In addition, the employer can unilaterally set or change wages, hours and terms as well as conditions of employment.¹⁰⁶ Hence, further legal protections are needed in order to protect and promote equality in labor relations between the employer and workers so that it can assure peaceful relations in the workplaces.

The philosophy of collective bargaining is based on the concept that it acts as a social treaty of a fixed duration during which economic weapons from both sides are not allowed to use.¹⁰⁷ This means that the right to strike of the parties is prohibited during the life of the collective bargaining agreement. Therefore, in order to respond to this consequence, compensation toward this right needs to be established through impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreement.¹⁰⁸

The idea of collective bargaining reflects a tool to building long-term employment relationship with full potential to secure workplace stability and social justice. The collective bargaining is a tool to prevent industrial actions through its required regulations on how to deal with disputes arising from the collective agreement before using economic weapons. In this sense, collective bargaining does help producing smooth relations between employer and workers. Collective bargaining is a forum to exchange views and promote common interests of the parties and compromise diverse interests effectively. In addition, collective bargaining is a cost-effective and administratively efficient way to determine the terms and conditions of employment for similar groups.

¹⁰⁶ *Id.* at.27-28

¹⁰⁷ Rubin, *supra* note 69, at.350

¹⁰⁸ *Id.*

Through the process of negotiation, diverse interests are reconciled. This bargaining process is very important as it can convey workers' complaints and employer's counter-arguments responding to the demands of worker. In addition, the collective bargaining process can create ongoing opportunities for communication that can benefit production and quality well beyond the terms of agreement.¹⁰⁹ The collective bargaining is the most effective means that give workers the right to represent in decisions affecting their working life. Indeed, the right to bargain collectively should be the prerogative of workers (through their representatives) in a democratic society.¹¹⁰

1.2 Right to Bargain under the ILO Concept

The right to organize is merely a dead letter when there is no right to bargain collectively in place. The right to bargain provides opportunity for mutual understanding among all concerned parties. Therefore, to protect and upgrade the right to bargain is a must. In this respect, the ILO ratified convention No.98 in 1949. All member states of this convention are bound and required to draw up proper policies in accordance with their own situation.¹¹¹

Under the ILO Recommendation, collective bargaining should not be hampered by the absence of the rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules. Moreover, the ILO Recommendation states that bodies and procedures for the settlement of labor disputes should be so conceived as to contribute to the promotion of collective bargaining.¹¹² In order to encourage harmonious development of collective bargaining and to avoid industrial disputes, the government should draw up formula to determine bargaining representative for the purpose of collective bargaining. When the formula is not clear it would hamper the two core rights namely the right to organize and the right to bargain collectively.

¹⁰⁹ CAMFEBA, Strategic Collective Bargaining: An Introduction for Employers, Dec.2009, at.8

¹¹⁰ Charles Barrow, Industrial Relations Law, 2nd ed., 2002, at.146

¹¹¹ See Articles 3&4 of the ILO Convention 98, 1949

¹¹² C154 Collective Bargaining Convention, 1981 , art.5, available at:<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C154> (last visit: March 27, 2010)

The provisions governing the recognition of trade unions are closely linked to the obligation to bargain which in some legislations taking the form of the duty of the parties to “bargain in good faith”, compliance with this requirement and its consequences being evaluated by specialized bodies. Numerous legal systems spell out this obligation in greater or lesser detail.

In 1978, Convention No.154 defined collective bargaining as all negotiations which take place between an employer, a group of employers and one or more worker organizations, for the purpose of; (a) determining working conditions and terms of employment; (b) regulating relations between employers and workers; or (c) regulating relations between employers or their organizations and a workers’ organization or workers’ organizations. Further important aspects in labor relations were concluded within this mentioned definition.

III. Relations and Importance of the right to Organize and the right to Bargain to uphold Industrial Democracy

Among the functions of trade union, the method of collective bargaining is quite important. In order to qualify as a labor organization, the union must have the ability to meet with management so as to negotiate in order to bargain for its members. This collective bargaining method provides opportunity for workers to share views with their employers through their representatives. The most important aspect of this method is based on the fact that the employers will be refrained from unilaterally determining terms and conditions of employment. This method of collective bargaining also provides more pertinent peaceful ways to secure sound industrial relations through further mutual understanding and terms agreed in the agreement. In addition, the ways to solve disputes stipulating in the agreements do serve as an important aspect in keeping peace in the workplaces.

The employment relationship is different from that in others due to inequality of the concerned parties namely employer and workers. Within this relationship, the notion of subordination is found and both

parties possess different power while the employer has capital and more power.¹¹³ Thus, workers must form their groups so that they can protect their interests effectively. Without the right to organize, the prospects for achieving social justice are poor.¹¹⁴ Collective bargaining plays as one of the principal functions of a trade union and serves as a tool to counterbalance the bargaining strength of the employer.¹¹⁵ Generally speaking, workers cannot protect their interests in an effective manner unless they can establish organizations.¹¹⁶ The trade union is a group of workers that bands together for their common purpose of improving working conditions through negotiating with their employer in order to achieve better terms and conditions of employment.¹¹⁷

The right to organize and the right to bargain collectively are of core elements to uphold social justice and democracy. These two rights serve as fundamental principles and rights in the workplace. These two rights act as paramount importance for both workers and employers to engage in negotiations of mutually beneficial collective agreements. Through constructive bargaining, the parties can meet and exchange their views. Through such efforts, the collective bargaining helps promoting fairer economic development and increasing productivity as well as enhancing conditions of work.¹¹⁸ Freedom of association and the effective recognition of the right to bargain collectively are considered as foundation which drives the parties to get in touch with each other in a very effective way.¹¹⁹

One of the core characteristic of a trade union is the right to conduct of collective bargaining. Without this element, the right to organize could not completely fulfill its vital purpose in lifting up workers' rights and interests. The existence of trade unions is very vital in protecting workers from social oppression and the community from industrial parasitism. In addition, trade unions were a paramount strength for democracy.¹²⁰

¹¹³ Hepple, *supra* note 20, at.72

¹¹⁴ Dunning, *supra* note 19, at.128

¹¹⁵ Perrins, *supra* note 26, at.18

¹¹⁶ Dunning, *supra* note 19, at.139

¹¹⁷ Perrins, *supra* note 26, at.3

¹¹⁸ Sophia Lawrence & Junko Ishikawa, Social Dialogue Indicators, Trade union membership and collective bargaining coverage: Statistical concepts, methods and findings, working Paper No.59, Oct. 2005, at.3

¹¹⁹ ILO-Geneva, *supra* note 72, at.7

¹²⁰ Perrins, *supra* note 26, at.3. The Basic characteristic of trade union is illustrated by *conduct of industrial relations* and especially the *conduct of collective bargaining*.

In order to represent interest of workers in an effective way, both rights to organize and to bargain collectively must be comprehensively protected under legislations. In this sense, in order for unions to fulfill the purpose of furthering and defending the interests of workers through collective bargaining, they have to be independent and must be able to organize their activities without any interference by the public authorities which would restrict or impede the exercise of the lawful acts.¹²¹ In addition, unions must not be under the control of employers or employers' organizations.¹²²

The act of refusal to recognize assigned representatives or trade unions and the fact that an employer does not bargain with these legitimate representatives in good faith may constitute further consequences. The consequences include the establishment of special proceedings for damages or the application of sanctions as a result.¹²³

IV. Right to Organize in Cambodia

Cambodia has been a member of the International Labor Organization (ILO) since 1969.¹²⁴ After becoming an ILO member, Cambodia ratified all core conventions, of which there are 13 ratified conventions in total up to 2006.¹²⁵ Amongst these conventions, two core conventions to protect and promote collective labor relations were ratified on 23 August 1999; namely conventions No.87 and No.98.¹²⁶ The remarkable period of these rights especially the right to organize can be found in 1990s since the birth of bilateral agreement between the Royal Government of Cambodia (RGC) and the United States.

The relationship between the ILO and the RGC has been developed since Cambodia has become a member of the ILO. However, due to the civil war during 1975-1979, the ILO was not able involved with Cambodia.

¹²¹ ILO Convention No.78, arts.3,10

¹²² ILO Convention No.98, art.2

¹²³ Rubin, *supra* note 69, at.328

¹²⁴ HEL Chamroeun, Labor Law, 2005, at.44 (Khmer Version)

¹²⁵ Ngim Sokrachany, The Impact of Excessive Overtime Work on Labor Standards: Cambodia Case, 2008, at.7

¹²⁶ *Id.* at.8

After the Paris Peace Agreement in 1991, the ILO started a relationship with Cambodia again through various assistance programs including employment generation programs, technical training programs, and monitoring working conditions in garment factories. The most famous assistance program to uphold workers' rights and interests was the Better Factories Cambodia (BFC). The main role of this program is to monitor the application of working conditions in garment factories that registered under this program.¹²⁷ The right to organize and the right to bargain collectively are also strictly monitored by this project.

1. Right to Organize within a legal framework

The development of labor movement in Cambodia was based on many grounds. First, membership of Cambodia in the ILO serves as a factor to push up the implementation of all relevant labor laws and the conventions. Second, provisions on protection of the right to organize in the Constitution 1993 and under the 1997 Cambodian Labor Law are the routes for the growth of workers mobilization in Cambodia. Third, the reason is due to bilateral-binding agreement between the RGC and the US on January 20, 1999 under which Cambodia promised to apply good labor standards in garment sector. Fourth, the growth of labor unions might be due to different preferences of workers leading them to form in different groups. Fifth, yellow unions sometimes were formed by employers to weaken *bona fide* workers' unions.

All Khmer citizens of either sex should have right to form and join any union as provided by the constitution.¹²⁸ This supreme law drives to an interpretation that the right to organize is guaranteed for only workers but not that of the employer. The language of the constitution and the use of the word union here without broader elaboration will be interpreted in a narrow sense that refers to an organization of workers. Within the Cambodian Labor Law, organizations of workers and employers are called by different words; such as employers' association and unions, in which these two groups cannot absolutely combine with each other. Therefore, if union in the constitution does refer to an organization of workers, then this means that the right to organize under this supreme law does apply to only workers. If so, the constitution does not provide equally protection toward all parties in labor relation in this respect. The original aim in

¹²⁷ For more detail about BFC, please visit this link: <http://www.betterfactories.org/ILO/aboutBFC.aspx?z=2&c=1>

¹²⁸ Cambodian Constitution, 1993, art.36

stipulating this provision maybe to protect workers while they were in critical situation at that time. In order to handle this possible interpretation, there should be further elaboration on this article in order to protect the right to organize for all concerned parties in industrial relations. This term is interpreted in a broad sense in this paper however.

Noteworthy, there was no remarkable point of labor movement in Cambodia before the adoption of the constitution in 1993 and the labor law in 1997.¹²⁹ If tracing back the history of recognition of the right to organize in Cambodia, then the 1993 constitution incorporated the protection of this right.¹³⁰ This right is protected under the labor law 1997 as well. Prior to the labor law 1997¹³¹ this right to organize was not recognized and protected. The new amendment of labor law in 1997¹³² has in many aspects completing the previous ones. In this sense, the provisions under this law provide a great freedom of establishment of trade unions, right to strike and to lockout and so on. This amendment of the labor law in 1997 provided a framework for the new path toward a free-market economy. Within this law, only private sector was covered while the civil service and informal sector were beyond the scope of protection.

Besides the constitution 1993 and the labor law 1997, the right to organize was also protected within the framework of draft trade union law 2010. As Article 1 of the draft stated that “This law aims to provide for the rights of workers and employers to establish and join professional organizations as the basis of harmonious industrial relations”.

The right to organize refers to the right of the employers and workers to form their organizations in order to safeguard their occupational interests. The core purpose of organizing is to bargain for better wages and conditions of work. This right to organize plays an important role in the economic, social and political

¹²⁹ There is no protection toward this right to organize within the previous laws including the Labor Law in 1992. The reason maybe there is no legal protection under the Constitution so that it attributed to silence in the law at that time. And it was not until the promulgation of the Constitution in 1993 that the right to organize was protected.

¹³⁰ Article 36 of the Constitution 1993 states that “Khmer citizens of either sex shall have the right to form and to be members of trade unions. The organization and conduct of trade unions shall be determined by law.”

¹³¹ Prior to this 1997 Labor Law, there was a labor law in 1992. This law was drafted by the Department of Labor Wages of the Ministry of Planning. And this law was implemented by the Ministry of Social Affairs and Labor.

¹³² In 1994, with the kind support of the ILO, the French Ministry of Labor, and AAFLI, the Ministry of Social Affairs, Labor and Veteran Affairs took the existing 1992 Labor Law and other related-labor documents in conformance with the 1993 Constitution as a foundation to draft the new “Labor Law” which was subsequently promulgated by Royal Decree No CS/RKM/0397 of March 13, 1997. (Please refer to history of labor law development stated in the 1997 Labor Law)

development of their communication and countries as a whole.¹³³ Besides the right to form, to join, to withdraw and not to join, all members of professional organization can participate in the leadership, management and administration of the organization.¹³⁴ Moreover, a professional organization has the full right to draw up their own statutes and administrative regulations, as long as they are not contrary to the laws in effect and public orders, freely elect representatives, and formulate a work program.¹³⁵

This right to organize refers not only to the right to form, to join or not to join; but also the right to withdraw from the organizations on their own choosing. In this sense, the law requires no one should interfere with a worker's right to join or to leave a union.¹³⁶ This right is protected for all workers and employers without any distinction whatsoever or previous authorization. However, the law prohibits an organization that includes employers and workers together.¹³⁷ A union security agreement has not been known within Cambodian industrial relations.

Any forms of discrimination toward the use of the right to organize are prohibited. Gender, age, nationality cannot be used as condition for workers to form or join any organization.¹³⁸ However, the draft of the Trade Union Law (TUL) includes more prohibited criteria that cannot be employed to discriminate against any workers in respect to this right and it expands to cover race, color, sex, religion, political opinion, nationality, social origin or health status.¹³⁹ This drafted provision indicated wider protective. Thus, this draft provided wider method to protect workers in this regard.

¹³³ ILO-Geneva, *supra* note 72, at.7

¹³⁴ Cambodian draft Trade Union Law, 2010, art.68 (Khmer version)

¹³⁵ *Id.*

¹³⁶ Cambodian Labor Law, 1997, arts. 266 & 273 and draft TUL 2010, art.7

¹³⁷ Cambodian Labor Law 1997, art.266 and draft TUL 2010, art.5

¹³⁸ Cambodian Labor Law, 1997, art.271

¹³⁹ Cambodian draft Trade Union Law, 2010, art.6 (Khmer version)

2. Right to Organize within a practical framework

The need for unions:

Unions allow workers to have a more balanced relationship with their employers.¹⁴⁰ Workers band as groups in order to protect their interests collectively. The individual power of workers cannot uphold their rights and interests effectively.¹⁴¹

In fact, the first Cambodian trade union confederation can be traced back to its existence in 1979.¹⁴² This confederation was formed by the Vietnamese backing government, and the name was changed in 1999 to the Cambodian Federation of Independent Trade Union (CFITU).¹⁴³

At present, the labor movement in Cambodia is very new and young compared to that in other countries namely the UK, the US and Japan. Cambodian labor movement really lacks of human and financial resources. The Garment Manufacturers Association in Cambodia (GMAC) was established in 1996 and as of 2006 there were 278 active members. The GMAC has played an important role in development of garment industry by lobbying the government to seek for the Generalized System of Preferences (GSP) and the Most Favored Nations (MFN) status and advising the government in relevant policies to promote the industry.¹⁴⁴ Cambodian Federation of Employers and Business Associations (CAMFEBA) and GMAC are two main employers' organizations assisting and protecting their members' interests.

According to a current study on unions, around one percent of the total workforce is forming unions. The vast majority of organized workers are found in the garment sector where around 60 percent of workforce is organized. There are several sectors where there is an increase in labor mobilization including building and construction, transportation, and hotel and tourism.

¹⁴⁰ ILO-Geneva, *supra* note 72, at.7

¹⁴¹ Carrell & Heavrin, *Collective Bargaining and Labor Relations, Cases, Practice, and law*, 1985, at.39

¹⁴² Arnold, *supra* note 9, at.10

¹⁴³ *Id.*

¹⁴⁴ Neak Samsen & Yem Sokha, *Trade and Poverty Link: The Case of Cambodian Garment Industry*, August 07, 2006, at.13. Available at: http://www.cuts-citee.org/tdp/pdf/Case_Study-Cambodian_Garment_Industry.pdf (last visit: January 05, 2009)

No unions existed during the period the Khmer Rouge regime. After the collapse of this regime, the existence of union was found. This association was established by the state and called a union. The union existed in the ministries, provinces, districts and establishment. As planning economy was adopted by the state in accordance with socialist ideology, the government tended to control everything in order to accomplish its plan. Thus, control by the state over all syndicates could not be denied at that time. Because union was representative of mass people's voice; the government considered it as vital group to convey messages from its members to the state and vice versa. The roles of union at that time were to conduct peer-to-peer education and to provide training to uneducated people as well as to promote lifestyle of working people.

During the transitional period between 1991 and 1993, some officials who had experiences in unionism were assigned to continue this work. Some other officials were sent to further some doctrines and concepts of unionism in Vietnam. In this respect, the concept they got focused mainly on communist style. During this transitional period, most leaders of the state-controlled unions were assigned to work in various ministries. However, there were few of these individuals who decided to keep up their work with unions and they started organizing workers in establishment.

The existence of the modern labor movement in Cambodia can be found since 1997 from the time that modern labor law was enacted. One outstanding labor union was the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWCK), which was established in 1996 and has been operating actively to protect workers' interest up to date. This union is the first and biggest federation of unions in the garment sector during this time. This union functions actively and leads workers to demonstrate and go on strikes since its outset and continues to fight for the full implementation of the Labor Law.¹⁴⁵ FTUWKC not only began heavily organizing exploited workers but also interacted with the international labor movement. This led to more widespread understanding of the often abusive nature of employment in Cambodia's nascent

¹⁴⁵ Its first president was Ms. Ou Mary who was a worker and she was severely attacked during the 1997 strike. This incident forced her to change her position from president to adviser of this union. Then the next president was Mr. Chea Vichea. He was a very active union leader in protecting and promoting workers' rights and interests. He had struggled with a very strong support from union's members and the members had been increased. See: <http://www.ftuwkc.org/history.php> (last visit: 5 October, 2009)

textile and garment industry.¹⁴⁶ There were only five principal union federations established by 2000 but this number increased up to forty-nine with a majority of these union federations in the garment sector.¹⁴⁷

Even before or after the enactment of the labor law, the labor movement has not received friendly welcome in Cambodia by employers. Reactions and further attitudes from the employers indicate that labor mobilization is not important but is used to interrupt their businesses. Various forms of abuse and threats to union leaders occur. Many union leaders have been assassinated including the very famous union's leader, Mr. Chea Vichea and other active union leaders.¹⁴⁸ Furthermore, the fact that employers recruit new workers while terminating current workers for attempting to organize their occupational groups still continues in the workplaces.¹⁴⁹

Modernization of the labor law in 1997 opened a pathway for a growth of the industrial sector as well as growth of union movement. Worker organizations can be formed at the enterprise level, industrial level, or national level as workers wish to do so. Still, the most practical form for the current labor movement is at enterprise level.

Legal protection opens room for the existence of multiple unions in single workplace and this leads to many unavoidable problems accordingly.

Labor organizations historically arise first in strategically important sectors.¹⁵⁰ Thus, Cambodia has experienced the same trend of labor mobilization. The labor movement concentrates mainly in garment sector. The garment sector has helped national economy for more than a decade. This sector has been helping low educated people earn more income than from works in agriculture. Furthermore, the labor

¹⁴⁶ Arnold, *supra* note 9, at.10

¹⁴⁷ Labor Conference at the Sunway Hotel 22-23 July 2010, <http://ki-media.blogspot.com/2010/07/labor-conference-at-sunway-hotel-22-23.html> (last visit: August 20, 2010)

¹⁴⁸ Chea Vichea was killed on February 22, 2004 and three months later another union leader was also killed. *See* <http://www.ftuwkc.org/history.php> (Last visit: 5 October, 2009)

¹⁴⁹ Current case happened at a company producing construction products. Workers want to form a union to protect their interests but the employer terminates them and recruits new workers. (Radio Free Asia, August 20 (evening broadcast), 2010), <http://www.rfa.org/khmer/audio>

¹⁵⁰ Larson & Nissen, *supra* note 13, at.11

movement in Cambodia concentrates mostly among low-educated, unskilled and manual workers because those workers have less power and are easily-heavily exploited by employer. Leaders of labor movement in Cambodia are mostly workers with very limited education.

Because of the importance of this sector in the total economy, and based on promises made by the Royal Government of Cambodia with the US government regarding export quotas on garment product, workers' right in this sector are highly protected.¹⁵¹ In order to keep up these promises, the RGC has been seeking for assistance to protect and promote workers' rights as well as working conditions in this sector. In response to this need, the International Labor Organization (ILO) has been in operation to assist Cambodia. One project was set up under its original name "Garment Sector Project (GSP)" which was changed later in 2004 to "Better Factory Cambodia (BFC)". The establishment of this project aimed at improving working conditions in the garment sector. The mechanism of this project was to monitor working conditions in registered factories,¹⁵² follow up, and suggest for betterment of working conditions.

Step into Challenges of the right to Organize:

The idea of banding a group together is a good strategy for those who have bargaining weak power with those who have much power. Workers are wiser when they avoid negotiating individually with the employer. This form of collective group will strengthen their bargaining power vis-à-vis the employer. This right to form a union constitutes a consequence in which this group will have the legal right to use economic weapons when the employer refuses to bargain with them in regard with interest matters. Therefore, this is better for workers to stand together to protect their rights and interests in more effective way.

Consequences stemming from legal protections toward the right to organize are unavoidable phenomenon.

Up to 2008, there were around 1,000 trade unions for about 300 garment factories. This means that there

¹⁵¹ Lejo Sibbel & Petra Borrmann, Linking Trade with Labor Rights: The ILO Better Factories Cambodia Project, available at: <http://www.ajicl.org/AJICL2007/Sibbel%20article.pdf>, at.3. The RGC and the U.S entered into a three-year Trade Agreement on Textile and Apparel on January 20, 1999. This Agreement was amended and extended for another three-year on December 31, 2001.

¹⁵² The ILO staffs can only get into all factories that have registered with the Ministry of Labor for the purpose of getting export quotas to the US. For more detail, please visit BFC website at <http://www.betterfactories.org>

are 3 to 4 trade unions in one enterprise in average.¹⁵³ For some cases, there are up to 9 or more labor unions in one enterprise. This constitutes; therefore, a negative aspect of the use of the right to organize because of union pluralism. Competition for membership amongst such unions is unavoidable within the existence of multiple unions. Furthermore, a multiple ways of determination for legitimate representative for bargaining purpose is figured out by the law. The existence of multiple unions somehow affects effective function of the right to bargain. Troubles stemming from such multiple unions affect function of production in the workplaces. In this regard, many perspectives from stakeholders with respect to labor standards as well as the right to organize can be found. From the employers' perspective, social compliance is like a two-edge sword once it helps promoting sustainability it also troubles labor relations. According to employers' perspective, trade unions are irresponsible and work for personal benefits for current situation.¹⁵⁴ Having more than one union in one enterprise is good to some extent as different preferences of workers would be represented by those various unions. It; however, also contributes to troubles in the workplaces. Once tension occurs, this tension would affect industrial relations as a whole and as a result all are losers and the most vulnerable are workers. Based on a report dated March 13, 2008 by the Industrial Relations Working Group (IRWG), companies did not have time to deal with conflicting interests and one minority union can block agreements reached with unions representing the largest numbers of employees.¹⁵⁵ Within this regard, labor unions also accept the fact that many unions in one enterprise and concern on it. The labor union also suggested for solutions to deal with it.¹⁵⁶ Public expectation is also critically important to ensure trade unions understand their rights and obligations and do not abuse their positions.¹⁵⁷

In the context of globalization, competitiveness has become the main concern for all countries in order to achieve high growth and prosperity.¹⁵⁸ Hence, this competitiveness is a challenge for the RGC to find

¹⁵³ IR-PSWG, *supra* note 4

¹⁵⁴ Economic Institute of Cambodia (EIC), Export Diversification and Value Addition for Human Development, at.28. This statement was highlighted by many factories' owners. They stressed that today there are more strikes that its nature has changed, and its demands are higher.

¹⁵⁵ IR-PSWG, *supra* note 4

¹⁵⁶ Note on Union Representative System Meeting, August 9, 2007, Cambodiana Hotel, Phnom Penh (Unpublished document)

¹⁵⁷ EIC, *supra* note 154, at.28

¹⁵⁸ *Id.* at.23

suitable way out to keep this sector. For the time being, the problems stemming from a multi-union system lead to hot debate amongst all stakeholders. There is an attempt by the employers which suggests for only union in one enterprise. But, this attempt might be impossible to be taken into consideration for it is time to deal with multi-unionism. However, discussing backward to this single union system which is denied in democratic nations is not appropriate for the time being.

Though there are various legal protections on the right to organize, the present labor movement still has various threats as it is inevitable phenomenon that labor movement still under pressure from the government and employers. In Cambodia, though there is no significant study on the attitude of the employer towards the labor movement, there is some evidence indicating that attitude of employer. So far, there are various types of threats on union leaders or activists as well as acts of discrimination in the workplace towards those activists which indicates negative attitude of the employer toward labor movement. Furthermore, not only the employers' side impedes the labor movement but the government also tends to restrict the movement too. Lately, the government proposed amendment of current long-term contract to short-term contract. This negative intention does affect employment security of workers and does affect the right to organize as workers would fear of being active or members in movement. The proposal tends to put pressure on worker in regard to the organizing or joining a group. So long as the short-term contract is adopted, the employer can freely terminate employment contract once it comes to the expiration date. Membership in a trade union would become a condition for the employer to consider for ending the employment contract. This assists an employer easily in getting rid of unions' involvement. Workers will have to act carefully in operating their roles for the purpose of interests of their members. This proposal will produce more worries on union members and be a factor for workers reluctant to be member or join any organizations. As a result, the right to organize would be hampered under this short-term contract regime. There are many discussions and reaction on this matter from all sides in the relations, and especially has strong protest from union's side.

In addition, a limited use of the right to express as an element of the right to organize is recently adopted by the government. The current law on "Right to Strike" limits the place and number of demonstrators. This is

regressive move against the right to express opinion as well as the right to organize. Regarding this issue, there are some reactions from civil society that this measure will affect the right to strike or demonstration. The way that the government limits the place and number of demonstrators does affect the effectiveness of the movement. Without a huge number of demonstrators, workers would have little hope to get what they are requesting. Accordingly, the principle that organization should be established freely may also be jeopardized.¹⁵⁹

Besides this negative action from the government toward the right to express and organize, there is still remarkable move regarding this collective right especially to cope with what is happening in the industrial relations. In fact, in Cambodia recently, there is a big movement toward the establishment of the Trade Union Law. The draft of the TUL is under discussion among all stakeholders before finally being submitted to the National Assembly for approval. Whether or not the TUL will become effective is open to debate.

V. Right to Bargain in Cambodia

Collective bargaining does play an important role in Cambodia as it is conceived as a tool to prevent and settle disputes in the workplaces. The parties in this respect are required to include provision regarding mechanism to solve their problems. This right to bargain plays a crucial role in building up and maintaining peace as well as harmonious relations in the workplaces. Moreover, it enhances enterprise productivity and competitiveness.¹⁶⁰

1. Right to Bargain within a legal framework

The right to bargain collectively is protected under the current labor laws. After legally formed and recognized as a legitimate representative for workers, unions are entitled the right to represent its members’

¹⁵⁹ Rubin, *supra* note 69, at.140

¹⁶⁰ Robert Heron & Hugo van Noord, National Strategy on Labor Dispute Prevention and Settlement in Cambodia, 2004, at.38

interests and bargain collectively on behalf of its members as well as to enter into collective bargaining agreements with the employer.

The ILO Convention C.98 which was ratified by Cambodia in 1999 was one among other core legal instruments to protect and promote the right to bargain. In this convention, the governments of member states are suggested to set up its proper labor policies to lift up this right in accordance with real circumstances of each country.¹⁶¹

Under the ILO legal framework, to protect the right to bargain, a basic principle of voluntary basis and mutual agreement is adopted. A voluntary principle is applied for the case in which workers wish to bargain collectively at any levels upon their choices without interference from the government.

Furthermore, the term of “promotion” of collective bargaining can be interpreted in a manner that requires member states to intervene in order to encourage collective bargaining. However, it is prohibited for any compulsory means in order to enforce collective bargaining by the government. In this sense, the compulsory ways employed by the government would alter the nature of collective bargaining. The ILO does not criticize; however, the principle of unfair labor practices applied by many countries to promote collective bargaining.¹⁶²

While the Cambodian constitution in 1993 guarantees the right to form a union, the protection of the right to bargain with this supreme law is absent. The labor law in 1997 completes this gap by providing some provisions in regard with this right. This law; nonetheless, does not provide comprehensive protection toward the right to bargain. This law mentions mainly on the parties of the bargaining, its scopes, duration, and modification and so on. Article 96 of the labor law can be interpreted that as long as the workers can

¹⁶¹ ILO convention, C.98 provides that “Measures appropriate to national conditions shall be taken...to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers’ or employers’ organizations and workers’ organizations with a view to the regulation of terms and conditions of employment by means of collective bargaining.”

¹⁶² Bernard Gernigon et al., ILO Principles concerning collective bargaining, International Labor Review, vol.139, no1, 2000, at.40-41

form their legitimate group so that they will be represented collectively for the purpose of collective bargaining through their representatives.

Another supplemental legal instrument can be found in ministerial proclamation or Prakas 305/01 which provides more protective provisions regarding the obligation to bargain in good faith on the parties. It is; however, still not enough in this Prakas in order to protect the concerned right. Since the current law is still absent on how to remedy the act of breaching the obligation to bargain, it really needs more legal provisions.

The collective bargaining agreement determines working conditions and regulates relations between employers and workers as well as between their respective organizations.¹⁶³ The favorable principle is applied for collective agreement in Cambodia. Under this principle, contents of collective agreement which are better than those in the laws will be allowed and as long as it does not against the laws and public orders.¹⁶⁴ The Cambodian Labor Law further provides that any provisions of labor contract between employers and workers that already covered by the collective agreement appear to be less favorable than that thereof should be nullified and must be replaced automatically by the relevant provisions of the collective bargaining. This favorable principle is restated in the draft TUL¹⁶⁵ and supported under the ILO framework. The principle provides that stipulations in contracts of employment which are more favorable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement.¹⁶⁶

There are some terms and conditions that the law does not allow to be negotiated by the parties including the matter of salary deductions; waiving employee's rights to be paid annual leave or authorizing the

¹⁶³ Cambodian Labor Law, 1997, art.96

¹⁶⁴ Cambodian Labor Law, 1997, art.98

¹⁶⁵ Cambodian draft TUL, 2010, art.72

¹⁶⁶ Gernigon et al., *supra* note 161, at.35

employer to pay compensation in place of paid leave; waiving a women's right to paid maternity leave and related benefits.¹⁶⁷

Besides the current legal provisions toward the right to bargain collectively, the attempt under the draft TUL 2010 also has such protective provision toward this mentioned right. Article 1 stipulates that this draft aims at ensuring the right to bargain collectively between the employers and workers.¹⁶⁸

2. Right to Bargain within the practical framework

Most collective bargaining is conducted between unions and individual employers at the enterprise level. Regarding the subject of the bargaining, most subjects concern with the existing rights which are stipulated in the labor law. These subjects relate to wages, overtime, leave, and other related issues. Collective bargaining over future benefits in which workers' representatives and the employer bargain in good faith is very limited and only a few comprehensive agreements have been negotiated up to date.¹⁶⁹

Maturity in labor relations in order to reach effective and comprehensive collective bargaining agreements is needed. This factor is currently lacking in Cambodia's industrial relations system. This immaturity in labor relations leads to the situation in which none of them wish to come to negotiating table. In this light, unions and employers have very limited capacity to handle the process of collective bargaining. Moreover, employers in particular are concerned that the collective bargaining could lead to excessive and unrealistic demands which far exceed the financial capacity of enterprises.¹⁷⁰ The capacity to bargain effectively does not exist currently in Cambodia even though there are some supportive provisions under the labor laws regarding the process and interactions of collective bargaining. Therefore, Cambodia is in need in building such capacity, and it is a real challenge for protecting and promoting collective bargaining overtime.

¹⁶⁷ Cambodian Labor Law, 1997, art.129 says that "Collective agreement authorizing any wage deductions other than these cases are null and void." Art.167 says that "...any collective agreement providing compensation in lieu of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave shall be null and void..." art.183 states that "During the maternity leave,...women are entitled to half their wage, including their perquisites, paid by the employer...any collective agreement to the contrary shall be null and void..."

¹⁶⁸ The Cambodian draft TUL 2010, art.2 states that "This law has the following purposes...guaranteeing the right to collective bargaining between workers and employers..."

¹⁶⁹ Heron & Noord, *supra* note 160, at.38

¹⁷⁰ *Id.*

The collective bargaining is not to confirm what the laws said but to find better terms and conditions of employment that is a focal point toward effective collective bargaining in Cambodia. In order to reach this aim, the parties must have more open knowledge on how to make a comprehensive agreement. The involvement of the Ministry in question is important in order to encourage collective bargaining to reach better terms and conditions of employment. In addition, employers' organizations, individual employers, trade unions and trade union federations must have even more crucial and active roles. These actors are considered to provide the necessary motivation, knowledge and skills to pursue collective bargaining in a responsible and effective manner.¹⁷¹ In order to deal with such concerns, the need to train all relevant parties on how to make a comprehensive collective bargaining is needed. This training will make collective bargaining agreement more effective instrument to protect the interests of workers.

Though the right to organize is currently protected under the laws, this does not mean that worker rights and interests are effectively represented. In fact, a number of total garment factories is very huge. In contrast, it is not for the number of collective bargaining agreements. As already mentioned, the collective bargaining is the only effective and peaceful channel to provide smooth industrial relation as well as worker protection. However, the real number of total collective bargaining agreements in 2006 was only 43 for around 300 garment factories.¹⁷² This number increases to around hundred recently which includes those in other sectors namely bank, hotel and so forth.¹⁷³ If a comparison between the number of unions, garment factories and collective agreements is made, then this is an illustration of quite different gap among them. It is not appropriate that the number of collective bargaining agreements (CBAs) is very small compared to that of unions as well as that of garment factories. Though the current number of CBAs is up to around one hundred this number is not appropriate with the number of unions of around 1,000. There are only around 10 per cent of unions that have concluded CBAs in average. This phenomenon indicates that development of the right to organize and the right to bargain collectively does not co-exist.

¹⁷¹ *Id.* at.38-39

¹⁷² ILO Report, *supra* note 5, at.33

¹⁷³ Unofficial data from an officer at the Labor Dispute Department, Ministry of Labor in Cambodia

In most cases, the employers in an enterprise with more than one union seem to ignore minority unions with regard to the right to bargain collectively. Moreover, minority unions do not seem to cooperate with the most representative union in collective bargaining process.¹⁷⁴ This means that multi-unionism system does not effectively help workplace relations as well as worker interests.

According to the annual Survey of Violations of Trade Union Rights in 2007 by the ITUC, the right to bargain in Cambodia has been affected by the employers. Both rights to organize and to bargain collectively have been diminished even though the law provides protection. The discrimination comes from either the government or employers which impedes both rights.¹⁷⁵

V. Summary

The close relationship between the right to organize and the right to bargain collectively is undeniable. In additions, their importance to promote industrial democracy cannot be ignored. Without these two core rights, workers would be hard to achieve their goals. Moreover, workplace strife could increase, and the entire society could encounter acute danger. Up to this moment, the labor movement is supported around the world as a sign of success of workers' struggle. At the same time, unions also lose some autonomy. The unions were autonomous on their own internal affair, on the process of the election of their officers without inference from the government at its earlier stage of movement. For now, legislation has set up some requirements for the unions to respect. Accordingly, success and failure are resulted but it is success rather than failure. For the time being, this right is protected in almost every part of the world. In addition, there is a special international organization that plays an important role to ensure the protection and promotion of this right.

¹⁷⁴ ILO Report, *supra* note 5, at.32

¹⁷⁵ ITUC, 2007 Annual Survey of Violations of Trade Union Rights.
<http://survey07.ituc-csi.org/getcountry.php?IDCountry=KHM&IDLang=EN> (last visit: January 19,2010)

For Cambodia, the right to organize is on a good path toward further development. However, while workers enjoy their right to organize, the right to bargain collectively remains questionable. Even though the right to organize and the right to bargain collectively have a strong relation, these two rights do not function well fairly. This is the reason why a number of collective bargaining agreements is very limited. This reflects the reality that labor movement in Cambodia is not so successful to represent worker interests.

In short, the labor movement of Cambodia is strong in terms of its quantity (huge number of labor unions) but it is relatively weak in terms of its quality (collective bargaining agreements).

CHAPTER THREE

Bargaining Representative and Obligation to Bargain

I. Multi-unionism and Bargaining Representative

The existence of multi-unionism is an inevitable phenomenon in democratic nations. The fact that various interests of workers under this system can be represented by different unions indicates a positive aspect of this system. However, this system contributes to complexity in bargaining relation. In order to deal with such complexity, there are several approaches to solve it differently within the legal context of the countries in this comparative analysis.

1. Characteristics of Multi-Unionism

The term “multi-unionism” is used to refer to the fact where there is more than one union in which workers are represented for many purposes including that of collective bargaining.

Trade union pluralism is granted legitimacy in Convention No.87. This convention does not oblige member states to adopt this union pluralism, but instead it requires possibility of this plural unionism in order to ensure trade union democracy. This pluralism of trade union enables workers to be freed from the subjugation of a single national confederation affiliated to the ruling party. This pluralism in a society indicates fundamental democratic principles as freedom of choice to be represented in the workplaces.

Within the pluralist view, workers should be free to pursue their self-interest through interest-group bargaining.¹⁷⁶ This view allows plural unions exist in one enterprise accordingly. This pluralism tends to produces industrial strife very often. The multi-union system inevitably forms more industrial conflicts compared to single union system. As such, the industrial conflicts affect not only the parties in the relations, but also the society as a whole because of industrial strife. However, to discuss backward on consideration

¹⁷⁶Alan Bogg, *The Democratic Aspect of Trade Union Recognition*, 2009, at. xxxi

of single union to be applied in democratic world is not appropriate for the time being. Instead, to find out how to solve problems stemming from such system and how to use this system in more effective way for workers' interests and the society is appropriate to discuss.

Multi-unionism is wasteful of time and effort for communication. This multi-unionism produces risk of disputes between groups of workers.

One of the problems of multi-unionism is inter-union competition. As the number of unions representing any groups of workers increase, the number of possible rivalries increases even more. With two unions, only one rivalry situation can occur between the two unions. When the number increases to four, increasing potential rivalry situation is inevitable.¹⁷⁷ Therefore, there will be more and more potential conflict so long as the number of unions increases.

There were some critics of multi-union system that undermines labor movement solidarity and union bargaining effectiveness. Some critics have argued that this system limits employer flexibility, productivity and growth, and efficiency of whole society as well as employment opportunities. This system produces complication in bargaining process, pushing up wages and so forth. Some other critics have argued that it affects the innocent public through a higher incidence of strikes.¹⁷⁸

Actually, not all multi-unionism will cause trouble in the workplace. Though some negative aspects of multi-unionism have been found and recognized, there are also some positive aspects. This system lifts up democracy in the workplaces while various interests of workers are represented by number of unions. Thus, workers have full freedom to choose or create an organization based on their preference and not due to the imposition by the laws. In fact, freedom to organize is a channel that allows various worker preferences to be represented by those unions. Thus, since the interests of workers are so divided, allowing various unions to complete the diversity is a proper response. In short, multi-unionism can help solving diversity of

¹⁷⁷ Mark Harcourt & Helen Lam, Inter-union conflict in a Multi-Union, Non-Exclusive Bargaining Regime: New Zealand Lesson for the U.S., at.4

¹⁷⁸ *Id.* at.4-5

preferences in the workplaces. The main cause of non-solidarity does not absolutely rest on the system *per se* but it rests mainly on acknowledgement of unions toward its roles.

2. Types of Bargaining Representative under multi-unionism system

To have only one union in one enterprise does not cause difficulty to find worker representative for the bargaining purpose but it would affect the right to organize of workers. In addition, single union system might seriously affect worker interests in case of yellow union. In contrast, if there is more than one union in the workplaces, it will be complicated to appoint right union to be bargaining representative. In order to cope with this issue, an exclusive representative system, multiple bargaining representatives or joint representative have been adopted by the laws of the countries in this comparative research.

2.1 The US and Japan

Two different systems dealing with multi-unionism for the bargaining purpose can be found in the case of the US and Japan.

2.1.1 Exclusive Representative System: Case of the United States

Competition for bargaining rights under the multi-unionism system in the US is handled through the adoption of the secret-ballot election and the doctrine of exclusivity.¹⁷⁹

The existence of multiple unions in one bargaining unit cannot be avoided in this country. As a result, there are numerous problems related to discriminatory acts by employers in favor of one union over other union. In order to secure industrial relations, a single union with majority support from workers in an appropriate unit is adopted by legislation. Where more unions complaint for recognition their representation status for the same employees of the same employer, this representative problem is handled by the National Labor Relations Board through a secret-ballot election.¹⁸⁰

¹⁷⁹ William B.Gould, Japan's Reshaping of American Labor Law, 1982, at.81

¹⁸⁰ *Id.* at.81

The exclusive representative system by majority rule is called a “democratic” solution in the US.¹⁸¹ Within the bargaining relations, workers have the right to bargain collectively through their representatives of their own choosing. This right was protected by the National Industrial Recovery Act enacted by the Congress in 1933. Any acts of interference, restraint or coercion by the employers toward the right to organize were prohibited by this act, but the provisions in this act became insufficient. This legal act did not express clearly the principle that only one union was to be the spokesman for all employees in the bargaining unit.

Historically, unions were involved energetically and generally successful in organizing drives after 1933. The existence of company unions were dominated by the employers who bargained only with these kinds of unions. This attempt of the employer to make up their own unions was to oppose the union movement in general which was on a course toward much stronger and this would cause troubles for their business. Thus, the labor movement during the 1930s was fragile, and solidarity among labors was found ineffective. These unions then started to compete for bargaining right bitterly. As a solution, exclusive representative through majority rule was adopted and company unions then were declared illegal.¹⁸²

Later on in 1934, the National Labor Relations Board declared that the employer was not free to bargain with a union other than the designed one by workers as their bargaining representative. The employer was obliged to bargain in good faith with the representative in regard with working conditions for all workers in the bargaining unit. The board reasoned that any principle of plural representation—whether in the form of separate negotiations or of a single negotiation with a representative council—would be divisive within the plant and would permit the employer to bestow favors so as to foster inter-union rivalry and deprive the employees of an effective representative voice.¹⁸³ Thus, this philosophy of the board was incorporated in the National Labor Relations Act (NLRA) in 1935.

An amendment of the NLRA in 1947 incorporated the principle of majoritarianism which extended the obligation of unions to represent all employees in the appropriate unit. Besides fair representation

¹⁸¹ Clyde W. Summers, Exclusive Representation: A Comparative Inquiry into a “unique” American Principle, *Comparative Labor Law & Policy Journal*, Fall, 1998, 20 Comp. Lab.L & Pol’y J.47, at.1

¹⁸² *Id.* at.2

¹⁸³ Robert A. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining*, 1976, at.374

obligations of representative union toward all employees in the concerned unit, the majority unit bears obligation to represent those employees equally with adjustment of grievances and reserve certain powers to individual employees in the resolution of grievances.¹⁸⁴

This is a very special feature of the US labor relations of having such exclusive representative. All workers regardless of their membership in an incumbent majority union should be fairly represented by this exclusive representative. This system entrusts any union elected by a majority employees in the appropriate unit as sole bargaining representative. This principle follows the model of governance in a political democracy, where majority choice displaces individual preference.¹⁸⁵ Representatives selected for the purpose of collective bargaining by the majority of employees should be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect of pay, wages, hours of employment or other conditions of employment.¹⁸⁶ In order to implement it, the National Labor Relations Board (NLRB) is designed and obliged to determine the “appropriate bargaining unit” and determine which union has a majority support in that appropriate unit.

Statutory duty is placed on a majority union to represent all workers in the appropriate unit under this system.¹⁸⁷ Employers could not insist for the majority union bargain only for its members through the ground that it would be improper to accord such recognition on behalf of all employees. This representation was not proper because the employees voted against the union and this indicated that the employees had no willingness to give authority to the union in order to represent their interests in bargaining relations with the employer.¹⁸⁸

The exclusive representative principle was developed in 1944. The *J.I Case Co.v. Labor Board*, 321 U.S.332, 1944 was the first case in which the Supreme Court dealt with the principle of exclusive representative. The employer in this case denied bargaining with the union with majority support by

¹⁸⁴ *Id.* at.375

¹⁸⁵ Roger Blanpain, *Decentralizing Industrial Relations and the Role of Labor Unions and Employee Representatives*, 2007, at. 108

¹⁸⁶ Section 9 (a) of the NLRA, 1935

¹⁸⁷ Barbara Townley, *Labor Law Reform in US Industrial Relations*, 1986, 25

¹⁸⁸ Gorman, *supra* note 183, at.375

reasoning that the employer had made individual written contracts with its employees prior to the existence of this majority union. The employer did not agree to bargain with majority union in regard with rights and obligations under the existing individual contracts. The Supreme Court upheld the order of the NLRB and declared that an employer has individual contracts of employment, covering wages, hours and working conditions, with a majority of his employees, which contracts were valid when made and were unexpired, does not preclude exercise by the employees of their right under the National Labor Relations Act to choose a representative for collective bargaining, nor warrant refusal by the employer to bargain with such representative in respect of terms covered by the individual contract.¹⁸⁹ The agreements incorporated in the individual contract which precluded a choice of representatives and warranted refusal to bargain during their duration were overruled and such kinds of agreement could be prohibited by the Board.¹⁹⁰ This research agreed with the decision of the Supreme Court in this case. As long as the individual workers were allowed to bargaining individually with the employer, the right to organize and to bargain collectively will be impeded. This kind of decision is also perceived to protect workers while they have weak position vis-à-vis employer in bargaining relations. Forming as a group and acting collectively was the only effective approach to uphold their rights and interests of the workers.¹⁹¹

This system of exclusive representative prevents the employer from bargaining with other persons or unions without legal entitlement right to do so. Though it is stated in the legislation that the exclusive representative union will represent all workers in the appropriate unit regardless their membership, the legislation does not prohibit the individual worker to bargain with the employer. The law allows the worker to bargain when the employee values their own bargaining position more than that of the group. However, under the majority rules, individual advantages or favors by individual bargaining will generally in practice go in as contribution to the collective result.¹⁹² Therefore, better benefits generated by individual negotiation would be applied to all. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Advantages to individuals may prove as disruptive of industrial peace as disadvantages. Individual bargaining is a fruitful way of interfering with organization and choice

¹⁸⁹ J.I Case, 1944, <http://supreme.justia.com/us/321/332/case.html> (last visit: May 20, 2010)

¹⁹⁰ J.I Case, 1944, <http://supreme.justia.com/us/321/332/case.html#339> (Last visit: May 20, 2010)

¹⁹¹ To see reasons by the Supreme Court, please see Gorman, *supra* note 183, at.37

¹⁹² Summers, *supra* note 181, at.1

of representatives, and is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.¹⁹³

Under the system of exclusive representative, the principle of fair representative was also adopted by the legislation. The doctrine of fair representation was rooted on case of racial discrimination in the United States.¹⁹⁴ The nature of the duty of fair representation has been defined as the “statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.”¹⁹⁵ This fair representation requirement includes bringing cases to arbitration. The duty of fair representation is violated only when the union acts in an arbitrary, discriminatory, perfunctory, or bad-faith manner.¹⁹⁶

This system intends to fill the gap of the individual strength in bargaining relations as well as to reduce complexity in bargaining process. Furthermore, this system tries to keep harmonization among labors for bargaining on pluralistic basis which generates a severe risk of employer domination and interference. Through this system; therefore, the majority representative holds the tasks of harmonizing and adjusting the conflicting interests of employees within the bargaining unit.¹⁹⁷

However, this system of exclusive representative could not be considered as best for its all aspect and suitable to apply elsewhere. Though this system is good in term of harmonizing terms and conditions in the workplaces that help keeping industrial peace, there are many critical points stemming from this system. One question raises concern on how employees use their rights to negotiate in bargaining unit in case there is no any union holds majority status. Based on the system of exclusive representative for bargaining purpose, employees can perform their right to bargain only through their exclusive representative. As long as a union is exclusive representative, the employer will bear obligation to bargain in good faith. If the

¹⁹³ Gorman, *supra* note 183, at.377

¹⁹⁴ Summers, *supra* note 181, at.18

¹⁹⁵ Alvin L.Goldman, Labor and Employment Law in the United States, 1996, at.252

¹⁹⁶ Herman, *supra* note 15, at.327

¹⁹⁷ Gorman, *supra* note 183, at.379

union is not, the employer is not required to bargain with this union in good faith. Absence of such good faith obligation in bargaining relation will undermine right to bargain collectively. Bargaining without good faith from any party (employer) would provide unsatisfied outcomes.

In sum, the principle of exclusive representative for bargaining purpose consists of both strong and weak points.

2.1.2 Multiple Bargaining Representatives: Case of Japan

After World War II, Japan's fundamental rights of workers to organize, the right to bargain collectively, and the right to strike were established in the constitution. In Japan, collective labor relations were protected under the constitution of 1946, the Trade Union Law (TUL) of 1949 and the Labor Relations Adjustment Law (LRAL) of 1946. Article 28 of the constitution provided that the right of workers to organize and to bargain and act collectively was guaranteed.¹⁹⁸ Any legislative or administrative act that infringes on these rights without reasonable justification is unconstitutional and void. This article entrusts the Diet to enact statutes to effectuate this basic rights. Therefore, the LRAL of 1946 and the TUL of 1949 were enacted in response to constitutional protection.¹⁹⁹

In order to deal with multiple unions in the bargaining relations, Japanese law provides every *bona fide* union the equal right in bargaining. Accordingly, an employer is obliged to bargain with any groups of workers. In Japan, unions once established, enjoy the full right to bargain and act collectively. The most significant result of this legal protection is that every legitimate union can demand and force an employer to bargain regardless the amount of its members.

Besides the constitution, article one of chapter I of the Trade Union Law protects the right to organize and the right to bargain collectively. The aim of this law is to elevate the status of workers by promoting their

¹⁹⁸ Sugeno, *supra* note 54, at.21. The right to organize refers only to the right to form labor organizations whose principal goal is to maintain and improve working conditions; and to the right to operate those organizations. This right does not cover the right not to join within the virtue of this Constitution. This is why *union-shop agreement* is allowed to exist within Japanese industrial relations.

¹⁹⁹ Takashi Araki, *Labor and Employment Law in Japan*, 2002, at.159

being on equal standing with their employer in their bargaining with the employer. This law also aims to defend the exercise by workers of voluntary organization and association that allow them to act collectively.²⁰⁰ The rules which imposed the obligation to bargain in good faith on the employer toward all unions in the workplace can be found in the legislation. Furthermore, special treatment of such protection can be illustrated through the principle of unfair labor practice imposed on the employer if they disrespect the obligation to bargain in good faith.

The Trade Union Law in Japan was first enacted in 1945 which was before the constitution came into effect in 1946.²⁰¹ The TUL 1945 was amended in 1949 in order to improve some of the provisions interpreted in light of constitutional protections.²⁰² Trade Union Law of 1949 required certain basic requirements to be fulfilled by unions. These requirements were conditions for unions to be eligible for certain privileges such as to register as a juridical person and to file complaints of unfair labor practices or requests for extension of collective agreements. Once the unions were authenticated they were entitled to the light of bargaining and to act collectively.²⁰³

Japanese labor law does not limit the level of workers' mobilization,²⁰⁴ yet it has concentrated mostly at enterprise level. Workers are formed in specific enterprises without regard to craft.²⁰⁵ The characteristic of an enterprise union in Japan is unique in the way that it welcomes both white- and blue-collar workers. The only requirement is that these workers are regulator ones so that they can organize jointly. The law does not allow other persons who represent the interest of employer to be a member of labor union.²⁰⁶ Due to direct authority in hiring, firing, promotions or transfer, this type of workers cannot be member of labor union. These workers' positions are higher than a certain level so that it will conflict with their sincerity and responsibilities as member of the labor union concerned.

²⁰⁰ Japanese TUL, 1949, art.1

²⁰¹ Gould, *supra* note 179, at.23

²⁰² *Id.* at.30

²⁰³ Tadashi Hanami, *Managing Japanese Workers*, The Japanese Institute of Labor, 1991, at.46

²⁰⁴ Workers can form their occupational organization at any level namely plant, enterprise, sectoral or national levels.

²⁰⁵ Sugeno, *supra* note 54, at.498. *See also* Marsland, *supra* note 50, at.152-154

²⁰⁶ Japanese TUL, 1949, art.2 (i)

In 2005, unionization rate in Japan was 18.7 %, with about 10.138 million out of a total of around 54.16 million employed workers belonging to unions. Union membership has encountered steady decline since its peak in 1949.²⁰⁷ The industry with the largest number of union members is the manufacturing industry of 25.6%. Over 90 percent of unions are enterprise unions.²⁰⁸

The concept of pluralism is applauded in democratic nations. Therefore, though the Japanese constitution does not provide clearly a support for multi-union system; there is limit on it as well. This multi-union system will uphold a level of democracy in the workplace for there will be no monopoly union and it can avoid yellow unions. So long as it is the case of yellow unions, the *bona fide* union will entrust to protest against it in order to assure their right of self-organization.

In order to protect these unions for bargaining purpose, Japan has adopted its own system of bargaining representative. Rather than adopting the system of exclusive representative, Japan has adopted a multi-representative for bargaining purpose.²⁰⁹ Every single legitimate union has an equal right in bargaining relation with the employer. Under this system, the employer has to bargain with those unions in good faith regardless of the number of their members. All unions can design their own draft of collective bargaining regardless any terms or conditions are already concluded by other unions with the employer. Moreover, the employer cannot refuse bargaining with unions on the ground that suggested terms and conditions were already agreed by other unions. Furthermore, this system requires the employer to be neutral in treating those unions.

This system of multi-representative in Japan does not provide absolute sound industrial relations. Within this pattern of bargaining representative, conflicts due to the act of unfair treatment from the employer

²⁰⁷ There were two factors behind the decline of unionization: first, the burgeoning of development in the service economy in which the unionization rate have historically been low; second, the diversification of employment increased part-time workers who are difficult to organize. *See* The Japan Institute for Labor Policy and Training, Labor Situation in Japan and Analysis: General Overview 2009/2010, at.91-95

²⁰⁸ The Japan Institute for Labor Policy and Training, Labor Situation in Japan and Analysis: General Overview 2009/2010, at.91

²⁰⁹ Kazuo Sugeno & Kazutoshi Koshiro, Special Issue: The Role of Neutrals in the Resolution of Shop Floor Disputes: JAPAN, Comparative Labor Law & Policy Journal, Fall 1987, at.4

toward those unions still exist.²¹⁰ The employer cannot provide more benefits to one union while denying such benefits toward other unions without proper reasons. In such a case of unfair treatment, the employer will be convicted of committing an unfair labor practice for not treating these unions fairly in bargaining relations. Under this system, all unions are provided fair and equal protection in bargaining relation. Minority unions are also entitled to the protection under unfair labor practice principle.²¹¹

There is a remarkable area within this multi-unionism in Japan as union security system is legally functioned. Though the labor law in Japan does adopted the multi-representative for bargaining purposes, agreements between the employer and majority union can limit the right to organize of the newly workers in the concerned workplace. In this regard, a union shop agreement is allowed to function so long as the agreement concluded between majority union and employer. As required condition, there must be a majority support from workers to conclude this union-shop agreement, and the employer has full right to conclude such agreement.²¹² Within the provisions of this agreement, any new workers are required to join the majority union in a specific period of time after accepting employment. There is a provision in the Trade Union Law in the case where a labor union represents a majority of workers employed at a particular factory or workplace. In such a case, the parties are free to conclude a collective agreement which requires that the workers should be members of such labor union.²¹³

This legal provision seems to be contrary to the concept of the right to organize in other countries including that in Cambodia. However, the Japanese constitution protects only the right to join, but not the right to refuse to join. Hence, new workers cannot refuse being a member of the majority union under the context of a union-shop agreement. Cambodian legislation does not allow this kind of union-shop agreement to exist in order to deal with the multi-unionism in enterprise. In this regard, the law protects workers that can be seen in its principle of the right to organize which not only include the right to form, to join, to withdraw

²¹⁰ Kozo Kagawa, Legal Problems in Multi-union Situation in Japan, at.76, available at: http://www.research.kobe-u.ac.jp/gsics-publication/jics/kagawa_3-1.pdf (last visit: October 29, 2010)

²¹¹ Takashi, *supra* note 199, at.192

²¹² Gould, *supra* note 179, at.26

²¹³ Japanese TUL, 1949, art.7-1

but also the right to not join an organization. This indicates that in whatever case, the Cambodian worker is not forced under any agreement to become a union member.

Regarding the right to bargain of minority unions in the existence of union-shop agreement, the Japanese TUL still protects and promotes the right to bargain collectively for these unions. The law applies that the existence of this agreement does not interfere the right to bargain of minority unions. It does not mean that other minority unions' right to bargain is impeded due to this union-shop agreement. Instead, these minority unions still have the right to request the employer to bargain with them in good faith. Failure to do so by the employer will be an act of unfair labor practice.

This kind of agreement is not contrary to the ILO concept since this organization opens forum to its member states to draw up this system of union security as long as it does not impose;²¹⁴ but allows the operation of the union security clause. Under the ILO concept, once the system of union security is allowed to function, it does not affect the freedom of association. In contrast, if the law imposes this system, then it will hinder the right to organize and will encourage the system of trade union monopoly.

The collective bargaining agreement will extend its scope over all workers as the same kind of regularly employed in a particular factory. Once three-fourth of the mentioned workers is covered by a collective bargaining agreement, then the rest will be also covered too.²¹⁵

Actually, there was a suggestion for adoption of the majority-rule principle for Japan,²¹⁶ but it was not successful. This principle was criticized by both labor scholars and employers. As a result, the current system of multi-representative has been in place.

²¹⁴ As long as it is not compulsory condition for parties in bargaining relations to regulate such provisions in their agreement yet it is a voluntary attempt from the parties, then it does not breach the ILO's concept of the right to organize. However, it is still questionable though it is allowed the parties to do so due to its consequences on those who are not willing to participate in any groups.

²¹⁵ Japanese TUL, 1949, art.17

²¹⁶ Gould, *supra* note 179, at. 29

2.2 Bargaining Representative Systems in Cambodia

Cambodia is a member of the ILO Conventions C.87 and C.98. The status as a member of these conventions requires Cambodia to draw up further policies and mechanisms to protect and promote these rights. Due to various protections of the right to organize, the existence of many labor unions in one enterprise is inevitable. This phenomenon leads to complication in determination of bargaining representatives. The existence of multiple unions does affect the application of the right to bargain and this serves as an excuse for the employer to deny bargaining with legitimate unions.

Under the Labor Law, the representativeness of a professional organization or a union of professional organizations is recognized in a geographical area or a profession or, if necessary, by the type of which the union was registered to operate.²¹⁷ The representativeness of the professional organizations of workers should be recognized within the geographical or occupational framework, as follows:

a. Geographical framework

- At the level of the enterprise or establishment
- A province or municipality
- At the national level

b. Occupational framework

- A specific occupation
- A number of occupations, which are related or similar
- A specific industry or branch of industry
- A number of industries or a number of branches of an industry.

The dominant pattern of labor mobilization in Cambodian can be found at the enterprise level with the existence of multiple unions concentrating there. The multiple unions really matter for workers' side because of the existence of multiple unions in one enterprise. More importantly, solidarity amongst labors is more fragile than that amongst businessmen.

²¹⁷ Cambodian Labor Law, 1997, art.277-1

In Cambodia, there is neither an absolute exclusive representative system nor an absolute plural representative system, but Cambodian system seems to be mixed of these both systems. Once a union receives more than 50 per cent of workers in the enterprise, this union will act as sole bargaining representative for all workers regardless their preference of this union. This system gets closer to exclusive representative in the US system. Once the union holds less than 50 per cent support from workers in the workplace, all unions will act on behalf of their own members only. This latter system moves closer to the plural unionism in bargaining process as in Japan. Another approach is allowed for two or more unions to join together in order to find majority voice to represent in bargaining process with the employer. However, this approach is a rare pattern in practice.

Regarding of the bargaining representative determination, there is a slight difference between bargaining representative determination in the Labor Law and that in the Prakas 305/01. In order to deal with multiple unions in one enterprise, the Cambodian Labor Law provides the right to bargain to only two main types of bargaining representatives. Unless a union holds representative status of professional organization so that this union will have competence to bargain with the employer.²¹⁸

In order to gain this status, each union has to fulfill further legal requirements. A union has to be legally registered; receive dues from at least 33 per cent of its members; and have programs and activities indicating that the union is capable in providing professional, cultural and educational services to its members. Another important requirement is that the union has to have more membership. Any union having the largest number of members in the order of the largest two majorities will be considered to be the representative unions within the enterprise. Nonetheless, the most representative status will be provided to any unions whose members is over 51 percent of all workers in the enterprise.²¹⁹ Accordingly, there are only two types of unions that can be representatives for the bargaining purpose within the language of this article. Within this matter a new approach in the draft TUL 2010 also clarified the legal requirement of having the most representative unions in the bargaining relation. Legal requirements to be bargaining

²¹⁸ Cambodian Labor Law, 1997, art.277-3

²¹⁹ Cambodian Labor Law, 1997, art.277-1

representative include legal registration, due receipt of at least 33 percent of its members, and proper programs and activities which indicates capability in protecting and promoting the interests of its members.²²⁰ Another important criterion is that the union has to hold at least 50%+1 of the total workers in the enterprise so that it can become sole bargaining representative.

In contrast to this legal article, there are more possibilities to find bargaining representative under Prakas 305/01. Within the framework of multi-unionism, this Prakas sets three main types of bargaining representatives: the most representative union, joint-representative union and multi-representative unions are workers' representatives for bargaining purpose.

2.2.1 The Most Representative Union

This system of the most representative union for bargaining purpose allows any union that obtains an absolute majority supports from workers in the workplace to be sole representative for all workers.

There are two ways to obtain the status of the most representativeness; it can be voluntarily recognized by employer or it can be achieved by union's complaint.

Within the framework of the Labor Law, there is no provision regarding the voluntary recognition of the representativeness, but it can be found in the current draft TUL 2010. In Article 59 it says that an employer or employer association may voluntarily recognize the most representative status of a workers' union upon that workers' union showing that it meets the criteria set out in article 57 of this law. In this case, the relevant employer or employer association and workers' union must jointly request the Ministry in charge of Labor to issue a certification of the voluntary recognition if no other union objects to it.²²¹ However, there must be careful examination on such a voluntary recognition to avoid the development of a yellow union.

²²⁰ Cambodian draft TUL 2010, art.57

²²¹ Cambodian draft TUL, 2010, art.59

Besides the above voluntary recognition, a union must file a complaint to ask for legal recognition as the most representative union. The request to recognize the representativeness after fulfillment of all legal requirements must be submitted to the ministry in charge of labor. Within sixty days, the ministry must give an official decision on that request.²²² If it is necessary to determine the representative nature of a professional organization or to verify its sustainability, the minister in charge of labor can conduct an investigation.²²³ The professional organization in question is required to provide all supporting documents at the request of the competent official. When the supporting documents are not available or these documents are not sufficient, the recognition of representativeness can be rejected or suspended until the necessary information is obtained. The advantages deriving from the representativeness which every professional organization benefits are consequently cancelled or suspended.²²⁴

Any union that has an absolute majority of the workers in an enterprise will be entitled to represent all the workers in the said workplace.²²⁵ Within the Prakas 305/01, the ministry in charge of labor must certify the status of a union as the most representative at the request of said union, which must furnish any appropriate means of proof, in particular, the means of proof specified in article 277 of the Labor Law. However, before issuing this certification, union founders must send a registered letter or hand-deliver a letter with acknowledgement of receipt to the employer and the unions represented on the Labor Advisory Committee (LAC), inviting them to submit their comments and objections within a period of 15 days. Any natural or legal person having a legitimate interest may also submit comments or any objections within the same period. Beyond this time, if there is no objection, the ministry must issue the certification in question.

In the event the ministry decides not to certify the most representativeness of the union, and the union objects to this decision, the union may request the ministry to organize a secret-ballot vote, in which case all workers or category of workers that the union represents must participate. If more than one union has presented evidence to the ministry that they represent workers in that enterprise or establishment, all such unions should appear on the ballot. The union that obtains the majority of validly cast votes at that time

²²² Cambodian Labor Law, 1997, art.277-2

²²³ *Id.* art.277-4

²²⁴ *Id.*

²²⁵ Prakas 305/01, clause No.6

should be recognized as the most representative. If any union does not obtain a majority of votes cast at the election, that union should be recognized as a minority union.

The most representative union should be recognized as such for a minimum of two years. Beyond this time, any natural or legal person with a legitimate interest may request a new vote for the purpose of verifying whether the union should retain its status as the most representative union. Furthermore, Article 59 of the draft TUL states that “Apart from the voluntary recognition of a most representative status union by the employer as provided for in the first paragraph of this article, a professional organization shall refer a request for the most representative status certification to the Ministry in charge of Labor in accordance with the formalities and procedures described in a Prakas issued by Minister in charge of Labor.”²²⁶

This recognition of the most representative union as a sole representative for all workers in concerned workplace is not contrary with the principle of freedom of association as long as it does not affect the right of workers to join other unions.

2.2.2 Joint-Union

This approach is not provided under the Cambodian Labor Law 1997. Instead, this system is stipulated in the Prakas 305/01. While there are only two systems of representative that can represent workers in bargaining process in the Labor Law, there are more stipulated in the Prakas.

Two or more unions do have the full right to band together in order to seek a majority supports from concerned workers for bargaining purpose. The labor movement in Cambodia does not apply a cooperative spirit in their relations. Instead, workers are applying confront approach to each other due to their different ideologies. This fact constitutes a situation in which those unions act separately and compete for more members to have majority voice rather than peacefully join together for that purpose. Accordingly, this type of joint-union for bargaining purpose is hard to be achieved though it is allowed to function by the law.

²²⁶ Cambodian draft TUL, 2010, art.59-2 & 60

2.2.3 Multiple Unions

Within this scope of multi-representative for bargaining purpose, each union or joint union without majority support can become legitimate representative. Though this kind of bargaining representative will cause uneasiness for the employer in dealing repetitively with them on the same or similar terms and conditions of employment, it does provide more opportunity for workers to have their own-selected representative. This approach provides a high level of worker protection in the bargaining relation which does not stick to only one union. However, this approach does constitute more barriers for employers especially it is very wasteful. This type of bargaining representative is interpreted through clause 9 of the Prakas 305/01, where minority unions together do not represent a majority of workers in the enterprise or establishment, or category of workers that the collective bargaining agreement seeks to cover, the employer should be required to negotiate with such unions only on behalf of their members who they represent. In addition, current empirical study indicated that individual minority unions have been involved with collective bargaining agreements.²²⁷

2.2.4 Shop steward

Shop stewards are also legitimate bargaining representatives. Once there is no union in the enterprise for the purpose of collective bargaining, workers representative the so-called shop steward is entitled the right to bargain with the employers for all workers in the workplace. Having such representatives in the bargaining relationship does not affect the right to organize or the right to bargain of the group.

Under the draft trade union law, parties to collective bargaining must be duly mandated by their members through a written authorized letter or by delegating the rights prescribed in this law to conduct and conclude negotiations.²²⁸ Article 74 of the draft TUL states further that “Where there is union(s) in existence in the enterprise/establishment, collective bargaining is the union’s exclusive right to sign a

²²⁷ Noun Veasna, Building Trade Union in Cambodia, 2010 (Unpublished document at the time this dissertation finished)

²²⁸ Cambodian draft Trade Union Law, 2010, art.74

collective agreement with the employer. In an enterprise/establishment where there is no union in existence, then collective bargaining to conclude a collective agreement is the right of shop stewards.”²²⁹

In this sense, there are many ways to represent workers’ interests through bargaining process within the Cambodian context. However, its effectiveness is still doubtful due to many reasons. Among these reasons, the treatment of obligation to bargain in good faith becomes a focal point.

II. Obligation to Bargain in Good Faith

1. Obligations to Bargain as an important element to Protect and Promote Right to Bargain

As long as bargaining does not consist of a good faith element, then collective bargaining agreement cannot be achieved successfully and effectively for workers’ interests. The requirement to bargain in good faith; however, is not a condition for every single union in bargaining relation. This obligation depends on other conditions in order to apply good faith principle there upon.

2. Concept of Bargaining in Good Faith

Collective bargaining can effectively function only through good faith bargaining by an employer and union. The principle of good faith bargaining has been perceived as an important element toward the promotion of the right to bargain. This obligation to bargain in good faith occurs when one party in the labor relation suggests collective bargaining. Upon such a request another party has to bargain with a suggesting party in good faith. The Committee on the Freedom of Association has pointed out that “it is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties.” Any unjustified delay in the holding of negotiations does not match with this principle of good faith and it should be avoided by the parties. Under

²²⁹ *Id.* art.74

the ILO framework, this principle further refers to the efforts by both parties to reach an agreement and that the agreement should be binding on the concerned parties.²³⁰

As consequences of this principle, the employer is liable to be sanctioned for refusal to recognize the representative trade union for bargaining purpose. Such an attitude by the employer is considered as an unfair labor practice under some jurisdictions.²³¹

Within the theory of freedom of contract, people should be free to make agreements, and the government should not interfere unless one of the party calls upon it to implement the agreement by enforcement.²³² The advocates for freedom of contracts have argued that the parties are clever than others about their own desires.²³³ Through this perception, the law must leave the party to manage their relation other than the interference from the government.

However, the freedom of contract may be diminished if one party to the contract is holding stronger power to set the terms and condition of the agreement without bargaining with the other party. This situation will constitute a great disadvantage for the other party. Therefore, the intervention of the government to set rules for enforcement is a wise policy.²³⁴ Though it represents of misplaced government neutrality in the contract relation, yet this involvement is important in labor relation due to inequality of power in the relations that workers are at very weak position.

The workers and employer have no way toward their equal power in the relations. History illustrates that employers possess strong power vis-à-vis that of their workers. Accordingly, the employer enjoys their prerogative in determining further terms and conditions of employment to be applied on their workers. Therefore, the interests of workers will be impeded by the employers. If the theory of freedom of contract is applied in this labor relation, workers would hardly use their right to bargain effectively. So, in order to

²³⁰ Gernigon et al., *supra* note 162, at.33

²³¹ *Id.* at.34

²³² Wellington, *supra* note 105, at.37-38

²³³ *Id.* at.29

²³⁴ *Id.*

handle this problem only intervention from the government can help balancing the situation and the interests of workers. Thus, in order to build up equality in the bargaining relation within the labor scope, the employer bears a legal duty to bargain in good faith with the union on wages, hours and other terms and conditions of employment. This principle is applied in many countries to rebuild better labor relations. A refusal to do so constitutes an unfair labor practice. In addition, collective bargaining agreement is enforced within the courts.²³⁵ The legal requirement of obligation of good faith in bargaining relations plays as supportive role of the statutory structure that assists employees who wish to bargain. In the absence of acting in good faith, collective bargaining has never been conducted effectively.²³⁶

In several countries, the legislation prohibits these practices which are harmful to collective bargaining. In other countries, the employer is liable to sanctions for the act which is considered as an unfair labor practice.²³⁷

Numerous legal systems spell out this obligation in greater or lesser detail and in some cases decisions of the bodies responsible for administering recognition procedures have specified exactly what the obligation involves. The act of refusal by an employer to recognize the designed or representative trade union or when an employer bargains with another trade union, or does not bargain in good faith with the agent granted this exclusive right may be attributed to special proceedings for damages or the application of sanctions.²³⁸ These mentioned acts indicate the attitude of the employer that is regarded as unfair labor practices in some countries such as in the US, Japan, and South Korea, the Philippines, and Thailand. Recently, Cambodia is on the same track toward the adoption of this principle too.

Under the ILO principle, it is contrary to the principle of collective bargain when a legal provision allows the employer to modify unilaterally the content of signed collective agreements, or to require renegotiation.²³⁹

²³⁵ *Id.* at.50

²³⁶ *Id.* at.55

²³⁷ *Id.*

²³⁸ Rubin, *supra* note 69, at.328

²³⁹ *Id.* at.338

To attach the obligation to bargain in good faith in the bargaining relation is important in order to maintain development of the collective bargaining and the harmonization in the workplace. In this regard, the employers and unions should bargain in good faith through the effort to reach an agreement. Moreover, genuine and constructive negotiations are necessary components to establish and maintain a confidential relation between the parties.²⁴⁰

Under the ILO framework, in order to meet the obligation to bargain in good faith requirement, the parties without reasonable grounds should not delay in holding negotiation. This act should be avoided. Furthermore, the parties bear an obligation to make all efforts to reach an agreement and this agreement should be binding on the parties.²⁴¹

The meaning of bargaining in good faith does not impose on the parties to agree on terms and conditions proposed by another party. Good faith in bargaining relation includes the act to meet with a suggesting party within appropriate time. Acting in good faith is included during the bargaining process for instance putting all efforts to reach an agreement. As long as both parties put their efforts to negotiate on these terms and conditions, a breach of the obligation to bargain in good faith does not occur even though an agreement could not be reached. This good faith obligation in bargaining relations refers mainly toward all efforts to reach an agreement but not force the parties to conclude what they do not agree after mutual negotiation.

Once the agreement is still in effect, any attempt from the employer to unilaterally change the existing terms and conditions in the contract is prohibited. The employer can unilaterally change the terms and conditions unless he or she consults with legitimate bargaining representatives prior to make such changes.²⁴² In some cases, the employer may act quickly in order to save the business because a business opportunity will not always wait. In this case, it may be too late if the employer has to bargain with unions

²⁴⁰ *Id.* at.329

²⁴¹ *Id.*

²⁴² Townley, *supra* note 187, at.25

first.²⁴³ Therefore, the employer may have to unilaterally change some necessary terms and conditions in collective bargaining and negotiate the consequences with the union later.

Within the NLRA of the US, a national policy has been set up in order to encourage collective bargaining as a means to mitigate industrial conflicts. Under this Act, employees are guaranteed the right to form their self-organization in order to seek strength and to ensure equal power in bargaining relation. However, when this right to bargaining is performed, both parties of the relations are obliged to act in good faith.²⁴⁴

2.1 Parties in Bargaining

As long as the parties are legitimate by the laws for the bargaining purpose, the parties in this relation must bargain in good faith.

The parties are obliged to bargain in good faith toward legal representatives in the bargaining relation from both sides. The employer must bear an obligation to bargain in good faith toward the legitimate worker representatives.

Bargaining representatives are unions of various levels in accordance with the scope suggested by the parties. This means that party can be the union at enterprise, local or industrial levels. However, a union is not the only type of bargaining representative. For the case where there is no union to represent workers for bargaining purposes, then other types of worker representative is allowed in order to perform the bargaining role. So far, to fill the gap, shop stewards that are directly elected by workers act as bargaining representative. In this case, the employer must bargain in good faith with this type of bargaining representative. Within the ILO concept, the worker bargaining representative does not impede the right to organize because it only replaces the case where there is no union in the workplace.

In the US, the employer is obliged to bargain in good faith with the exclusive representative assigned by majority of workers in an appropriate unit. In this case, the employer must bear an obligation to bargain in

²⁴³ Willington, *supra* note 105, at.74

²⁴⁴ Carrell & Heavrin, *Collective Bargaining and Labor Relations, Cases, Practice, and law*, 1985, at.111

good faith with this mentioned union. Without reasonable ground to refuse this obligation, the employer will be convicted of committing unfair labor practice act. Within the US jurisdiction, as long as a union holds majority status, the employer bears an obligation to bargain in good faith at any time there is proposal for bargaining or renewal or modification the current agreement. Furthermore, the employer has an obligation to bargain either over questions arising from alleged breaches of the contract or mandatory subjects not included in the existing agreement.²⁴⁵

For the cases of other countries, the employer must bargain in good faith with all unions in the workplace. In Japan, this obligation is applied where multi-representative for bargaining purpose is functioned. In this country, the employer bears an obligation to bargain in good faith with all unions regardless their membership. The employer is committing an unfair labor practice if he or she happens to deny bargaining with one union while he or she does with others. Furthermore, an obligation imposed on the employer to treat all unions in bargaining relations fairly. The employer might unfairly treat unions if the employer provides more benefit to one union while he or she does not do toward other unions without any reasonable ground.

In the case of Cambodia, there are many legitimate types of bargaining representatives from the workers' side. The worker representative system is a bit complicated if compared to that of the employer. Besides all types of legitimate unions for bargaining purpose, the shop steward is also entitled to represent workers for bargaining relations with the employer.²⁴⁶ This point will be detailed in next part of this chapter.

2.2 Subjects of Bargaining

Generally, there is no conventional rule for the determination of the subjects of bargaining that requires the parties to bargain in good faith. The only well-known concept lies on the condition that the subject of the bargaining is legal. Nonetheless, the aspect of this illegal subject in bargaining relations does vary from one

²⁴⁵ Townley, *supra* note 187, at.25

²⁴⁶ Cambodian Labor Law, 1997, art. 96-2 (b)

place to another.²⁴⁷ The bargaining subject might be considered as illegal in one country; but it is not in another. Moreover, when it is mandatory subject in a country it can be non-mandatory one in any other. Thus, whether the bargaining subject is illegal or not depends on the set rules of each country and that the parties must bargain in good faith accordingly.

As long as the bargaining subjects are legal, the parties are free to bargain on these subjects. In addition, the parties are obliged to bargain in good faith if the subjects of bargaining fall into mandatory ones. This criterion of mandatory subjects is accordance with the legal requirement of each country.

Matters concerning payment, wages, hours and other conditions of employment are considered as mandatory subject within the legal framework in the US. Under the jurisdiction of the US, subjects of bargaining are classified into three groups. The first one is mandatory subject, the second one is a permissive subject, and the last one is illegal subject. Within the first type, the employer and bargaining representative are obliged to bargain in good faith. Failure to respect their obligation of good faith within this regard will constitute as an act of unfair labor practice. However, the parties in the bargaining relations are free to bargain on permissive subjects. In this regard, one party cannot insist on another party to bargain in good faith toward this type of bargaining subject. If any party persists and requires another party to bargain on such subjects, it is an act of unfair labor practice as well. Nonetheless, the parties are prohibited to negotiate on illegal subjects such as. The attempt to put in such illegal subjects in the bargaining agenda is prohibited. Neither party in the bargaining relations is obliged to bargain in good faith in regard with this subject.

However, there is no distinction between a mandatory subject, permissive subject, and illegal subject under Japanese context. The law does require the employer to bargain in good faith in regard with all matters that are not contrast to the laws and public orders. As for the case of Japan, before the adoption of the Trade Union Law, a number of personnel issues were excluded from collective bargaining.²⁴⁸ Therefore, it

²⁴⁷ As for some cases in the America, some states do allow the matter of union security (closed-shop agreements) clause be subject matter of collective bargaining while it is illegal in other states. Such union security clause is also allowed in Japan. However, there is no such clause allowed under Cambodian labor legislation.

²⁴⁸ It was considered by Japanese employers that it was management prerogative in regard with matters of organization and production. It included the introduction of new technology, changes in managerial organization, relocation of plants, mergers

implied the exception of the obligation to bargain in good faith in this case. Accordingly, there is another way to produce mutual interaction between the employer and unions/workers toward internal changes. Once mentioned issues were classified as prerogative of management, the approach to deal with those issues through collective bargaining was shifted. In this light, joint consultation within the enterprise on those matters was employed. Within this approach, the parties were not obliged any compulsory acts toward the interaction. Instead, they have conducted it through their willingness.²⁴⁹ Yet, the interesting points of the joint consultation²⁵⁰ were that employee representatives participating in this process are officials of the enterprise unions.

In addition, in most cases the same items are discussed in both collective bargaining and joint consultation. Therefore, there is no clear-cut frontier between these two channels. The inter-relation of collective bargaining and joint consultation can be found through the fact that once there is no agreement in joint consultation process, the issues will be referred to collective bargaining. The most noticeable point about the characteristic of the Japanese industrial relations is the practice that unions are refrained from calling a strike on an issue that is still being considered under the joint consultation procedure.²⁵¹ This approach helps keeping much better labor relations and produces various means for parties to communicate to seek for mutual understanding.

Under the Cambodian legal framework, there is no clear division of the bargaining subjects. The obligation of good faith is imposed on the parties with regard to the terms and conditions of employment in accordance with the legal provisions. Current legal provision implies that beyond this terms and conditions of employment, parties have no obligation to bargain in good faith.

of firms, closures of plants, subcontracting and production plans. See Taishiro Shirai, Recent trends in collective bargaining in Japan, Int'l Labor Review, Vol.123, No.3, May-June 1984, at.312. Available at:

<http://heinonline.org/HOL/Page?handle=hein.journals/intlr123&id=321&collection=journals&index=#326>

²⁴⁹ *Id.*

Realization of the involvement from unions in managerial was made. Further reaction from workers' side play very crucial role to survive company and to compete in home as well as overseas market. In this view, instead of going against managerial decisions a union will try to secure adequate information about it well before its enforcement and if necessary will press the management to modify it to take account of the employees' views.

²⁵⁰ *Id.*

²⁵¹ Taishiro Shirai, Recent trends in collective bargaining in Japan, Int'l Labor Review, Vol.123, No.3, May-June 1984, at.313. Available at:

<http://heinonline.org/HOL/Page?handle=hein.journals/intlr123&id=321&collection=journals&index=#326>

There is no clear provision regarding mandatory subject and permissive subject in the Cambodian law. However, as long as the bargaining subject is not classified as mandatory by the law and it is not against to public orders, it is permissive one. The Cambodian labor law provides a full right to the parties of the bargaining to determine whatever subjects they wish to negotiate. This leads to some problems in the practice since unions have been asking to negotiation on some matters that the employers assess that it is the prerogative of management to decide on those matters and it requires no involvement from the unions accordingly. Within this respect, there are some assessments from employers towards some bargaining subjects that they do not wish to negotiate with unions. The employers argue that those subjects are of employer's prerogative that the unions should not involve with it. According to the IRWG 2008, the employers suggested that there should be some exceptional subjects for bargaining and the law should give right to the employer to deal with those issues. One related case was brought to the Arbitration Council. Case No.163/09 is about the complaint that union required the management to have clear responsible person in the company. In order to respond, the employer assessed that this is company's right to decide. However, there was no decision could be heard from the AC due to withdrawal this point by the union.²⁵² Though it does not lead to a big discussion in the arbitration panel, this matter should be taken into much consideration because it can lead to many obstructions in the bargaining relation. Experiences from other countries can illustrate many positive points of this matter. Once the division between mandatory and permissive subjects is made, the employer or unions have no obligation to follow the legal requirement regarding the obligation to bargain in good faith if the subjects are not mandatory. Furthermore, if the subjects are mandatory, either party will be convicted of committing unfair labor practice which need to be remedied. In contrast, once there is no distinction on this matter under the Cambodian labor law, this absence is supposed to be a leading factor to further conflicts in the future especially regarding the implication of good faith obligation.

²⁵² AC Case No.163/09, http://www.arbitrationcouncil.org/awards/A_16309_K.pdf (last visit: 20 May 2010)

III. Obligation to Bargain under Cambodian Legislation

1. Labor Law 1997

No provisions regarding the obligation to bargain in good faith can be found under the Labor Law 1997. Within this law, the right to bargain collectively is somehow stipulated in the fifth chapter, which only provides further provisions regarding the definition of the collective bargaining agreement. In addition, parties in the bargaining relations are defined as well as further aspects of the collective agreement.²⁵³

2. Prakas 305/01 (Ministerial declaration)

This Prakas determines the bargain representative, and it focuses mainly on the most representative union determination. Even though Cambodia has not adopted the system of exclusive representative like that in the US, special attention from the government toward the most representative (MR) union is found. This Prakas serves as a supplement legal instrument on bargaining right, while it is absent in the Labor Law. Provisions in this Prakas concern the determination of the most representative union for the bargaining purpose.

The employer is required to respect the obligation to bargain in good faith once the existence of the most representative union is found in the workplace. Any union with the status of the most representative should have the right to approach the employer for the purpose of negotiating a collective bargaining agreement applying to all workers it represents.²⁵⁴ As long as any union holds majority voice of workers in concerned workplace, this union can act as the sole bargaining representative to all workers. In this case, the employer must bargain in good faith with this union.

Nonetheless, if the most representative union cannot be found in the workplace, the law provides opportunity for two or more unions to join together in order to find a majority support. If this alliance can

²⁵³ Cambodian Labor Law, 1997, arts.96-101

²⁵⁴ Prakas 305/01, clause No.9

find majority voice from workers in the concerned workplace, this alliance will become a sole bargaining representative for all workers in that workplace.

If there is no most representative union nor a joint-most-representative union is selected in the workplace for the purpose of collective bargaining, the law requires the employer to bargain in good faith toward all legitimate representatives. Where minority unions together do not represent a majority of workers in the enterprise or establishment, or category of workers that the collective bargaining agreement seeks to cover, the employer should be required to negotiate with such unions only on behalf of their members.²⁵⁵ Without a proper reason, the employer cannot deny bargaining with any of these unions. Furthermore, the employer cannot use the fact of many unions exist in a workplace to avoid bargaining with those legitimate bargaining representatives.

The obligation to bargain in good faith can be performed in various forms. The obligation of the employer to supply further relevant information to bargaining representative unions is required by this legal instrument. To supply further relevant information is important so that unions can use it for a wise bargaining with the employer. Absence of such legal requirement for the employer to supply these documents will become an obstacle for unions to bargain intelligently. However, there is some protest from employers about some confidential information that could not be revealed to the public. Within this regard, there is a suggestion from the employers to limit such requirement by the law.²⁵⁶ This suggestion will constitute further tasks for the government to set a proper formula to solve existing problems.

3. Draft of Trade Union Law 2010

More details on the obligation to bargain in good faith were incorporated into the draft of TUL 2010. This draft can be considered as a comprehensive instrument to deal with multi-union system comparing in the current labor legislations. In this draft, many new provisions were proposed to handle with union registration system. Provisions on the representative system can be found in the draft as well. Furthermore,

²⁵⁵ *Id.*

²⁵⁶ IR-PSWG, *supra* note 4

the obligations of the parties in respect to the collective bargaining right are incorporated along with the introduction of unfair labor practice principle. Based on thorough examination on this draft, it provides high protection to both employer and most representative union. The obligations to bargaining in good faith imposed on the parties are incorporated as well. The employer has a duty to be engaged with workers' unions within this obligation of good faith.²⁵⁷

The obligation of good faith includes many aspects of relations in the workplaces. In the draft, the obligation to bargain in good faith is included as one of the obligation of good faith in workplace relations. The obligation to bargain in good faith is imposed on either the employer or unions. The obligation that is imposed on the employer mainly focus on the faith conduct toward the most representative union. As found in Article 56, the obligation to bargain in good faith includes the obligation in respect of certified most representative status union or a higher level most representative union to meet and convene promptly and expeditiously for the purpose of negotiating a collective bargaining agreement. This obligation of good faith is imposed for the negotiation with respect to the terms and conditions of employment in accordance with the provision of this law, as well as to consider proposals for adjusting any grievances or questions arising under such agreement.²⁵⁸

This draft also requires the employer to supply further relevant information for the bargaining requested by unions.²⁵⁹ This draft does not limit this requirement for some confidential information. Therefore, the draft leaves the interpretation of this matter to relevant authority to define what should be supplied by the employer within the bargaining relation. To be considered as confidential issues is depended on the reasons made by the employer to convince the others to believe.

²⁵⁷ Cambodian draft TUL, 2010, art.56

²⁵⁸ Cambodian draft TUL, 2010, art.56

²⁵⁹ *Id.*

IV. Bargaining Representatives and Obligation to Bargain in Good Faith

There are three main ways of determining legitimate bargaining representative under which the obligation of good faith is imposed on the parties. The three ways includes the obligation toward the MR union, joint-union and multiple unions.

1. The Most Representative Union and Obligation to Bargain

As already mentioned, when the most representative union is determined to engage in bargaining, the employer must be obliged to bargain in good faith with that union. Clause 9 and 10 of the Prakas 305/01 clearly defines this obligation. The Prakas provides that the employer must bargain with any union that gets majority support from workers in the workplace. This obligation is applied once the subjects fall in terms and conditions of employments which more clearly defined in the Labor Law.

Another important issue under the most representative union approach in Cambodia is the obligation of such a group toward other unions or other workers in the concerned workplace. Under the concept of the most representative union, only one union holding majority voice will act as representative for all workers in the workplace. In order to compensate minority unions while they have no more right to bargain, there is a forum allowing those minority unions to share their views with the most representative union. In addition, to protect the interests of minority unions, the most representative union must bear an obligation to fairly represent all workers regardless their membership in incumbent MR union. In this regard, there is no such principle of fair treatment imposed on the most representative union. The absence of such principle creates incentive for the MR to act freely in representing the interests of all workers. This may lead to the fact that it protects only the interests of its own members. Thus, the US experience should be learned. In fact, the most representative union system in Cambodia and exclusive representative union system in the US do share similarities in terms of being the sole union to represent all workers in the concerned workplace or bargaining unit. However, current provision is not sufficient to protect all workers under this system in Cambodia due to its lack provisions regarding the obligation of the MR union toward other minority unions.

In the case of the US, the doctrine of fair representative does help balancing the function of the exclusive union. Therefore, there is a way to check proper act of that majority union.

Under the current Prakas 305/01, the minority has more opportunity in the bargaining process and is more protected. The Prakas allows these minority unions to join in drafting the collective bargaining if the majority union allows them to do so. This kind of provision does provide a chance for those unions to share their views in regard with collective bargaining. By doing so, a wider perspective relating to collective bargaining can be heard by concerned parties. Though this approach cannot guarantee high opportunity for minority to take part in drafting collective bargaining; yet it makes up opportunity for them. In this regard, consideration this participation by the MR union would be beneficial for all parties since it could help them more wisely negotiate with employers. This also helps unions to be much stronger and trustful representative since various views and demands would be taken into consideration and discussed.

Unfortunately, this approach is kept aside under the draft law. The absence of such requirement indicates less protection toward the bargaining right of the minority union within this new initiative. Therefore, neither the opportunity to join pre-bargaining process nor fairly represented requirement is ignored by the MR union.

2. Joint Union and Obligation to Bargain

This obligation to bargain in good faith is imposed on the employer in the case where the most representative union does not exist in the workplace. In such a case, two or more unions can form together to find majority support. When they fulfill that requirement, this joint union will become sole bargaining representative. In this case, without any proper reason, the employer cannot deny the obligation to bargain in good faith with this type of bargaining representative.

3. Multiple Bargaining Representatives and Obligation to Bargain

Beyond the above cases, the employer bears responsibility to bargain in good faith with all unions. The employer then is obliged to bargain with all legitimate unions. Under Prakas 305/01, all unions are entitled

the same right to suggest the employer for bargaining purpose. In this case, the employer must bear obligation to bargain in good faith with all of these unions.²⁶⁰ Under the draft TUL 2010, the employer should bargain with one or more unions as regard with terms and conditions of employment for the individual members of those unions.²⁶¹

V. Summary

Each system in determining this form of representation is assumed to be good for real circumstance of each country. Therefore, to say absolutely that one system is the best to be applied in other countries is inappropriate. One system can be good to be applied in one place; but not in others.

There was an argument on the bargaining representative system in the US from Japanese viewpoint that such a system impedes the constitutional right of workers for bargaining purpose. Under the US system, a minority union will lose their voices for such purpose. This system is allowed only union with majority support to bargain with the employer. In this respect, Japanese scholars totally opposed any attempt to apply this system in Japan. This exclusive representative system in the US was criticized as a system that opposes the right to bargain of workers. Without the existence of the exclusive union, the employer has no obligation to bargain in good faith with unions without such status. Therefore, though those unions could approach the employer for bargaining purpose, the employer is free from acting in good faith within bargaining relation with those unions.

As long as the bargaining relations are conducted in bad faith, the use of the right to bargain of unions or employees will be impeded by the employers. In this respect, the attempt to introduce the US system is denied by Japanese labor unions as well as scholars toward any attempt to import this exclusive representative into the industrial context in Japan. The unions insisted that this approach was not appropriate because labor movement was and is so divided. Furthermore, Japanese scholars have argued

²⁶⁰ Prakas 305/01, clause No.9,10&11

²⁶¹ Cambodian draft TUL 2010, art.58-2

that this approach is inconsistent with Article 28 of the Constitution and undermines constitutional right. This approach does affect the right to bargain collectively of minority unions which is protected under the Constitution. In addition, the employer saw that this system of exclusivity is giving one union too much power in order to speak for the workers; therefore, they were reluctant for any attempt to enhance unions' power.²⁶² Thus, there was strong opposition in Japan toward the exclusive representative system; instead it is suitable for current system of multi-representative for bargaining purpose.

The argument in this matter is that the current system of bargaining representative in Cambodia is really flexible due to diversity in labor movement. So, such determination does provide an opportunity to workers to be represented by their own chosen bargaining representatives. In addition, worker views are heard fairly and effectively if this right is strongly and effectively respected as well as if it is used for real interests of workers. Therefore, in order to assure effective use of current system, every stage of selection of these bargaining representatives must be assured its accuracy by relevant authorities. Any abuse or mistake must be corrected through further measurement such as de-registration for instance. The law must put strong legal restriction on yellow union which can be the case and is hardly witnessed. This worry rests on the case that the most representative union is functioning for bargaining purpose. Hence, if the MR union happens to be backed by the employer, then the interests of all workers in the workplace must be hindered.

Regarding the obligation to bargain in good faith within Cambodia legal framework, current legislation seems to focus mainly on the case of the MR union. Since it is not the only channel in bargaining relation, to have further legal protection toward all kinds of bargaining representatives would be much better and appropriate.

²⁶² Gould, *supra* note 179, at.37- 38

CHAPTER FOUR

Legal and Practical Aspects toward the Right to Bargain

I. Legal and Practical Aspects to Ensure the Right to Bargain in the United States and Japan

The existence of multi-unionism can be found in democratic countries including the US and Japan. In order to protect the right to organize is one focal issue within the labor field. Moreover, to deal with its consequences is another matter that seems very hard to find conventional solutions due to different context of labor relations in each country. In this regard, further measures that are considered as appropriate for the real circumstance of economic, cultural, and social factors are drawn up by each government.

A specific approach to protect this right is regulated in comparative jurisdictions. In addition, a mechanism to handle with the breach of these rights is set up under a specific and appropriate procedure that indicates high protection toward this right. Below is the study of how the laws in the US and Japan treat the right to bargain collectively as well as the mechanisms to deal with the breach of bargaining obligation. In addition, the case of Cambodia is also explored.

1. The case of the United States

Harsh attitudes of the employer toward the labor movement have been generally acknowledged in the United States. Workers' combination was ultimately recognized through a very long period of struggle of labor activists for the legitimate recognition by the laws. Along with this recognition, multi-unionism began exist within industrial relations. Many unions in one bargaining unit can be found and competition among those unions becomes an unavoidable phenomenon. In order to deal with this consequence, the exclusive representative system was established in the United States. As mentioned in the previous chapter, this exclusive representative system was designed to reduce complexity in determining bargaining representative and to facilitate bargaining process. Furthermore, the system aims at promoting the right to bargain of workers by building balanced power between the two. However, the reality indicates that there is

still a problem impeding this right to bargain. Most cases of breaching the obligation to bargain occurred when the employers do not respect their obligation in good faith with exclusive representative by making up further reasons to avoid bargaining with employees' unions. Such attitudes by the employer constitute barriers interrupting performance of union's role in this regard. In order to deal with this, unfair labor practice principle had been adopted in the United States.

1.1 National Labor Relations Act 1935 and Taft-Hartley Act 1947

In 1935, the Wagner Act or National Labor Relations Act was enacted by congress. The situation of unions was so vulnerable before the enactment of this act that various judicial techniques had been employed in order to suppress labor movement.²⁶³ The congress alluded to the inequality of bargaining power between employees in comparison with that of employers. In this respect, the congress also sought the protection of the right to select their representative of employees and the right to get involved in collective bargaining.²⁶⁴ During the great depression, individual bargaining did fail to meet workers' needs. Due to this acknowledgement, this act was adopted to protect and encourage collective bargaining as an important means of addressing workers' interests.²⁶⁵ In addition, this act aimed at promoting equity between labor and management, and to promote industrial peace.

This act provided more power to employees and unions to use this legitimate right so that it served as grounds which led to strikes and other forms of industrial unrest once unions and workers possessed such legal protection. Accordingly, the industrial strife interrupted business operation and prosperity.²⁶⁶ Therefore, employers were not happy with this NLRA because this act gave much protection to employees and unions. Along with such protection, it did not provide any restrictions on union activity or any protection for employers. As a result, the National Association of Manufacturers conducted an intense campaign and alleging that the act was unconstitutional and advised its members to disrespect it. Until 1937

²⁶³ Gould, *supra* note 179, at.20. *See also* Carrell & Heavrin, *supra* note 249, at.26-27

²⁶⁴ *Id.* at.21-22

²⁶⁵ Roger Blanpain, Labor Law in Motion, Diversification of the Labor Force & Terms and Conditions of Employment, 2005, at.183-184. *See also* Carrell & Heavrin, *supra* note 141, at.17-18

²⁶⁶ Gould, *supra* note 179, at.21

this Act was enforced by the announcement of its constitutionality by the Supreme Court. Still, the employers conducted a campaign in order to change the law by making it more balanced.²⁶⁷

The advantages and disadvantages of this legislative act can be found through its protection of the employees and unions without any consideration on its result. As for the original purpose, this act was to protect employees and unions by indicating certain prohibited activities of the employers which negatively affected the use of the right to organize and the right to bargain collectively. However, this Act stipulated no provisions to control its outcomes attributed to such protection.²⁶⁸ For instance, this law was silent on the protection of the employer, the public, or even the employees in a course of fighting between two or more unions. In addition, the act required the employer to bargain with a union of the employees. However, it did say nothing for the case in which union refuses to bargain and tries to request conditions on an employer. In addition, the act did not provide for employees caught in a dictatorial union. These served as main reasons to make this act as inadequate and impermanent labor policy. Accordingly, this act was amended in 1947. Additional reasons rested on the fact of vocal criticism of the Wagner Act and of unions by business and the press.²⁶⁹

While the Wagner Act sought to protect employees and unions, the Act of 1947 attempted to provide protection not only to employees and unions but also management, and the public from the acts committed by both unions and management.²⁷⁰ One remarkable point in the Taft-Hartley Act was application of unfair labor practice principle on unions' side as well.²⁷¹ Unions will illegally act if they engage in illegal strike or boycott to put pressure on the employer or employer's association. Moreover, union's act will constitute an unfair labor practice if the act coerces employees in their selection of a bargaining representative to force employer to discriminate against other unions or non-union employees.²⁷²

²⁶⁷ Herman, *supra* note 15, at.42

²⁶⁸ *Id.* at.43

²⁶⁹ *Id.*

²⁷⁰ *Id.* at.44

²⁷¹ Carrell & Heavrin, *supra* note 141, at.20

²⁷² *Id.* at.47

1.2 Unfair Labor Practice Principle

The special approach regarding the right to bargain can be found through the provision of the unfair labor practice (ULP). Once discussing the issue of unfair labor practices, labor scholars should particularly pay attention to this principle in the United States for this was the first country to introduce it into labor relations to secure industrial peace. The obligation to bargain in good faith is considered as core element of unfair labor practice. However, the ULP principle and the obligation to bargain in good faith were merely imposed on the employer at its outset. Moreover, this principle and obligation were extended its application on union side afterward.

The obligations to bargain in good faith have a close link with the exclusive representative principle in the United States. As long as a union holds the status as exclusive representative, the employer must bargain with this union in good faith for mandatory subjects in the bargaining. This obligation is imposed on the employer in order to correct inequality of the parties in bargaining relation. As standing on a weak scale in the relation, employees can use only this final weapon when there is no proper legal solution in this regard. Employees ultimately end up going on strike to demand their employer to respect the obligation to bargain. However, it is not wise for workers to use this economic weapon. And this means could not assure frequent success. Most of the time workers lose and sympathy on them could be reduced if it is not properly conducted. Accordingly, in order to ensure industrial peace, strike must be avoided as much as possible. In order to prevent industrial strife as well as to protect workers' right, stricter legal requirements are drawn up and imposed on the parties in bargaining relation. Abuse of this requirement will constitute specific mechanism and remedies to deal with it. The concept of unfair labor practices then was introduced by the congress in this regard.

In order to distinguish an unfair labor practice is to facilitate in determining consequences stemming from such unfair labor practice. Within the US labor legislation, workers can go on strike once the employer commits an unfair labor practice. This strike is called ULP strike with further protective consequences. In the case of ULP strike, the employer has no right to replace strikers during the strike. It differs from economic strike where the employer can legally replace those who are on strike. For the ULP strike, the

board may order all unfair labor practice strikers reinstated with back pay from the time they unconditionally offer to return to work. Moreover, the employer is ordered to fire any replacements hired during the strike to make room for the unfair labor practice strikers.²⁷³ Thus, the US legislation seems to tolerate businessmen since it provides chance for them to replace strikers in economic type. This legal provision does not exist in the Cambodian context.

1.2.1 Unfair Labor Practice of Employer

The terms of unfair labor practice were used within the industrial relations context in the United States. In fact, there is no clear and conventional definition of this term in American law. Instead, there are many aspects of unfair labor practices committed by the employer. These practices do mostly affect the right to organize of individuals as well as labor organizations. Furthermore, the unfair labor practices hinder the right to bargain collectively of the groups.

The first prohibited act by the employer is the interfering with, restraining, or coercing employees in the exercise of the rights which are protected within Section 7 of the Wagner act. The second, the act makes it as an unfair labor practice in case where the employer dominates or interferes with the formation or administration of any labor organization or provides financial support. Third, the employer is prevented from discriminating between union and non-union employees as from any participation in unions. Fourth, employers are banned from discriminating against anyone who files charges or gives testimony under the law. Fifth, the act prohibits an employer from refusing to recognize and bargain collectively with the representatives elected by the employees.²⁷⁴ The act of domination on a labor organization is considered as an unfair labor practice. Such a provision was originally designed to prevent company unions and it also extends its application on other types of joint labor-management committee.²⁷⁵

In respect to the right to bargain collectively, if the employer denies bargaining with legitimate bargaining

²⁷³ Frank H. Stewart, Conversion of Strikes: Economic to Unfair Labor Practice. <http://www.jstor.org/stable/pdfplus/1070682.pdf>. Economic strike means far more than merely wage increases. It does not guarantee of continued employment for the employer may permanently replace economic strikers.

²⁷⁴ Herman, *supra* note 15, at.42

²⁷⁵ *Id.* at.70

representative, the employer is committing an unfair labor practice by abusing the good-faith –bargaining requirement. Furthermore, the act of the employer will constitute an ULP when the employer refuses recognizing exclusive representative supported by the employees for bargaining purpose.

1.2.2 Unfair Labor Practice of Union

At the very beginning of the legal protection toward the right to organize and the right to bargain collectively, employer bears more obligations required by the legislations. The two parties in labor relations have bore almost the same obligations afterward however.

After the enactment of the NRLA in 1935, the labor movement in America became stronger and had become an obstacle for business. Thus, businessmen had been seeking for legal protection against some acts committed by the unions. The secondary boycott by the union became the ground which annoyed the businessmen. In this regard, businessmen had been looking for more legal measures in order to protect their interests as well. As a result, unions have been convicted of committing unfair labor practice when they conducted a secondary boycott. Strict legal provisions imposed on employees have been more than the act of secondary boycott. In addition, unions are prohibited from committing various discriminatory acts hindering the right to organize of individual employees.

Moreover, due to the perceived power of organized labor during the 1940s which dictated to the employer rather than convening with the employer, the ULP was also imposed on unions in this sense.²⁷⁶ Furthermore, the unions were required to act fairly in representing all employees in the bargaining unit once it becomes an exclusive representative for bargaining purpose. This imposition was to respond to the principle of exclusive representation which only one union will act for the interests of all workers. Due to such exclusive right, this union has to act fairly in representing the interests of all workers in concerned bargaining unit regardless their membership.

²⁷⁶ Carrell & Heavrin, *supra* note 141, at.108

This kind of unfair labor practice was imposed on the union's side as defined in the Taft-Hartley Act 1947. This act was applauded by management who saw it as a shift to a more balanced approach to labor relations.²⁷⁷ According to the act, not only the employer will be convicted of committing an unfair labor practice; but also unions. It is an act of unfair labor practice if any union forces employees in the selection of a bargaining representative except for the case of union security clause.²⁷⁸ Furthermore, the union is committing an unfair labor practice when any union forces employer to discriminate other unions or non-union employees. It is also illegal if a union tries to provoke employees to go on strike in order to force their employer to recognize one union while there is already duly certified union.²⁷⁹ This act constitutes an unfair labor practice under the language of this act. Within this act, labor unions bore many of the same duties as employers.²⁸⁰

1.3 Enforcement mechanism

The National Labor Relations Board was designed to be in charge of unfair labor practice cases. Furthermore, in order to make it more effective in protecting the rights of organizing and bargaining, the abiding effect of the law was empowered in the decisions of the NLRB and appeal to the courts.

1.3.1 Specific Procedure: National Labor Relations Board

In order to accomplish the main objectives incorporated in the NLRA 1935, a competent institution was set up in accordance with the law. As such, the National Labor Relations Board (NLRB)²⁸¹ was set up. In fact, there were two main roles of the National Labor Relations Board. The first role was to determine the bargaining unit and exclusive representative election for the purpose of collective bargaining. The second role was to handle the case of unfair labor practice by determining when an act was an unfair labor practice

²⁷⁷ Carrell & Heavrin, *supra* note 141, at.20

²⁷⁸ Carrell & Heavrin, *supra* note 141, at.45-47

²⁷⁹ *Id.*

²⁸⁰ For amended provisions in the Taft-Hartley Act, see Carrell & Heavrin, *supra* note 141, at.20-21

²⁸¹ There are two main roles of the NLRB. The first one is to deal with determination of bargaining unit and responsible for the process of exclusive representative election for bargaining purpose. The second one is to determine unfair labor practice case and to issue decision.

and providing appropriate remedies.²⁸² Every single case of unfair labor practices is still charged before the jurisdiction of the NLRB.

At present, every unfair labor practice case will be brought by private parties²⁸³ directly to the NLRB. A written form of the complaint is required for the party to fulfill. This written form of the complaint is a standard set up by the NLRB and this Board also assists the parties preparing their complaint.²⁸⁴ The NLRB is provided power to conduct investigation either before or during the hearing process if it deems to be necessary for the Board to complete its task.²⁸⁵ The conduct of investigation is the rule without any exception by the NLRB at the atmosphere of the place of the dispute in order to ask and obtain further relevant information.²⁸⁶ A thorough investigation will be conducted by the NLRB once there is a charge filed by disputing party. Most of the cases have been settled at this stage traditionally since the NLRB conducts a compromise or encourage for complaint withdrawal.²⁸⁷ In this regard, the approach in the US is different from that in the Japan since on-the-spot investigation is not absolutely the rule. The Labor Relations Commission in Japan rarely conducts investigation in the field because of its status as part-time officers and it is too hard for them to travel to the places of the dispute.²⁸⁸ Moreover, this approach is not employed within the Japanese legal framework because this will upset relations between the labor and management.

There are two main parts of the characteristics of the NLRB. The first one is the general counsel and the second one is judicial side of the NLRB. Within its first characteristic, a presidential appointee acts as a kind of civil prosecutor and has agents for unfair-labor-practice cases in regional offices throughout the country. In regard with the second characteristic, the NLRB is made up of administrative law judges operating at the trial level. In addition, the five presidentially appointed board members who sit in

²⁸² Gould, *supra* note 179, at.22

²⁸³ For employees' side, the party can be individual employees or unions depending on each case. For instance, if it concerns with unfair dismissal then individual employee of the case will bring the case to the NLRB. And, if the case concern with discriminatory acts toward the right to bargain collectively of employees, then representative union will be the party of the case.

²⁸⁴ Gould, *supra* note 179, at.49

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

Washington DC and review decisions of the administrative law judges. The second characteristic gets close to the central LRC in Japan that reviews the decisions of the local LRCs.²⁸⁹

1.3.2 NLRB Jurisdiction and Its Effects

Once there is a case of unfair labor practice occurs, the only competent institution to deal with this case is the NLRB. There is no duplicate jurisdiction concerning ULP between the court and the NLRB in the US. In this regard, legal practice in the US is different from that in Japan where the case of ULP can be filed directly with the court or with the LRCs. In contrast, the court in the US has no jurisdiction to deal with such a case at its very outset until there is complaint against or appeal of a decision of the NLRB.

The NLRB is provided discretion to issue orders of unfair labor practice case. In this respect, the NLRB is authorized to conduct hearings as well as to issue “cease and desist” orders. In addition, the law allows the board to order further appropriate affirmative action which includes reinstatement of employees with or without back pay.²⁹⁰

The decisions of the board have no self-enforceable effect. The intervention from the court is needed to enforce its orders. However, there is little room for the parties to choose binding or non-binding orders made by the NLRB, and this differs from the approach in Cambodia in dealing with current collective labor disputes. By its nature, this Arbitration Council in Cambodia provides room for the parties to decide to be bound by its decisions. This produces another barrier toward a speedy solution for labor cases especially for ULP if this would be adopted at the end of story.²⁹¹ In addition, it produces a deadlock in settling the disputes as the parties have no willingness to accept decision of the arbitration council. The weakness of the AC can be revealed in this instance. This weakness became an important point to be considered for further revisions in order to make this institution more effective in dealing with labor cases especially with unfair labor practice ones.

²⁸⁹ *Id.* at.50-51

²⁹⁰ *Id.* at.23

²⁹¹ Cambodia is now on the way to adopt this principle of ULP within the Draft TUL 2010. Yet, it is still on discussion among all stakeholders and planned to be in force by mid of 2011. However, it is likely that this ULP would be finally incorporated.

The NLRB has an obligation to seek enforcement of its order by filing a petition to the circuit court of appeal.²⁹² The order of the board is subject to enforcement and review in the federal courts of appeals.²⁹³ This means that once there is a case brought to the court concerning the decisions of the NLRB, the court will review on the accuracy of the decisions. If its accuracy is pronounced, the court will order the offender to respect and follow the decisions of the NLRB. In contrast, if its legality is questionable then the court will reverse the case to the NLRB to reconsider its decisions.

1.3.3 Appeal to the Court and Remedies

A case of unfair labor practice can be appealed to the court when the offender does not obey the decision of the board. In this case, the board will bring the case to the court to enforce its orders. The court then examines the decision of the NLRB. If it has sufficient legal ground for the decision, then the court will empower the Board's order by ordering the offender to obey it.

If the offender does not respect the decision of the court, then the court will issue a punitive order including fines and possibly imprisonment. However, there is no legal provision toward this punitive remedy unlike the case of Japan. Such remedy mainly bases on each case in accordance with the real circumstance justified by the court.

1.3.4 Characteristics of the NLRB and the Court

The employment relation is different from other relations. The employment relation is the place where two parties with unequal power interacting with each other. Therefore, further appropriate interventions from the relevant authorities as well as by the laws are in need to secure injustice in such relations. Furthermore, to secure good relations between these two parties is necessary for industrial peace. As long as there are many disputes taken place, instability in the labor atmosphere will spread its effect out onto the society as a whole. Due to the potential expansion of a labor problem, the government has perceived further appropriate

²⁹² Gould, *supra* note 179, at.23

²⁹³ NLRA, at.11-5

measure to prevent such obstruction. Various kinds of Alternative Disputes Resolution (ADR) have been found in the labor field in order to avoid serious dispute as much as possible.

Going to court will produce definite outcome that the parties will hardly bear such as fine with huge amount of money or imprisonment or both. Moreover, bringing the case to the court will end up with tough relations between the parties later on. Therefore, to correct the situation and to provide more flexible approach in dealing with such disputes the law tends to establish further procedures for the parties to have their cases handled by setting various forms of ADR which will possibly secure good relationship between the employer and workers. Through ADR, further flexible solutions will be provided by a competent authority appropriate to each case. This ADR also reduces tension between the two as well since it provides time the parties to understand mutually.

Different characteristics of the NLRB and the court rest on the ground that the NLRB is to restore the situation through various flexible remedies while the court is to punish the offenders. This characteristic was expressed clearly by the US Supreme court that provisions of the NLRA are designed to authorize “remedial orders” and not “punitive orders”.²⁹⁴ In this respect, the NLRB is designed to prevent an unfair labor practice by any parties in the industrial relations. Furthermore, the existence of the NLRB is for restoring the situations to the *status quo* which prevailed before the violations occurred. The nature of the NLRB is to provide remedial order rather than punishing any offenders.²⁹⁵ As the law says, the NLRB is entitled to issue cease and deist order as well as order appropriate affirmative action to heal the situation. Within this legal language, the NLRB seems to be more flexible to provide remedies at this level and it indicates soft characteristic of the NLRB. In contrast to the board, the court sanctions further acts which are harmful for industrial relations. The court does not restore the situation; but provides rigid punishments to the offender once they do not follow the decisions of the board which the court perceives as proper order.

²⁹⁴ Gould, *supra* note 179, at.64. See also “NLRB Power To Award Damages in Unfair Labor Practice Cases”, 84 Harvard L.Rev.1670, 1684 (1971)

²⁹⁵ Sterling H. Schoen et al., Cases in Collective Bargaining and Industrial Relations, 5th ed.,1986, at.23

In short, the decisions of the board are more flexible in many ways of providing remedies. By contrast, the court can only issue fines or imprisonment.

2. Case of Japan

Strong commitment by the Japanese government in promoting workplace relations can be found through the ratification of various ILO conventions including the C.87 and C.98. Japan ratified these two fundamental conventions in 1954 and 1965. These two conventions served as the main sources of law affecting the right to organize and to bargain.²⁹⁶

The decisions from management without some involvement from workers are not so effective. Industrial relations will be a very successful when employers welcome unions' existence and establish a relationship which bases on mutual trust and understanding. This rule is illustrated by the case of Japan where managers have tried to avoid conflict and build up a good relationship with unions. This characteristic within Japanese industrial relations has been recognized by other countries even those in the Western society. It is very unique nature of Japanese industrial relations which is hardly achieved in elsewhere.

However, tendencies from employers to hinder labor movement either through improper acts on the right to organize or the right to bargain of workers is unavoidable. In order to respond, further prohibited acts by the employers have been regulated by the laws. In addition, various necessary measures have been set up to handle with such acts. Moreover, employers in Japan are challenged in regard with every kind of unreasonable demand and obstructionism toward the right to organize. Finally, the employer will find they are losing in the court because the view of constitutional guarantee of "right to act" instead of "right to strike" from the judge. In this sense, the judges perceive legal protection as something more active than a simple walkout.²⁹⁷ In addition, the judges encourage employers to understand importance of mutual trust and understanding rather than keeping negotiation aside that will lead to industrial obstruction. Hence,

²⁹⁶ Sugeno, *supra* note 54, at.21

²⁹⁷ Tadashi, *supra* note 203, at.45

encouraging the parties to come to the bargaining table to discuss, to compromise and to find mutual solutions is very important.

The most important principle to protect and promote the right to organize as well as the right to bargain is so-called unfair labor practice.

The supreme law of Japan provides clear aims at protecting the right to organize and the right to bargain as well as the right to act collectively.²⁹⁸ In accordance with such protection, the unfair labor practice principle was perceived as main tool to respond to this aim.

The unfair labor practice remedial system has been perceived differently in Japan. On the one hand, the remedial system was perceived as a concrete form for the protection of constitutional right of self-organization. Additionally, this ULP remedial system is a part of constitutional right which directly stemming from the Article 28 of the Constitution. On the other hand, this system is a result from Article 28 of the Constitution. This unfair labor practices are defined as acts committed by the employer which hinders harmonious collective bargaining. Therefore, this system was adopted in accordance with special policy of TUL in order to build up harmonious collective bargaining relations.²⁹⁹

2.1 Trade Union Law 1949

Before 1925, labor mobilization in Japan was repressed under the Public Order and Police Law. As a result, criminal sanctions were imposed on those who had committed violent acts, threats, or public defamation in order to cause someone to join a group. In addition, this sanction was also imposed on those who had incited someone to involve in a strike.³⁰⁰ Later on, the attempt to granting legal status for unions and encouraging the development of a healthy union movement was made by the law.

²⁹⁸ Japanese Constitution, 1947, art.28 says that “The right of workers to organize and to bargain and act collectively is guaranteed.” The right to act collectively refers to the right to resort economic power which includes the right to strike. *See* Gould, *supra* note 179, at.30

²⁹⁹ There were many opinions toward the function of unfair labor practice remedial system. *See* Sugeno, *supra* note 54, at.691 (footnote)

³⁰⁰ Sugeno, *supra* note 54, at.5-6

As a result, a trade union law was initiated from 1919 to 1931. However, this attempt was blocked in the Diet due to resistance from industrialists against such intervention.³⁰¹ The awareness of the importance of the labor movement as a means effecting reform after WWII was pronounced. Accordingly, Japan finally enacted its first Trade Union Law in 1945.³⁰² Repeatedly, Japan has promulgated further acts to handle with collective labor relations. As a result, the Labor Relations Adjustment Law was enacted in 1946 and the Labor Standards Law was enacted in 1947. In the area of industrial relations in Japan, these three mentioned regulatory schemes have played important roles in industrial relations.

The TUL 1945 was drafted by the Council on Labor Law and Policy right after the War.³⁰³ This law; however, was criticized for various deficiencies including failure to fully implement a policy that would require employers not to interfere with organization of workers and to accept the collective bargaining process in good faith; the establishment of administrative supervision interfering with internal affairs of unions without any specific justification; the failure to prohibit domination of unions by companies, and the absence of the principle of majority rule.

Accordingly, the Trade Union Law was amended in 1949.³⁰⁴ This amended law empowered union governance by dispensing with reporting requirements, eliminating administrative intervention and supervision, expanding the list of employers' representatives who must be excluded from union membership and the scope of financial support that would disqualify a trade union. In addition, basis rights and the election of union officers were allowed to include in union constitution in order to promote union democracy. Furthermore, refusal of employers to bargain and their control over unions were considered as illegal acts and included in the scope of unfair labor practices. A remarkable change was the remedial procedures which were extended from criminal punishment to administrative relief.³⁰⁵

³⁰¹ Sugeno, *supra* note 54, at.7

³⁰² Trade Union Law, Law No.51 of December 22, 1945

³⁰³ For more detail, *see* Gould, *supra* note 179, at.17-22

³⁰⁴ Vai Io Lo, *Law and Industrial Relations: China and Japan after World War II*, 1999, at.121. *See* Gould, *supra* note 179, at.30

³⁰⁵ Sugeno, *supra* note 54, at.9

The Trade Union Law that entered into effect in 1946 was enacted in order to reform social order in Japan and to encourage labor mobilization. This act aimed at lifting up human dignity by safeguarding the working man from exploitation, abuse as well as raising his living standard. This law was to raise the status of workers and to contribute to economic development through assurance of the right to organize and encouragement of collective bargaining. In addition, the supportive idea toward unions was based on the belief that they were crucial to upgrade democratic principle in Japan.³⁰⁶ However, this TUL 1945 was enacted before the birth of the Constitution.³⁰⁷ Therefore, after the enactment of its supreme law, Japan amended its TUL 1945 by changing some provisions to make it comply with the virtue of the Constitution.

Accordingly, the TUL 1949 was born and has served as main legal instrument to control functions of labor movement and to protect as well as to promote the right to organize and the right to bargain. Therefore, the right to organize and the right to bargain collectively have a firm constitutional protection in Japan. Within this TUL 1949, the principle of unfair labor practice was adopted to ensure smooth labor relations and secure peace in labor atmosphere.

2.2 Unfair Labor Practice

The concept of unfair labor practices were constituted when an employer impedes the right to organize of any workers, a groups and the right to bargain collectively of workers.

There was a remarkable change in the former TUL 1945 by replacing the title of prohibitory provisions to “unfair labor practices”. In addition to this change, there was also extension of the scope of prohibiting conduct by the employer. Beyond disadvantageous treatment and the yellow-dog contract, the refusal to bargain, control and interference in and financial support by employers were regulated by the law and classified as unfair labor practices.³⁰⁸

³⁰⁶ *Id.*

³⁰⁷ Japanese Constitution was enacted in 1946

³⁰⁸ Sugeno, *supra* note 54, at.690

Cambodia now is following the step experienced by Japan for there are only certain prohibited acts in regard with the right to organize. The prohibition of certain acts is imposed on the employer, yet there is no any using of the term unfair labor practice though there are some notions therein.

The unfair labor practices principle in Japan followed the US. However, this principle is not totally applied on both unions and employers within the Japanese labor context.

There is a high possibility for this unfair labor practice to occur in the workplaces as long as many unions exist in there. In Japan, the case in which employer discriminates against employees due to their union membership or due to their membership of one union other than another union is unavoidable. As Tadashi Hanami pointed out that industrial relations will be insulted in case of plural unions. Therefore, a majority of the ULP cases are occurring in companies with more than one union which causes some trouble for foreign firms.³⁰⁹

2.2.1 Unfair Labor Practice of Employer

Within the old TUL enacted in December 1945, did not define the term unfair labor practice. However, there were some notions of this principle could be found in this law. Within this former law, there was a prohibition against disadvantageous treatment by the employers on their workers for many reasons; for example, the grounds could be union membership of workers, or requirement for yellow contract as condition to be employed.³¹⁰ Employers who violated this rule would be subject to a term of imprisonment not exceeding six months or a fine not exceeding 500 yen.³¹¹ Later on, there were changes in the former TUL 1945 due to its narrowness in prohibiting conducts and the inadequacy of the remedial system.³¹²

³⁰⁹ Tadashi, *supra* note 203, at.83

³¹⁰ Sugeno, *supra* note 54, at.689

³¹¹ The criminal proceedings against these offenses were initiated only upon the request of the Labor Commission.

³¹² Sugeno, *supra* note 54, at.690

An important difference between the application of the unfair labor practice principle in the US and in Japan rests on its application on unions.³¹³ In Japan, the unfair labor practice was applied only on the employer's side on the ground that this always was the stronger party in the labor relations. The unions and workers always were in weaker position vis-à-vis the employer. Therefore, there was an absence of such consideration on the union side. However, once labor movement achieves their strong power and able to act aggressively in the workplaces, then it would be dangerous for business. Thus, lawmakers should rethink about this possibility.

Though the TUL prohibits the act of domination from the employer on any labor organization and considers it as an unfair labor practice, the practice of joint-management committee is not prohibited in Japanese labor context. Such joint committee is perceived as an act of domination of the employer on unions and this joint committee is suggested for prohibition in the United States.

There were further acts by the employer considered as unfair labor practices by the languages of the TUL 1949. The first problem rested on the fact that employer treated their workers in a discriminatory manner due to their union membership or union activities. The second problem was that when the employer refused bargaining with a legitimate bargaining union.³¹⁴ Third was based on condition where the employer controlled or interfered with formation or administration of the union, or to give financial support to the union.³¹⁵

2.2.2 Unfair Labor Practice of Union

The principle of unfair labor practice is not applied to unions in Japan. This principle as already mentioned is applied on either the employer or unions in the United States.

³¹³ Tadashi, *supra* note 203, at.45

³¹⁴ Regarding the obligation to bargain imposed on the employer it was silent within the framework of the TUL 1945. This TUL did not invoke any obligation on an employer to bargain in good faith with a union. In contrast, it empowered union representatives to negotiate with the employer. This attitude of the Act served as an open door to complete frustration of trade union goals. See Gould, *supra* note 179, at.28-29

³¹⁵ Tadashi, *supra* note 203, at.83

Under the old TUL, there are no acts from the union that could be considered as an unfair labor practice. Within bargaining, any refusal to bargain in good faith from a union is not classified as an unfair labor practice.³¹⁶

This principle is applied only on the employer on the original ground that parties in labor relations do not stand on an equal position. The employers are always the dominant party in the relations. Refusal to bargain in good faith can be easily committed by the employers due to their strong power. Therefore, workers, through their bargaining representatives will hardly apply their right to bargain. In order to solve this situation, the employer is obliged to bargain with legitimate bargaining representatives. Without proper reason, the employers cannot refuse to bargain with these representatives.

Referring to the original purpose of the TUL 1945, it guaranteed the right to organize and protect the right to bargain collectively in order to improve and aid their economic status and to develop the economy. These aims were replaced by new objectives in the TUL 1949. This latter TUL provided that the purposes of the law was to promote “equality between workers and employers in collective bargaining”, to protect self-organization by workers which allows them to get involved in collective bargaining and other collective actions, and to support the procedures of collective bargaining.³¹⁷ This new amendment placed stress on the upgrading equality in bargaining relation between the employer and workers. Due to the fact that the employers have the dominant power in the relations which might impede the use of the right to bargain of workers, further legal requirements are regulated to shape the conducts of the employers. In this respect, the Japanese labor law obliges the employers to negotiate in good faith to secure good relations in the workplaces and industrial peace. The unequal nature in the labor relations might form the perception for lawmakers to apply unfair labor practice on employer side.

³¹⁶ To compensate, the law allows employer to unilaterally decide if both parties already put all efforts in good faith to reach agreement; yet impasses.

³¹⁷ Sugeno, *supra* note 54, at.690-691

2.3 Enforcement mechanism

Though all aspects of the principle of unfair labor practice are not applied in Japan, specific procedures as applied in the US can be found in Japan as well. Within the system of multiple unions in a single enterprise, more unfair labor practice cases stemming from unfair treatment toward all legitimate unions in labor relations by the employers is inevitable.

2.3.1 Specific Procedure: Labor Relations Commissions (LRCs)

Besides the United States, Japan was the first industrialized country that adopted the system of unfair labor practice. In addition to this principle of unfair labor practice, the Trade Union Law 1949 set up an administrative agency to interpret and implement this principle.³¹⁸

Criminal punishment was used as a means to redress violations of certain prohibited conducts in the TUL 1945. However, once this TUL was revised there was also change in the approach to remedy the abuse of further prohibited acts by the employer which is called as unfair labor practice under this amendment. The LRCs are then obliged to determine after investigation and hearing the case in order to respond to the request of remedy. The LRCs will determine if a violation has occurred, apply the set administrative procedure, and then issue a relief order or dismiss the case.³¹⁹

The Labor Relations Commissions were established before the amendment of the TUL 1949. There are two levels of this commission. The lower level was created in each prefecture with the same members representing three groups namely labor, employers and the public. This tripartite body is appointed by each prefecture governor. Labor and employer members are assigned in accordance with the recommendation of their organizations with the most representative status. In addition, by consent from both sides' members, public interest members are appointed. The upper level was set up at the Ministry of Labor with an office in

³¹⁸ Gould, *supra* note 179, at.42

³¹⁹ Sugeno, *supra* note 54, at.690

Tokyo. The prime minister appoints members at the upper level by the same procedure as at the lower level.³²⁰

The LRCs have jurisdiction to deal with labor disputes as it is provided in the previous law. However, this amendment includes more jurisdictions of the LRCs on the case of unfair labor practices. Under the current TUL 1949, the LRCs have two main tasks namely adjudication of unfair labor practice cases and labor dispute settlement.³²¹ There are also additional functions of the LRCs including the examination and recognition of the qualifications of a trade union and decision on whether to extend the effect of the collective agreements.

In fact, there was a critical comment on the function of the LRCs within the TUL 1945 that the commission should have the authority to make recommendations in a form of a “cease and desist order”. In addition, the LRCs should have power to order an employer to take affirmative steps to stop his unlawful conducts.³²² Later, there was a change of previous remedy by withdrawing criminal charge on employer’s unlawful conducts and another remedial system was replaced the previous remedy.³²³

Japanese case is like the case in the United States that private parties are responsible of filling the cases.³²⁴ Once there is an ULP case filed with the LRCs, a staff member is assigned to hold a meeting. This staff is assigned to investigate and find facts. The party who files a complaint is required to complete a written form in order to trigger the case. Though a written complaint is required, the LRCs are not designed to accept it since there is no uniform rule for written form of complaint. An oral form is also permitted.³²⁵ Japanese case differs from the US case in which a written form is required and there is standard form set by the NLRB. In addition, the NLRB will assist each employee to prepare the complaint.³²⁶ Accordingly, the

³²⁰ Tadashi, *supra* note 203, at.82

³²¹ *Id.*

³²² Gould, *supra* note 179, at.29

³²³ Sugeno, *supra* note 54, at.689

³²⁴ Gould, *supra* note 179, at.45

³²⁵ *Id.* at.48

³²⁶ *Id.* at.49

system in the US is well-prepared compared to that in Japan regarding the facilitation process for dealing the unfair labor practice cases.

During the meeting process, if any party refuses to answer questions by the commissions or does not wish to disclose relevant information, then the LRCs are provided power to take control over the case. The law provides that whenever the commission deem it necessary to carry out the work, the commissions may require the attendance or presentation of reports of the employer or the trade union or others concerned, or the commission may require the presentation of necessary books and documents, or it may also have its members of staff to inspect factories and other working places concerned or inspect the conditions of business, books and papers, and other objects.³²⁷ The LRCs in Japan rarely conduct an investigation prior to a hearing process because this will upset the consensus between labor and management. Instead, the LRCs will ask the party who possesses evidence to reveal during the hearing phase. The view by the commissions is that doubts will be resolved against the party who has relevant evidence yet denies revealing it at the hearings.³²⁸ Under the Japanese legal framework, the fact will come out at the hearings; then the greatest potential for settlement exists during and after the hearing.³²⁹ Actually, the LRCs in Japan rarely conduct investigation at the disputing area due to some additional reasons including the commission staff is a part-time official with prestige. This leads to infrequent investigation conducted on-the-spot by those LRCs. The fair judgment could not be made at the place of the dispute.³³⁰ Japanese case differs from the US case that investigation by the NLRB at the place of disputes is the rule and not the exception. The NLRB agents in the field are expected to ask questions and obtain information which provides more accurate justification.

LRCs in Japan are located at either national level or local level. At the first stage, an unfair labor practice case must be dealt at the local level by prefectural LRCs. A second trial will be held before the central LRC in Tokyo. However, local LRCs seem to be more practical since the commissions can deal effectively with the unfair labor practice case for the commissions are more likely to get close to the disputing parties, and

³²⁷ TUL 1949, art.22

³²⁸ Gould, *supra* note 179, at.49

³²⁹ *Id.*

³³⁰ *Id.*

the local commissions provide more convenience to investigate the case as well as conduct a hearing process.³³¹ The LRCs act as a judge in the case of unfair labor practices. The union is obliged to supply further evidence to support their case before the LRCs. The roles of the LRCs and the NLRB in this case are quite different. The NLRB will be obliged to act actively in fact finding. In contrast, the parties especially the union is required to find supporting proof in Japan. Regarding this passive role of the LRCs in the fact finding, there was a recommendation by a Study Group on Labor-Management Relations Law in 1982 that the commissions should make the most of field investigations and that these studies should be conducted by staffers.³³²

While the NLRB plays an important role in an unfair labor practice case, the Labor Relations Commissions is in charge of this case under Japanese legal frameworks. The organization and procedures of these two organs are not alike. The reason for the differences was due to the fact that the TUL 1945 already established the LRCs, and then the unfair labor practice remedies were added under the jurisdiction of the amendment in 1949.³³³ The original functions of the LRCs in Japan were to be the compilation of statistics on labor disputes and investigations of conditions of labor, mediation, arbitration, and conciliation.³³⁴ Later on, the LRCs were allowed to deal with ULP cases as this principle was introduced in the TUL 1949.

Compared to dispute settlement of cases other than those of unfair labor practice, further mechanisms were set up to facilitate and to help disputing parties find solutions on their own at the very first stage. If voluntary agreements could not be reached, then a third party can act and decide on the cases. So far, these mechanisms are called Alternative Dispute Resolution (ADR) which include a in-house solution within the collective bargaining provisions, mediation by relevant authority, conciliation and last through the arbitration council. These mechanisms are constituted for the cases affecting workers right other than the rights of organization and bargaining. Since theses two rights have their own special natures; therefore, dealing with it through a special mechanism along with more effective enforcement mechanism is

³³¹ *Id.* at.45

³³² *Id.* at.49-50

³³³ Lo, *supra* note 304, at.122

³³⁴ Gould, *supra* note 179, at.27

appropriate. Within this regard, as long as an unfair labor practice is committed by an employer, this case will be solved through a special body. The LRCs are provided discretion in this matter.

However, a process of conciliation is used to settle labor disputes of every kind in order to encourage voluntary agreements rather than solution from third party. This means that the parties may handle their difference on their own initiative. In order to handle such a case, the LRCs might also provide verbal recommendation to the parties, and then negotiation can take place after this verbal recommendation. However, there is no negotiation is allowed after written recommendations. There is no such recommendation service within the scope of the NLRB in the US even during or after the hearing. Instead, the board tends to provide more acceptable agreements to the labor and management.³³⁵ This means that the LRCs in Japan tend to provide recommendations in order to encourage voluntary agreement between the parties while the NLRB tends to provide agreement rather than recommendations. However, according to the law there is no reason why the NLRB's rules could not provide for conciliation.³³⁶

With the involvement of the LRCs in dealing with such unfair labor practice, the commissions will assist facilitating harmony and compatibility in the workplace. Therefore, the presence of third parties in a labor case does provide more rooms to improve very healthy industrial relations.

Once an ULP case occurs, it will be directly brought to the LRCs. However, duplication between discretion of the LRCs and the court can be found since the parties can bring the case directly to both institutions.

The overlap of discretion duplication appears to be considerable. Due to the non-existence of a doctrine of exclusive jurisdiction to deal with unfair labor practice case for either local LRCs or the central LRCs, even unfair labor practice case as well as discipline or dismissals can go directly to the district courts. Japanese case is not like the case of the US that exclusive jurisdiction on the case of unfair labor practice is provided to the NRLB.³³⁷ The parties still could go to the court for cases related to an unfair labor practice due to

³³⁵ *Id.* at.53-54

³³⁶ *Id.* at.164

³³⁷ *Id.* at.45

belief toward the slowness of the administrative machinery as well as the fact of the same procedure is conducted at both the local and the central level.³³⁸ Therefore, there is no clear-cut boundary of jurisdiction of these two bodies in regard with unfair labor practices.

2.3.2 Effect of LRCs' Orders

After hearing a case, the LRCs will issue an order-for-relief in a written form and the copies will be delivered to the parties.³³⁹ The employer is allowed to file an action against the decision of the LRC within a limited period. Out of this set period, the employer is considered to abandon his or her right to appeal and agrees with this order and then this order will become finalized and binding.³⁴⁰ In case the employer opposes the decision of the LRCs, the commission should notify the district court with jurisdiction over the address of the employers to that effect.³⁴¹

Once there is a complaint against the decisions of the local LRCs, it will be brought to the central LRC in Tokyo. Actually, the process at the central level of the Commission is to reexamine or the second hearing as such process of hearing has already taken place before the local LRC.³⁴² The orders of the LRCs have an enforceable effect on the parties. Once the LRCs issue the orders and the period to file a complaint against the decision has elapsed, the offender must obey. If the offender disobeys, other party or the LRCs will appeal to the court for enforcement.

2.3.3 Appeal to Court and Remedies

There is an open debate among labor scholars regarding the role of the court in Japan in regard with unfair labor practice cases. Japanese case seems different from the case of the US where the case of unfair labor practice must be under the jurisdiction of the NRLB. In contrast, the cases of unfair labor practice can be brought to the LRCs or directly to the court in Japan. In this case, the court is not reluctant to decide the

³³⁸ *Id.* at.48

³³⁹ Japanese TUL, 1949, art.27-12 (3)

³⁴⁰ *Id.* art.27-13 (1)

³⁴¹ *Id.* art.27-13(2)

³⁴² Gould, *supra* note 179, at.52

cases. Moreover, the parties seem to have high regard toward the involvement of the court to deal with their case. This may be because the parties trust the court and the court perhaps act expeditiously than the administrative process.³⁴³ Therefore, the parties can bring an unfair labor practice case to either the LRCs or to the court directly for instance a case of dismissal.

Once a case is brought to the court, the court will issue a punitive order against the offender as a result of abusing its order to respect the LRC's decision. The court order includes fine or imprisonment or both. The amount of a fine and the term of imprisonment are clearly regulated in the TUL. This approach to articulate such remedies is different from the US case where exact amount of fine and term of imprisonment by the court is silent.

2.3.4 Characteristics of the LRCs and the Court

The original power of the LRCs encompassed to dealing with every type of labor dispute. Regarding certain prohibited acts of the employer, the LRCs had power to impose a punitive remedy on the offender (employer). The employer was fined or imprisoned where there was abuse of the rules set by the law. Later, the LRCs were entitled to deal with unfair labor practice case after such principle introduced in Japanese labor legislations in 1949. This amended law provided discretion to the LRCs to issue only administrative and other affirmative orders. Unless the offender disrespects the commission decisions without rational reasons, then the orders will be enforced through the court. In this case, only the court has power to issue punitive remedy on the offender if the LRC's decision is abused without any proper reasons.

The purpose of issuing administrative and other affirmative orders by the LRCs is to provide a chance to the offender to correct the *status quo* and to rebuild relationship in the workplaces. This purpose allows the LRCs to issue various appropriate remedies as well as affirmative action (posting notice at the plants) imposed on the parties in order to restore the situation. Accordingly, the nature of the LRCs is flexible. On the one hand, the LRCs will issue order in accordance with the real cases in order to correct the situation.

³⁴³ *Id.* at.47-48

On the other hand, the commissions have discretion to conduct conciliation to encourage parties to find a solution on their own initiative. As a result, this voluntary solution will produce effective workplace relations.

In contrast, there is no such flexible solution within a court proceeding. Only a fine or imprisonment will be issued to heal the situation. This punitive remedy by the court is to sanction the offender that denies the LRC's order without any reasons which this act interrupts smooth relations in the workplace. Due to this rigid nature of the court, the LRCs were set up to provide more flexible solutions to restore labor relations rather than concrete remedy through the court. The process by the LRCs will provide more chances for the parties to rethink about their relations.

In short, the punitive remedy of the court will not provide a chance for the offender to correct misconduct. Instead, it is allowed the offender chance to do so within the LRC's proceeding. Therefore, the LRCs serve as a channel to promote more mutual understanding between the parties rather than forced remedy by the court.

II. Legal and Practical Aspects toward the Right to Bargain in Cambodia

There is no provision protecting the right to bargain under the constitution of Cambodia 1993, which only has a provision regarding the right to organize. Though the protective provisions cannot be found through this supreme law, the commitment of the RGC toward this right can be illustrated through its ratification the ILO convention C.98 regarding the bargaining right.³⁴⁴ As a consequence of being a member of this convention, Cambodia has to produce further relevant labor policies to protect and promote this right including mechanisms to deal with the cases abusing such a right.

³⁴⁴ Cambodia become a member of the ILO Convention C.98 in 1999

The right to bargain collectively promotes democracy in the workplace through which workers can join in any decision affecting their working standards. The use of this right is through their representatives to conduct and conclude an agreement with their employer. Therefore, there are three main points here that the employer can commit to defeat collectivity. First, the employer can refuse to recognize legally-selected workers' representative for bargaining purpose. Second, the employer can abuse their obligation within the whole bargaining relation with workers' representative. Third, the employer can disrespect the effect of the existing collective agreements. These acts by the employer really affect the use of the collective rights especially the right to bargain collectively of workers that might constitute chaos in the labor relations. Accordingly, the law must pay particular attention toward these mentioned cases. The following section of this dissertation explores the legal protection within Cambodian context toward the mentioned rights.

1. Labor Legislation Framework

1.1 Labor Law 1997

The Labor Law 1997 provides some protective provisions of the right to bargain while such protection is absent in the constitution 1993. Within the framework of this law, some provisions regarding the right to bargain collectively are stipulated. However, current provisions in the labor law 1997 are not comprehensive toward the protection of the right to bargain.

In this law, provisions regarding collective bargaining agreement are incorporated in one chapter. Extracting from this chapter, the right to bargain collectively is indirectly protected. However, it is not as comprehensive as the protection of the right to organize.

In order to secure the right to bargain, the law requires the party from workers side to be legitimate bargaining representatives which includes trade union and shop steward.

Under the law, any collective bargaining agreement (CBA) made between the employer and union(s) has a longer period than that concluded by the employer with shop steward. The collective bargaining agreement

in the first case can be extended its total period to three years as maximum duration. However, the collective bargaining agreement in the second case is allowed to be concluded for only one year. This indicates that though the shop stewards has the same right to bargain on behalf of all workers in the workplace, the CBAs concluded by the shop stewards has no the same possibility for longer period.

1.2 Prakas 305/01

Prakas 305/01 is considered as a supplement legal instrument to Labor Law. Further aspects of legal protection toward the right to bargain are incorporated in this Prakas. The original purpose of this Prakas was to provide clearer determination of the bargaining representatives under multi-unionism which has been adopted in Cambodia. Due to the complexity stemming from existence of many unions in one enterprise, the government tempted to issue this Prakas to curb the situation as the outcomes of current union system. Many forms of the bargaining representatives can be found in this Prakas: 1/ the most representative union system; 2/ two or more unions can join together to find majority support as it becomes sole bargaining representative on behalf of all concerned workers; 3/ every union has the same right to suggest for bargaining with employer. As a consequence, the employer has the obligation to bargain in good faith with all of these three main types of bargaining representatives.

Actually, there were only two types of bargaining representatives determined within the provisions of the labor law 1997.³⁴⁵ This law provided only the method to determine bargaining representatives in the regime of multi-unionism. However, it does not provide further protective provisions toward the protection and promotion of the right to bargain collectively. By contrast, protective provisions of the right to bargain collectively were stated in the Prakas 305/01.

In order to protect all bargaining representatives, the employer is required to bargain in good faith toward every kind of bargaining representative. As stated in Prakas, once the existence of the most representative union is confirmed in the workplace or the enterprise, the employer has an obligation to bargain in good

³⁴⁵ Cambodian Labor Law, 1997, art. 277-1(b)

faith with this union.³⁴⁶ Besides this type of bargaining representative, the employer still bears this good faith obligation in bargaining relation with other types of bargaining representatives.

The employer has the obligation to bargain in good faith with a joint-bargaining union when it has majority support from workers in the concerned workplaces. According to the law, if there is no single union that holds a majority status so that two or more unions are allowed to combine together to seek for majority support, then becomes sole bargaining representative. When this alliance can get majority voice from workers of their employer at concerned workplace, then the employer has to bargaining in good faith with this alliance. In real practice, these two mentioned types of bargaining representatives do not dominate the workplace. Since the most representative union is hardly found for bargaining relations, a space is open for all unions to bind together. However, sense of cooperation of unions is hardly achieved within Cambodian industrial relations; therefore, these unions tend to stand on their own to represent their members for bargaining purpose. Accordingly, they do enjoy separate bargaining with the employer. This existence of multiple unions in one enterprise drives the legal provision toward determination of another bargaining representative. Finally, once there is a failure to have the two said bargaining representatives, the final choice is to allow all unions to act separately for its members' interests in bargaining relation with the employer. In order to respond to this legal determination of bargaining representative, the employer is obliged to bargain in good faith with all separate unions based on equal and fair treatment.

1.3 Draft of Trade Union Law (TUL) 2010

In order to lift-up the right to bargain collectively, a new attempt in the draft TUL 2010 does provide further protective provisions. Many new attempts of protection toward this mentioned right are regulated within this draft. A clarification on the bargaining representatives is made within this draft and the obligation toward bargaining representatives exists comprehensively.

³⁴⁶ Prakas 305/01, clause No.9

2. Unfair Labor Practice under the draft TUL 2010

There is a new noticeable development toward protection and promotion of the right to bargain collectively. Once the employer as well as unions abuses the obligation to bargain in good faith, the offenders will be convicted of committing an unfair labor practice. This type of protection does not exist in the current positive labor provisions.

In this regard, Cambodia already has protective provisions toward the right to organize. Certain acts by the employer are prohibited. Any abuse of such prohibited rule will be remedied through fine or imprisonment or both as stipulated under current labor legislations.

For the time being, Cambodia is moving towards a further step by changing term of use in current labor law. Instead of prohibited acts, certain acts by the employer are defined as unfair labor practices within the draft TUL 2010. Moreover, within this new approach, prohibited acts are expanded to those related to the right to bargain. This is another move forward by the government in intervening in the labor field.

2.1 Unfair Labor Practice of Employer

In order to protect and promote the right to bargain collectively, the current Prakas requires the employers and union to bargain in good faith. This obligation is also provided in the draft TUL 2010. However, the obligation to bargain is stipulated in more comprehensive way by providing wider elaboration of good faith and legal consequence of abusing this obligation by both parties.

The employer has to meet and convene upon the request from unions for bargaining purpose in regard with terms and conditions of employment. This obligation requires the employer to meet and consult with workers' representatives. This obligation also imposes the employer to provide further relevant information relating with the negotiation. However, as this obligation is defined in other jurisdictions, good faith in bargaining relation does not oblige the employer to agree with any suggested terms and conditions raised by unions. In this sense, the act of the employer to refuse agreeing on requested terms and conditions is not

improper when the parties in the bargaining have already put all efforts to reach the agreement. Failure to reach an agreement does not mean that bargaining process is conducted without good faith.

This draft of TUL requires the employer to respect the right to bargain of workers through their legitimate bargain representative. Abuse of this obligation to bargain with legitimate representative will be considered as an unfair labor practice act.

2.2 Unfair Labor Practice of Union

The application of the ULP principle in the US and the Philippines is similar for this principle is imposed on union's side as well. Within this regard, the explanation could not be found from the draft makers; therefore, the rational grounds in such proposal on unions are hardly explained. Within this regard, conducting a thorough study on why it is proposed to be imposed not only on the employer is needed. As in Japan as well as in South Korea, though this principle is found importance in protecting and promoting the right to organize as well as the right to bargain collectively, this principle is not imposed on unions. Instead, this principle is applied only on the employer. This fact leads to a consideration on such application in Cambodia. It leads more consideration on further research on such mentioned issue as it is not main focal point in this dissertation.

Experiences from the US show that this principle was designed to be imposed on the employer. The rational grounds for this application were due to attitude of the employer toward labor movement. In the US, unions and management have been more conflict-oriented. Furthermore, employers in the US have tended to defeat the labor movement rather than providing them a place to stand. This sort of behavior led to various kinds of discriminatory acts as well as acts hindering the right to organize and to bargain. In order to protect the right to bargain, the US government perceived this principle of unfair labor practice as a legal rule to respond to the employer's behavior in this regard. However, this principle was later proposed to be applied on unions as well. The legal grounds for such proposal were due to harsh attitude from unions toward management including that in bargaining relation. Since the enactment of the NRLA 1935, unions

became stronger and used further tactics to defeat the employers. As a result, this act affected peace industrial sector. So, the employers suggested stricter legal provisions to impose on improper acts by unions. Accordingly, the principle of unfair labor practice has been extended its application on unions.

In this regard, the questions can be raised for the case of Cambodia while this principle is also attempted to be imposed on unions. The current labor movement does produce critical obstruction in the workplaces so that this principle is proposed on them. This question is based on the laws of some countries where this principle is applied only the employer. As its original concept, this ULP principle is applied on the employer in order to build up equal relations in the workplace between the employers and unions. Afterward, the reason was due to harsh attitude from union interrupting business operations this principle then extends its application on unions as well.

3. Enforcement mechanism as a practical matter

Though Cambodia is on the way to adopt the principle of unfair labor practice, the nation seems unprepared and unclear on how to deal with this ULP case. Once there is no specific mechanism to deal with this ULP case, the current labor dispute mechanism is employed for analysis in this paper. Accordingly, there is no clear road map to apply this new principle.

3.1 Procedure for ULP cases in Cambodia

Experiences from other countries indicate that once unfair labor practice exists, such cases can be solved by a special body through separate procedure. The ULP case differs from other kinds of labor disputes which are settled through in-house dispute settlement, mediation, conciliation and arbitration as compulsory. The case of unfair labor practice will be brought directly to a special body without passing through further compulsory Alternative Disputes Resolution (ADR) procedures.

In Cambodia, the mechanism to deal with labor disputes varies due to different types of disputes.³⁴⁷ Within the current legal framework, individual and collective disputes are settled separately. The mechanisms to settle labor disputes appear in various steps in Cambodia including conciliation and arbitration before going to the court. The procedure at the conciliation and arbitration stages is free of charge and conducted by separate agents.³⁴⁸

If it is defined as an individual labor dispute, the parties in conflict will go to court for a solution. The way to solve the conflict depends on the party who seeks for a third person out of the court to help them solving the problems. The law says that before taking judicial action, a disputing party can ask for preliminary conciliation to the labor inspector in the area.³⁴⁹ However, this process is not compulsory like the case of collective labor dispute. The conciliator should conduct conciliation upon request from the parties based on relevant laws, regulations, collective agreements, or the individual contract. Within three weeks upon the receipt of the complaint, the labor inspector should conduct a hearing procedure. At the end of the conciliation, the labor inspector should make a report on the result of conciliation whether it is an agreement or non-conciliation with the signatures of the parties and the labor inspector. If the parties agree to the solution through the conciliation and sign to indicate their agreement, then the result of the conciliation at this stage will become an agreement between the parties and have legal effects and enforcement.³⁵⁰ In case conciliation fails, the interested parties can file a complaint within two months to the court.³⁵¹ Any complaint filed in a period longer than these two months will not be acceptable.

As a practical matter, the disputing parties in the individual disputes also choose conciliation stage for the solutions. Based on labor report of the Ministry of Labor 2004-2006 and of 2007,³⁵² there was 325

³⁴⁷ There are two types of labor disputes namely individual dispute and collective dispute. An individual dispute is one that arises between the employer and one or more workers or apprentices individually, and relates to the interpretation or enforcement of the terms of a labor contract or apprenticeship contract, or the provisions of a collective agreement as well as regulations or laws in effect (Article 300 of LL.1997). A collective dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peace (Art.302 of the LL.1997)

³⁴⁸ Cambodian Labor Law, 1997, art.316

³⁴⁹ Cambodian Labor Law, 1997, art.300-2

³⁵⁰ Cambodian Labor Law, 1997, art.301

³⁵¹ Cambodian Labor Law, 1997, art.301

³⁵² 2004-2006 Labor Report of the Ministry of Labor, Phnom Penh 23-24 January 2007, at.4-5. *See also* 2007 Labor Report of the Ministry of Labor, Phnom Penh 12-13 February 2008, at.4-5. *See also* Orn Pannha, 2009, at.61

individual labor cases filed with the labor inspection office. Among these 325 cases in 2004-2006, there were 159 were settled, 156 were unsolved and 10 were void. Within the year 2007, there are 61 individual cases in total with 37 cases are solved, 24 cases are unsolved and none of case is void. However, workers are not wise to bring cases to the court because the court is not so reliable. Furthermore, it is very costly and time-consuming at the court.

The transformation phenomenon from individual labor dispute to collective labor disputes could be avoided especially when the individual labor disputes of groups of workers. In this case, the individual dispute has potential toward collective labor dispute.³⁵³ Accordingly, the procedure to handle with collective dispute is applied for this case.

In case of a collective labor dispute, the parties are obliged to bring the problem to a third party to solve the problems. Under the Cambodian legal framework, collective labor disputes are required to be conciliated before going to the arbitration. Finally, the parties can end up in court action or use economic weapons upon the nature of the disputes whether the conflict is collective right or collective interest disputes. Conciliation is a compulsory mechanism to handle collective labor dispute. The law allows the parties to regulate dispute mechanisms in the collective bargaining agreement in fact. In the absence of such grievance settlement, the parties must file the case to the labor inspector of their province or municipality to conduct conciliation process.³⁵⁴ Upon the acknowledgment of the collective dispute, the Ministry of Labor must design a conciliator within forty eight hours to handle the case.³⁵⁵

If there is no agreement by the parties at conciliation stage, then the cases will be brought to arbitration. However, before conducting the process at arbitration, the concerned labor inspector has to report non-conciliated case to the Ministry of Labor. Within three days upon the receipt of the report, the ministry

³⁵³ Most of the cases, strikes or demonstration is general form once industrial disputes occur.

³⁵⁴ Cambodian Labor Law, 1997,art.303

³⁵⁵ Cambodian Labor Law, 1997, art.304

in charge should refer the case to the Arbitration Council, and the council has to act within three days following the receipt of the case.³⁵⁶

According to the law, the Arbitration Council has jurisdiction to handle with the collective labor disputes if conciliation fails. When such failure occurs, the collective labor disputes should be referred to any arbitration procedure regulated in the collective agreement; or to any other procedure agreed upon by disputing parties; or to the arbitration procedure provided by this law.³⁵⁷ In addition, the Arbitration Council is obliged to decide on collective labor disputes in accordance with article 309 of the Labor Law.³⁵⁸

The Arbitration Council has jurisdiction merely to examine on non-conciliation issues in the report and direct consequences stemming from these issues after the report is made.³⁵⁹ The arbitrators are provided power to decide on both collective right and interest disputes. The arbitration panel accomplishes its role on collective right disputes by interpretation and application of laws, regulations, contracts or collective bargaining agreements. For a case of collective interest disputes, the arbitration panel will make its decisions based on equity. The principle of fairness is employed during the arbitration procedure accordingly. Furthermore, to fully accomplish its task, the Council of Arbitration is authorized to investigate economic situation of enterprise. Moreover, it is also authorized to investigate social situation of workers in the dispute. This council has full power to request parties to supply further relevant information to the case. In order to analyze those documents, for some extent, the council can ask for assistance of experts. In order to professionally execute its roles, the Council of Arbitration is obliged to keep secret of all confidential information. All sessions of the AC should be held behind closed doors.³⁶⁰

The Arbitration Council was set up on tripartite basis to handle collective labor cases. Most of the cases brought to this institution are from the garment sector. There are also cases from other sectors including

³⁵⁶ Cambodian Labor Law, 1997, art.310

³⁵⁷ Cambodian Labor Law, 1997, art.309

³⁵⁸ Prakas 099/04, clause No.32

³⁵⁹ Cambodian Labor Law, 1997, art. 312-1 & Prakas 099/04, clause No.33

³⁶⁰ Cambodian Labor Law, 1997, art.312-2

those from tourism and construction ones. This Arbitration Council is considered as a transparent organ with high credibility and trust from the public especially from the parties in the disputes. The independence of the council can be observed from the fact that the arbitrators are selected from high qualified figures that are capable in labor field.³⁶¹ In addition, the composition of the Arbitration Council is selected yearly.³⁶² These arbitrators are representatives from government (Ministry of Labor), unions and employers' associations which are full members of the LAC.³⁶³ So, the arbitration panel of representative from these three groups serves as means to secure fairness for the parties.³⁶⁴ Furthermore, independence and impartiality of the Arbitration Council serves as special feature during the current weak judicial system that is well-known of corruption.

During an absence of the specialized labor court, this labor arbitration serves as a critical organ to provide settlement in labor field. This special characteristic of the council leads to an attempt considered by further stakeholders that this Arbitration Council should play as a model for judicial reform.³⁶⁵ Whether to agree or not on the solution within this stage is the decision of the disputing parties.³⁶⁶ A resolution by the conciliation will be considered as collective agreement and have legal binding effect if the parties do agree at this stage. The cases will be brought to arbitration if it cannot be conciliated. In this respect, the conciliator has an obligation to make a report on such non-conciliated outcome.³⁶⁷

In fact, the conciliation can be used at every step of alternative labor dispute mechanism. Though conciliation is failed at the conciliation stage, this conciliation can be also used within the arbitration

³⁶¹ Article 311 of the Cambodian Labor Law 1997 says that "Members of the Council of Arbitration shall be chosen from among magistrates, members of the Labor Advisory Committee, and generally from among prominent figures known for their moral qualities and their competence in economic and social matters. These persons..."

³⁶² Cambodian Labor Law, 1997, art.311

³⁶³ There are at least 15 arbitrators in accordance with the article 317 of the Labor Law. First tier is selected by the Ministry of Labor; the second tier is selected by the employers' association which is full member of LAC and the third tier is selected by union federation which is full member of LAC. (clause 3 of the Prakas 099/01)

³⁶⁴ Clause 12 of the Prakas 099/04 provides that the panel consists of three arbitrators. One is selected by the employer in the dispute, another one is selected by unions or group of workers in the dispute and the last one is selected by the agreement from the first two arbitrators. If there is no consent from these two arbitrators in selecting the third one, then the selection will be conducted through drawing.

³⁶⁵ Sibbel & Borrmann, *supra* note 151

³⁶⁶ Conciliation is needed in every stage of dispute settlement to encourage voluntary agreement between the parties which has effect rather than that made by any third party that disputing parties have to follow without their consents.

³⁶⁷ For more detail procedure to handle collective labor dispute, please refer to Section II of Chapter 12 of the Cambodian Labor Law 1997

process. If the parties happen to agree upon any terms of dispute, then it will become a subject matter of its final decisions.³⁶⁸ This kind of ADR is welcome at every step of dispute resolution mechanism for it helps preventing further serious interruption of business that affects every party. For instance, in a recent case, the conciliation conducted by the AC was partly successful. Among six non-conciliated disputing issues brought to the AC, five of these were withdrawn by unions after conciliation by the arbitration panel.³⁶⁹

3.2 Effect of the Arbitration Council's Awards

As is the nature of the ADR in Cambodia, the agreement will be bound to the parties until there is mutual agreement between them. If not, then the decision of each form of the ADR could not force the parties to obey. The decision of the Arbitration Council also holds this characteristic. Being one among other types of ADR, Labor Arbitration Council can only force the parties to respect its award only there is an agreement by disputing parties.³⁷⁰

The current legal provisions provide the ability of the parties to decide whether the awards of the Arbitration Council will be binding or not. This legal possibility serves as a condition leading to the decisions of this organ less powerful within the cases relating to the abuse of the right to organize and the right to bargain.

By its nature, the decisions of the council hold no absolute abiding effects. The council's decision will be binding to all concerned parties if they choose it to be so. However, the decision of the council cannot have any binding effect if the parties do express willingness for it not to be binding. Within this matter, the law clearly provides that the effects of AC will be binding upon the willingness of the parties. Though Arbitration Council is designed to deal with labor disputes in order to prevent industrial strife and to reduce work load at the court, this council cannot issue its decisions with absolute binding effects on the parties.

³⁶⁸ Prakas 099/04, clause No.30

³⁶⁹ AC case No.90/10, August 30, 2010. Available at: http://www.arbitrationcouncil.org/awards/A_9010_K.doc.pdf

³⁷⁰ The agreement by the parties to be bound by the AC award can exist in the Collective bargaining agreement, or during the process in the council.

In official data from July 1st to December 31, 2008, there were 78 cases in total brought to the Arbitration Council. Amongst those cases, there were 31 cases resolved without an arbitration award. There were 47 of cases in which an arbitration awards were issued, and there were only 5 of the cases in which the parties choose a bidding arbitral awards. Economic weapons are also used once decisions of the council are not accepted by the parties.³⁷¹

The law provides that the effects of final decisions of the Council of Arbitration should be implemented immediately when there is no appeal initiated by any disputing parties within eight calendar days.³⁷² If there is no any appeal by the parties toward the final decisions of the Arbitration Council, then decision of the council will become a collective agreement between the parties.³⁷³

Final decisions by the Arbitration Council will be reported to the Ministry of Labor. Upon the receipt of the final decision of the AC, the ministry should notify to the parties who in turn. Then, the parties have to express their willingness in accepting the decisions of the arbitration. Within eight calendar days, the parties should inform back to the Ministry of Labor by every kind of reliable method.³⁷⁴ The decision of the arbitration will be filed and registered as a collective agreement to be applied and bound on the concerned parties if there is no appeal within set days.³⁷⁵

Final decisions by the Arbitration Council without any appeal from the parties during set period will have the same effect as collective bargaining agreement made by the parties. However, its duration for implementation is for only one year if there is no other agreement made by the parties to replace this arbitral decision.³⁷⁶ The arbitral decision must be registered in accordance with the procedure used for

³⁷¹ The Arbitration Council, *Compilation of Arbitral Awards and Order*, Volume 11, July-December 2008 (Cases 82/08-159/08), Phnom Penh (1st ed., June 2010), at.ii. Available at: <http://www.arbitrationcouncil.org/Publication/CompilationofArbitralAwardsandDecisions/tabid/188/Default.aspx> (last visit: October 29, 2010)

³⁷² Cambodian Labor Law, 1997, art.313&314

³⁷³ Cambodian Labor Law, 1997, art.314-2

³⁷⁴ Cambodian Labor Law, 1997, art.313

³⁷⁵ Cambodian Labor Law, 1997, art.314

³⁷⁶ Prakas 099/04, clause No.43

collective bargaining agreements. In addition, the arbitral award will be extended beyond the first one-year term when there is no complaint by an interested party within three months.³⁷⁷

3.3 Appeal to Court and Remedies

Legally, the parties of the conflict have right to appeal the final decision of the Arbitration Council.³⁷⁸ This appeal refers to the process within the court proceeding. However, there is no specialized labor court to deal with this matter. For the time being, the ordinary court covers the labor case. In addition, the jurisdiction of the ordinary court on labor disputes is doubtful. It is doubtful on what the court will do in case of appeal resulted from disrespect of binding awards and non-binding awards. Whether or not the court will issue remedial or punitive order is unclear.

As already mentioned, there are two main types of labor disputes; individual dispute and collective dispute. Within the collective disputes, there are also two types including the collective right dispute and collective interest dispute. If a case falls within the collective right dispute, then the ordinary court has jurisdiction on this case. In contrast, if the case is a collective interest dispute, then it cannot be appealed to the court. Instead, the interested parties will employ economic weapons to reach their goals.

Within the jurisdiction of the court stated by the law, the labor court will have jurisdiction on merely individual labor disputes. The law provides that “Labor Court shall be created that have jurisdiction over the individual disputes occurring between workers and employers regarding the execution of the labor contract or the apprenticeship contract.”³⁷⁹ The language of this article can be interpreted as a collective labor dispute (collective right dispute) cannot be under the jurisdiction of this labor court.

However, another provision in the Labor Law expresses further that “Any labor dispute covered by Chapter XII of this law that could not be settled through conciliation can be brought before the Labor Court.”³⁸⁰

³⁷⁷ Prakas 099/04, clause No.44

³⁷⁸ Cambodian Labor Law, 1997, art.313

³⁷⁹ Cambodian Labor Law, 1997, art.387

³⁸⁰ Cambodian Labor Law, 1997, art.385

These two provisions are ambiguous. On one hand, one provision clearly expresses that collective labor disputes that cannot be solved through conciliation process will be brought to the court. On the other hand, another provision expressly indicates that only an individual labor dispute can be brought to labor court. This matter is still vague and it needs clarification to facilitate legal implementation.

III. Summary

Under the ILO Recommendation, collective bargaining should not be hampered by the absence of the rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules. Moreover, the ILO states that bodies and procedures for the settlement of labor disputes should be so conceived as to contribute to the promotion of collective bargaining.³⁸¹ In order to encourage harmonious development of collective bargaining and to avoid industrial disputes, the government should draw up formula to determine bargaining representative for the purpose of collective bargaining. When the legal provision is not clear this would hamper the two core rights namely the right to organize and the right to bargain collectively. Cambodia has already clear system of bargaining representative, yet there is no enough legal protective provision to encourage collective bargaining.

Unfair labor practice has been found as a profound principle to deal with the right to organize and the right to bargain. Particularly, this principle is to lift-up equality in the labor relation between the employer and workers like in the case of Japan and the United States. The Japanese; however, has not adopted the same application of this principle even though this country has a model law from the US in this respect. Actually, the main purpose of the amendment of the TUL 1949 was to build up equality in labor relations between the two. In particularly, the bargaining relation is the main focus while both parties really stand on different position. Therefore, the aim of the ULP which adopted by Japan was to protect fundamental right of workers including the right to organize and the right to bargain collectively. In addition, this principle aims to command employer to recognize unions as equal bargaining partners, and to develop a collective

³⁸¹ C154 Collective Bargaining Convention (1981) ,art.5, please visit :<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C154>

bargaining relations. Finally, the aim of this principle is to normalize future labor relations which are important goal of the remedial system as well as the ULP principle.³⁸²

This principle of unfair labor practices was attempted in Cambodia which has employed the labor code of the Philippines as model law on such an issue. The application of this principle in the Philippines is quite the same to that in the US where the principle of unfair labor practice is applied on either the employer or unions. Accordingly, finding concrete reasons why the government attempts to apply it on both parties becomes interesting. The experience in the US indicated that the application of this principle on unions was due to harsh attitude of the unions in labor relations. Whether or not labor movement in Cambodia currently is strong enough to put pressure or interrupt smooth labor relations is questionable.

Moreover, the introduction of such principle in Cambodia is doubtful. Silence in the draft regarding certain subordinate elements of this principle leads to a conclusion that the government is not well prepared for this new approach in labor relations. There is no clear division between ULP case and other labor disputes indeed. In addition, the inability of competent authority to deal with a ULP case is a problem once such a case occurs then the question would rest on where to file it or how to apply current Labor Disputes Resolution (LDR) mechanism. Therefore, real attempt of the government toward such introduction is hardly figured out.

In short, there is no significant feature of the ULP in Cambodia besides the term ULP itself. This needs more works for all concerned parties to clarify the ground and significance of this principle.

³⁸² Kazuo, *supra* note 54, at.691

CHAPTER FIVE

Toward Better Protection of the Right to Bargain

I. Legal protection of the Right to Bargain collectively

The right to organize and the right to bargain share the same importance in promoting industrial peace. Particularly, these two rights play important roles in providing chances to workers toward an equal position in labor relations. However, these two rights have been unfairly protected and promoted under Cambodian legal framework.

Cambodia ratified the ILO Convention C87 and C98 in 1999 and this was after the promulgation of the supreme law in 1993. As such, the protection regarding the collective rights seems insufficient especially toward the right to bargain collectively. Along with the absence of legal provision toward the right to bargain collectively in the constitution, this right is again unfairly protected under the current labor law. Under this labor legal instrument, the right to organize is more protected than the right to bargain collectively.

Regarding the right to organize, the law prohibits certain acts by the employer which affect this right. However, it stays silent on the prohibited acts by the employer toward the right to bargain.

1. Insufficient Legal Protection toward the right to Bargain

1.1 Protection of the Right to Bargain in Cambodia

Starting from legal protection within the supreme law, there is no provision relating to the right to bargain. Article 36 only spells out protective provision toward the right to organize. This provision ensures every person the right to organize and to join these organizations on their own choosing. Compared to legal protections under the Japanese constitution, both rights to organize and to bargaining collectively are

protected. Article 28 of the Constitution stipulates that “The right of workers to organize and to bargain and act collectively is guaranteed.”

In Cambodia, accordingly, the different level of protection and promotion of the right to organize and the right to bargain can be found within the supreme law. Later, the right to bargain is further protected and promoted within the framework of Labor Law 1997. This law was considered as the very first labor legislation that guaranteed the right to organize and the right to bargain which were absent under labor legislations in the past.

Prior to the enactment of this law, workers could not legally act collectively in forming their professional groups. Until the existence of this law that workers as well as employers can enjoy their organization right. Furthermore, the right to bargain collectively is also stipulated within this law. Still, the approach of protection and promotion for these two rights can be found unfair. Under the Labor Law, the right to organize is clearly protected within Article 266. Workers and employers can use freely their right³⁸³ to organize professional groups to protect interests of its members.

In order to avoid influence from management, the law also expressly forbids any joint organization of workers and employers. Any organization that is formed jointly by unions and employers must be void.³⁸⁴ Further improper acts by the employers that hinder the right to organize are prohibited. It is provided for any acts taking membership or non-membership of workers in any unions as condition for offering job, promoting, work assignment and granting other benefits. Any dismissal based on union activities is illegal within the virtue of this labor law.³⁸⁵ Further acts of interference are also prohibited.³⁸⁶ In addition, the employer is prohibited to deduct union due from worker wages without their consent. Any offer from the employer to pay union fees on behalf of any workers is prohibited.³⁸⁷ In addition to these mentioned

³⁸³ Cambodian Labor Law, 1997, art. 266-4

³⁸⁴ Cambodian Labor Law, 1997, art.266-4. “For the purpose of this law, trade unions or associations that include both employers and workers are forbidden.”

³⁸⁵ Cambodian Labor Law, 1997, art.279

³⁸⁶ Cambodian Labor Law, 1997, art.280. It says that “...acts of interference are primarily measures tending to provoke the creation of workers organizations dominated by an employer or an employers’ organization, or the support of worker organizations by financial or other means, on purpose to place these organizations under the control of an employer or an employers’ organization.”

³⁸⁷ Cambodian Labor Law, 1997, art.281

prohibited acts applied on the employers, the law further designs punishments for those who violate these rules. In this respect, the law reads out that those who are guilty of violating article 268, 269 and 270 are liable to a fine of sixty-one to one hundred twenty days of the base daily wages.³⁸⁸

The important element in protecting and promoting the right to bargain collectively is based on the obligation to bargain in good faith by all concerned parties. As already discussed, this obligation is imposed on employer toward every type of bargaining representatives within Prakas 305/01. However, it mainly focuses on the obligation to bargain in good faith by the employer on the most representative union under draft TUL 2010.

1.2 Protection of the right to Bargain in the US and Japan

The notion of legal protection toward the right to bargain collectively can be found in other jurisdictions. In Japan, the legal attempt in protecting and promoting this right is especially clear in the constitution. Either the right to organize or the right to bargain collectively is strongly protected under this supreme law. In the US, fairly legal provisions toward the right to organize and the right to bargain collectively are also found in the NLRA through its principle of unfair labor practice. This principle is imposed on various acts abusing the right to organize and the right to bargain collectively.

Under the legal requirements of these two countries, the obligation to bargain in good faith is imposed on parties toward legitimate bargaining representative in accordance with its system. Once the case regarding the abuse of the right to bargain collectively occurs; especially breaching the obligation to bargain, then this case is treated as an unfair labor practice within the US and Japan legal context. In Cambodia, in addition to unfair legal protection toward these two core rights the law is also silence regarding special protection of these rights. There is no special principle to regulate further acts of abusing the right to organize and the right to bargain.

³⁸⁸ Cambodian Labor Law, 1997, art.379

Under this principle, further related cases will be solved under the jurisdiction of special body namely the NLRB or LRCs.

2. Analysis

As mentioned already that there are many types of legitimate bargaining representatives under the Cambodian legal framework. The most representative union is considered as the most attractive channel for bargaining purpose for it provides more convenience in bargaining relation. In addition to this channel, other types are also functioning in the workplaces within bargaining relations. The Cambodian case is not like the case of the US that there is only one union that is entitled the right to bargain collectively on behalf of all employees in the bargaining unit. In Cambodia, if there are no any unions holding the most representative status, then the right to bargain collectively is provided to other types including joint-union or multi-representative for bargaining purpose. Within this respect, the employer must bargain with those legitimate representatives in good faith.³⁸⁹

According to the legal provisions, the shop steward is also legitimate bargaining representative.³⁹⁰ The law seems silent toward the obligation to bargain in good faith toward this type of bargaining representative. Upon the provisions of the Prakas 305/01, the obligation to bargain in good faith is imposed on the employer toward every type bargaining representatives described in this Prakas. Based on thorough examination on this Prakas, there is no provision that requires the employer to bargain in good faith toward the shop steward. The nature of the labor law; however, is to protect and promote the rights and interests of workers. Therefore, though there is no provision on this matter in the Prakas, the right to bargain of the shop steward is protected already. So far, many collective bargaining agreements have been concluded by the shop stewards and the employer. However, it will be more appropriate to provide concrete protection toward this type of bargaining representative as long as it is legally recognized as one among other legitimate representatives.

³⁸⁹ Prakas 305/01, clauses No.9,10 &11

³⁹⁰ Cambodian Labor Law, 1997, art.96-2(b). A collective bargaining agreement can be made between the employer and the shop stewards who have been duly elected as in accordance with the law.

Looking back to the bargaining representative types and the obligation of good faith imposed on the employer in bargaining relations, it is worth for more studies due to some improper attempts from the government in this regard.

Demonstrating that the most representative union is the only type of bargaining representative in industrial relations is inappropriate for the case of Cambodia. Different types of bargaining representatives can be found in the Prakas 305/01. As already mentioned, workers are represented for bargaining purpose not only through the most representative union but also other types. Besides this most representative union, workers are represented by joint-union with majority voice or by multi-representative union once there is no most representative or joint-union representative. All these legitimate bargaining representatives are equally protected toward their right to bargain collectively. Under the Prakas, the employer is required to bargain in good faith with all these representatives case by case. Once any union holds the most representative status, this union will act as sole bargaining representative. In this case, the employer has the obligation to bargain in good faith with this union. If there is no union with majority support from workers in the concerned workplace, then two or more unions have a legal right to band together in order to find majority voice. If majority support exists in this case, then the employer must bargain in good faith with this union too. Finally, if there is no single most representative union or joint-most-representative union for bargaining purpose, then all unions or joint-union without a majority support will act as legitimate bargaining representatives for its own members. The employer then has to bargain in good faith with all of these bargaining representatives.

The approach to protect those legitimate representatives in bargaining relation in Prakas 305/01 is much more appropriate. However, it is still doubtful for the approach found in the draft of TUL 2010 that main focus of the protection is for the most representative union.

Within this draft, the employer should bargain with one or more unions as regards terms and conditions of employment for their own members. This obligation does not include fair treatment toward those bargaining representatives. Regarding this point, the neutrality principle imposed on an employer is found

in the case of Japan. Within the framework of multiple bargaining unions, the employer is obliged to apply a sense of neutrality toward those unions in bargaining relations. It is as unfair labor practice if the employer provides more favorable terms and conditions of employment to one union while he or she refuses the same terms to other unions. Without any proper reason, the employer is banned to provide such offers. However, this kind of principle is absent within the current legal framework as well as under the draft of TUL 2010.

The attempt to establish a trade union law indicates further provisions regarding the obligation to bargain in good faith within the bargaining relations. New provisions in the draft differ from those in the current positive legislations. In this draft 2010, the obligations of the parties in the bargaining relations are stipulated in more comprehensive way. The definition of good faith is in more concrete language along with the detail of the obligations of the parties including that of the employer and of the unions.

Though the clear aim and purpose³⁹¹ of the draft is stated it does not show high commitment by the government through its ambiguous approach in uplifting bargaining right of workers. This draft aims at providing the rights of workers and employers to establish and join professional organizations as the basis of harmonious industrial relations.³⁹² However, regarding the ways to protect and promote the right to bargain collectively, this new approach leaves some gaps for the parties to act without legal consequences. With respect to a bargaining right, the obligation of the employer is imposed by the legislation. However, the law does not stress this obligation of the employer to act in good faith toward other types of legitimate bargaining representative including joint-bargaining and multiple-bargaining unions. Instead, the law does emphasis the obligation of good faith by the employer in bargaining relation toward mainly the most representative. In this sense, the law seems providing imbalance treatment toward all kinds of bargaining representatives.

³⁹² Cambodian draft TUL 2010, art.1

Therefore, to provide equal and fair protection of the right to bargain collectively for all legitimate representatives, the law should extend its provisions toward those bargaining representatives.

The attempt to establish the TUL is a good move to protect and promote workplace relations in Cambodia. However, there are some deficiencies within this new approach.

Though the draft provides more comprehensive provisions through current labor legislations, this new legal instrument cannot absolutely correct the current situation. Some deficiencies expressed through failure in establishing or clarifying administrative supervision to deal with new approach of unfair labor practices. In addition, the absence of sanction provision toward those who violate unfair labor practice rules is one of the deficiencies.

Some questions could be asked whether the current existence of the Arbitration Council should deal with the ULP case and what should be the exact remedies in each stage of settlement (by the AC and the court).

Regarding the introduction of the concept of unfair labor practice, Cambodia is still vague in defining its significance with other labor disputes. In this sense, Cambodia should frame the concept of unfair labor practice and the concept of other labor disputes to facilitate smooth implementation. The mere introduction of new terminology of ULP is not enough to correct current industrial strife in Cambodia as well as to upgrade the right to bargain. First, there is no clear-cut concept between ULP cases under the new draft TUL and other kinds of labor disputes. Second, there is no separate mechanism in dealing with ULP cases once it happens. The new approach seems silent in this respect leads to an assumption that ULP case will be solved through the same procedure as other labor disputes.

Accordingly, the ULP is a mere new terminology while there is no any other significant feature to separate it from other disputes. Since notions of the ULP have been taken place already before the introduction of this term, there should be more significant criteria to separate it or it would have no specific feature but the terminology. Therefore, the question arises as to the purpose of introducing this new term.

From the experience in the US, this principle of unfair labor practice in bargaining relation was based on the fact that unions for some cases refused bargaining in good faith with the employer.³⁹³ This behavior occurred once the employers suggested or conducted bargaining with unions to find the way improving their business situation. Once the businesses were in tough situation, the employers wished to suggest for negotiation to discuss on current terms and conditions. In this sense, the unions resisted and acted in bad faith for the suggestion from the employers suffering the interests of employees. The reaction of unions toward in this case did make troubles for the operation of their business so that it needed for corrective measurement from the government. To finish this problem, unions were imposed by the law the obligation to bargain in good faith. As a result, the principle of unfair labor practice also applied to unions.

To some extent, unions in Cambodia use excessively their rights. However, as already mentioned, though labor movement in Cambodia is strong in its quantity; it is still weak in its quality especially their involvement in bargaining relation. The most concern by all stakeholders rests on the limited knowledge of union leaders that might lead them toward various errors in accomplishing their roles. However, further mistakes should be first corrected through education. Due to less education of these workers as well as unions, it could drive to further disruption in the labor relations. Though further education is a primary approach, it would help mastering labor knowledge for all concerned parties especially the workers. Therefore, the government should provide more opportunity for workers to absorb more relevant knowledge so that it could help reducing further interruption in the labor relations. Until workers are considered adequately educated then further measurement or rules should be introduced to control their acts. The experience in Cambodia indicates that workers or unions rarely refuse to negotiate with the employer for the bargaining purpose. Accordingly, the ULP which is now being introduced in Cambodia and attempts to be applied to unions should be under more examination and research.

3. Recommendations

The clear legal provisions should be incorporated due to very limited capacity of court personnel as well as academic opinions. In addition, the clear provisions help all concerned parties easily understanding the law.

³⁹³ Carrell & Heavrin, *supra* note 141, at.108

Therefore, the legal provisions must be clear in the law itself to avoid further interpretation that might undermine the original purposes of the law. The language of the law must be clear to facilitate its implementation effectively. In this sense, the law should provide clear protective language toward the right to bargain collectively especially toward further improper acts by employers which hinder this right. This thesis recommends the government to learn from current legal protection that the law provides to the right to organize. As such, certain acts committed by the employer must be prohibited by the law. Up to this point, this paper really welcomes a new approach in the draft TUL 2010 which prohibits some acts of employer toward bargaining relation.

Furthermore, there should be a more clear distinction between ULP case and other labor cases in order to make it more effectively settled by competent authorities. Without such a distinction, the differences between these two cases are hardly figured out.

This thesis also recommends for further legal imposition on obligation to bargain in good faith. This obligation should be imposed on employer toward every single type of bargaining representatives. Without rigid legal requirement, collective bargaining right will be impeded through various excuses by employers. Without such concrete requirement, it will serve as room for employer to escape from obligation to bargain in good faith with other kind of bargaining representative besides the MR union. This research really welcomes the approach of spreading wide meaning toward further concepts regarding the right to bargain collectively. The law should especially clarify the concept of obligation to bargain in good faith toward all legitimate bargaining representatives. More comprehensive language regarding the concept of bargaining in good faith can be found in this new approach. Furthermore, the obligation to bargain in good faith by interesting parties is spelt out in this draft. Any abstract language in the law is conceived as ill suited to Cambodian situation while the competent in interpreting further legal provisions is doubtful. Furthermore, ethics of relevant authorities is questionable. Therefore, spelling out clear and concrete language in the law rather than sparing space for further implications is strongly recommended.

In fact, legislations does not provide sufficient protection toward concerned right so long as there is no effective mechanism. The current labor dispute resolution system still provides limited positive outcomes due to some factors below.

II. Non specific and ineffective mechanisms dealing with ULP cases

The current labor dispute resolution system in Cambodia can provide relative satisfied outcomes especially toward prevention of industrial strife. However, it is hard to say that it provides better protection toward the right to organize and the right to bargain collectively through current mechanism.

As already mentioned, collective labor cases are referred to the Arbitration Council. Since the AC has jurisdiction only over the collective labor case, some doubts still remain regarding the protection of the right to organize of individuals. Once any abuse of the right to organize of individual happens, such an instance will be treated as an individual conflict. For example, when unfair dismissal committed by the employer due to union membership of worker, the act will be considered as an abuse the right to organize of individuals and it is an unfair labor practice case as regulated in the draft TUL 2010.

In accordance with the law, such individual cases cannot be brought before the AC. Instead, these cases will be settled through voluntary conciliation and finally will be brought to the Court as a last resort.

In addition, the decision of the AC has no absolute binding effects on the parties. The law allows the parties to choose if they wish to be bound or not by the AC award. Most of the cases reveal that the parties have chosen not to be bound to the decision of the AC. The extent to which the AC could help promote workplace relations is questionable.

Finally, the Labor Court will be used as a last resort in dealing with labor cases. During the absence of such specialized court, the ordinary court will act instead until the existence of the mentioned court. However,

since the jurisdiction of the court covers only on the individual cases, it leaves room for doubts regarding the right bargain of workers.

1. Analysis on the practical aspect in protecting the right to bargain

1.1 Jurisdiction of the Arbitration Council on ULP cases

Since there is no private dispute resolution system functioning in Cambodia, the role of the Arbitration Council is very crucial.

Though Cambodia is now on the way to adopt the principle of Unfair Labor Practice, its approach in dealing with this new problem varies from that in other countries where this principle is also applied.

There is no clear provision providing the AC jurisdiction on cases of unfair labor practice. As discussed already, unfair labor practices compose two types of labor disputes namely the individual and collective dispute. However, only the case dealing with discriminatory acts by the employer toward the use of the right to organize of each worker is considered as an unfair labor practice for individual labor cases. Unfair labor practice in collective dispute cases occurs within acts of discrimination by the employer affect the right to organize and the right to bargain collectively.

Due to absence of such principle of unfair labor practice under current positive legal provisions further related mechanisms are not defined accordingly. This principle was only introduced in recent year in the draft which is under discussion among all stakeholders. However, though this principle is attempted to be applied in Cambodia industrial relations, there are still some gaps regarding further crucial measure to deal with this principle. Provisions regarding the competent authority to deal with unfair labor practice case are silent in the draft. Though the AC would be provided jurisdiction to handle with an unfair labor practice case, there should be a clear provision by the law itself to reduce further interruption in implementing procedure to solve this unfair labor practice case.

The existence of a third party in dealing with labor cases is a crucial tool build up very healthy industrial relations. In this sense, the Arbitration Council plays an important role in building such relations and preventing peace as much as possible.

The Arbitration Council is provided power to deal with two types of issues of collective labor disputes. The first type of dispute deals with the issues which are specified in the non-conciliation report and the second one relates to the issues which are stemming from events occurring after the report that are direct consequences of the dispute.³⁹⁴ The Arbitration Council is designed to deal with collective dispute as the provided in the law.³⁹⁵ The jurisdiction of the AC on individual dispute of unfair labor practice is questionable. For instance, once the employer discriminates against any workers due to their membership in any unions is considered as an unfair labor practice. The discriminatory act indicates through unfair dismissal, promotion or demotion and so forth. There are many discriminatory cases by the employers brought to the Arbitration Council especially the acts of firing or dismissing unions leaders or union activists. As experience from other countries, once such a case occurs, it will be brought directly to competent authorities to handle. However, it is really ambiguous for such case in Cambodia.

The characteristics of the Arbitration Council in Cambodia differ from administrative process of the US and Japan. Once, the Labor Relations Commissions in Japan is entitled to deal with all steps of alternative dispute resolutions as well as unfair labor practice case, while the National Labor Relations Board in the US covers only on the issue of determining the exclusive representative union and dealing with unfair labor practice cases. For the AC in Cambodia, it deals only with collective dispute cases in labor field. Therefore, the administrative process in these three countries has different roles and functions. An ambiguousness of the introduction of the ULP principle still remains in Cambodian context.

For Japan, the LRCs were formed by previous law prior to the TUL 1949 and kept its roles and functions as the way it used to execute. The main change in the LRCs was the insertion of more labor issues under the

³⁹⁴ Cambodian Labor Law, 1997, art.312-2

³⁹⁵ Cambodian Labor Law, 1997, art.309-317

jurisdiction of this body. As a result, this body was entitled in dealing with the unfair labor practice cases as the TUL 1949 provided. However, the procedure to deal with ULP cases and other labor cases is different, though these cases are under the same jurisdiction of LRCs.³⁹⁶

For Cambodia, though there has been an attempt to introduce such unfair labor practice principle in labor field but coverage of the roles and functions of the AC still remains the same as provided under current labor law and Prakas 099/04. Within this regard, whether the AC will have jurisdiction on unfair labor practice case is ambiguous, especially the case dealing with the abuse of the right to organize of individuals. In this sense, the approach towards clearer legal provisions regarding the jurisdiction of the Arbitration Council in the cases of unfair labor practice is needed in order to avoid further excuse from any party regarding the power of the AC to deal with concerned cases. As the experience in Japan, after the adoption of the principle of unfair labor practice was finally applied, the existing LRCs still involve with the cases. However, the law of Japan does provide clearly its provisions toward the power of the LRCs on the cases of unfair labor practice. This experience should be learned by the government of Cambodia.

Cambodia is very poor in terms of its finance as well as human resources. Therefore, the attempt to create separate body to deal with unfair labor practice cases is not suitable. Instead, the law should add more subject matter of labor cases under the AC jurisdiction.

The current relevant cases of the right to organize and the right to bargain collectively are referred to the AC as the last resort within ADR process. However, making it much clearer by the law would be much better as it is so ambiguous for current legal provisions regarding the jurisdiction of the AC as well as the Labor Court. It is not good for Cambodia to leave space for legal implication. The reasons for this concern rest on the fact that lack of human resource in legal entities is very crucial factor leading the further interpretation beyond the expectation of its original meaning of the law *per se*. Therefore, the law must be clearer in order to avoid further risks.

³⁹⁶ Once there is an act of dispute, mediation, conciliation and arbitration will be in place under the jurisdiction of the LRCs. Yet, when ULP case occurs, mediation, conciliation and arbitration are not used in such latter case. Instead, the LRCs will conduct investigation, hearing, deliberation and then issue order.

1.2 Effect of the Arbitration Council's Awards

The nature of the Arbitration Council in Cambodia provides that awards will become abiding or not upon the choice of the parties.

Looking to the nature of the rights to organize and to bargain, these two rights are very important in sustaining industrial peace. Allowing the parties to decide on the effect of an AC award in this regard is not appropriate since the right to bargain collectively will become impeded or ineffectively protected. The law should provide better protections toward these two rights. In this respect, the awards should be binding by the law not by the option of the parties and to abuse the effect of the award will lead to further legal consequences.

There are some defects of the AC jurisdiction toward collective rights. So far, there have been some cases where the employers abuse the right to organize of individual workers as well as the labor organizations through further discriminatory acts. The cases were then brought to the Arbitration Council. However, the effects of the awards as mentioned already depended on the decision of the parties whether it was abiding or not. As many cases indicated, the employers denied implementing the decisions of the AC. Therefore, whether the right to organize and to bargain collectively can be effectively protected and promoted through such current dispute resolution system is questionable.

In order to protect and promote these two core rights, any decision by competent authorities should be binding without options from disputing parties. Orders of the NLRB and LRCs have a binding effect on the parties. This suggestion is based on the argument in which the law provides the possibility for the parties to choose whether the decision is binding or not and the process will prolong period of correcting the situation. As a result, the right to organize and the right to bargain collectively will increasingly be more hindered so that it could seriously affect the interests of workers if a solution on such issue is prolonged.

Once there is an appeal to the court regarding a non-binding award of the AC, the court will start the procedure over again. The decision from the AC then will be treated as information for the court to

re-examine and consider the case. This fact will produce a longer waiting period for interested party to have the case finally solved. However, if there is an appeal to empower binding award, then the court will take action in implementing the decision.³⁹⁷ Therefore, a binding award will shorten duration in solving this matter somehow. This binding award also could somehow create obligation for the parties toward the AC decision. Furthermore, the law should be firm on this matter since it affects the core collective rights which should not rest on the parties to choose. In this respect, the law should not provide parties power while these rights need special protection.

1.3 Jurisdiction of the Court in labor matter

Finally, the disputing parties will seek for the court as the last resort to settle a dispute. The Labor Law 1997 is a core legal instrument to shape labor relations and is a tool providing further necessary measurement to secure industrial peace. The right to organize of all parties in the labor relations is stipulated in this law. The right to bargain; though it is insufficient, is also protected under this legislation. In addition, further supplementary legal instruments have been enacted constantly to fill in gaps of existing legislations in this labor field. Within the matter of labor dispute, further aspects of settlement can be found out there.

While the individual labor dispute is voluntarily conciliated by a labor inspector before conducting judicial action; the collective labor dispute is compulsory conciliated followed by arbitration step before starting economic power or court proceeding. A specialized labor court will be established to respond to this need in labor field.³⁹⁸ However, this labor court has not been created up to now. Therefore, the ordinary court will act on labor issues during the absence of this labor court.³⁹⁹ A lack of political will serves as main factor barring the development of such an organ.

³⁹⁷ Prakas 099/04, clauses 40, 42, & 46

³⁹⁸ Cambodian Labor Law, 1997, art.387

³⁹⁹ Cambodian Labor Law, 1997, art.387-389

There are many reasons leading to ineffectiveness in dealing with labor cases. Weak law enforcement is one example why labor dispute settlement is ineffective added by the weak control of the application of the labor provisions by the labor inspector. In addition, labor inspectors are seen as under-trained and are known to be corrupted.⁴⁰⁰

In addition to the absence of this specialized labor court, the current provisions within the labor law on the discretion of such a court are ambiguous.

Once there is no acceptable solution by the Arbitration Council, the parties will go to court for further solutions; however, it depends on the nature of each labor case. If an individual labor dispute arises, then the interested party has full right to file the complaint to the court without compulsory conciliation process. If a collective right dispute arises, then the interested parties will bring the case to the court after passing through further process of settlement required by the law. If a collective interest dispute arises, the court has no power according to the provision in labor law. In order to pursue their demand, interested parties in this case will use economic weapon as final tool but to what extent they will succeed their goal through this resort is really questionable.

As long as the employer has reasonable grounds to refuse the requests of the unions, workers might waste their physical and financial power to pursue their aims through this method. Furthermore, if strikes are denounced as illegal, then workers may obtain nothing yet lose their incomes during the demonstration. Therefore, the strikes will provide less favorable solutions for workers. In order to correct the situation, workers should deal peacefully with the employers through collective bargaining process. In addition, workers should join together if there is no the MR union to represent all workers for bargaining purpose. However, the law should provide more effective legal provisions to control the bargaining process in order to ensure that workers can use this right effectively without any interruption from employers and to respond to the fact that workers reduce the approach of using economic weapons. Accordingly, the law should

⁴⁰⁰ Sibbel & Borrmann, *supra* note 151

impose further important requirements on employers. Since the employers variously excuses to avoid bargaining with unions, the law should provide stricter provisions to rule the employer.

Looking back to the point, it seems so ambiguous under current legal provision regarding the jurisdiction of the court on labor cases. The Labor Court will have jurisdiction over the individual disputes occurring between workers and employers regarding the execution of the labor contract or the apprenticeship contract.⁴⁰¹ However, the language of article 385 of the labor law provides that labor disputes in chapter XII will be covered by Labor Court if it could not be resolved by the conciliation. In addition, remedies provided in this article indicate clearly that the Labor Court will have jurisdiction on collective labor dispute as well. Besides ordering employer to reinstate workers and pay them a retroactive wage, the court can declare the results of a union election or the election of a shop steward. In addition, the court can order an employer to negotiate with a union.⁴⁰² These two articles provide a very confusing perception on the jurisdiction of the Labor Court. In this sense, clarification of the AC jurisdiction is needed.

1.4 Weakness of the Arbitration Council and the need of the Labor Court

The arbitration concept functions effectively in preventing industrial strife stemming from using economic weapons by workers. In the absence of the Labor Court, the AC plays really important roles in dealing with collective labor disputes.

However, there is still room to make the decisions of this body less effective. The reason rests on the fact that the nature of the Arbitration Council is open possibility for the parties to choose to be bound by the decisions of the council. For this reason, the parties tend to choose non-binding awards rather than binding ones.

⁴⁰¹ Cambodian Labor Law, 1997, art. 387

⁴⁰² Cambodian Labor Law, 1997, art. 385

A non-binding effect of the Arbitration Council is mostly chosen by the parties. Through year 2003 to 2008, there were only 35 AC awards with binding effect while there were 341 with non-binding effects.⁴⁰³ These figures indicate that though the arbitration council holds a high credibility in dealing with the labor cases, the parties still have limited trust in this body. As long as there is a high number of non-binding arbitral awards this means that the effect of arbitration council still has limitation.

Case No.22/04, *Raffles Hotel le Royal vs. Union of Raffles Hotel le Royal*, is an example indicates position of the parties to choose the decision of the Arbitration Council as non-binding award.⁴⁰⁴ Within this case, a discussion on the discretion of the AC to deal with non-conciliation issues and other related matters should be conducted. The main issue in this case was concerned with the abuse of the bargaining right of workers by the employer. The act of the employer in this case indicated an attempt to defeat unions.

The fact finding in this case can be summarized from the AC award dated on June 7, 2004. While the unions went on strike, the employer conducted an election for new shop steward and concluded a new collective bargaining agreement with the newly-elected shop steward. Actually, the employer already made a collective agreement with the union for a period of two years running through December 30, 2005.⁴⁰⁵

The employees of the Raffles (97 of 219) went on strike on April 5, 2004 and asked for the recommencement the collection of the service charge. Prior to the strike, the employees had arranged for minimum service already to fulfill the minimum service necessary for the hotel. Two or three days before going on strike, the employees wrote a note stating the attempted date of the strike on April 5, 2004 and posted it on the union's bulletin board at the back of the Raffles Hotel le Royal. On February 13, 2004, the employees informed the Ministry of Social Affairs and all of the Hotels about the strike. On April 19, 2004, the employer dismissed the 97 striking employees. During the strike, the employer selected new workers to

⁴⁰³ Chea Sophal, Does Cambodia Need a Specialized Labor Court Based on the Current Arbitration Council? 2009, at.9. Refer also to RFA, October 11, 2010, evening broadcast, available at: <http://www.rfa.org/khmer/>

⁴⁰⁴ *Raffles Hotel le Royal vs. Union of Raffles Hotel le Royal*, AC Case No.22/04, available at: http://www.arbitrationcouncil.org/awards/22.04-Le%20Royal_e.pdf

⁴⁰⁵ *Raffles Hotel Le Royal v. Union of Raffles Hotel Le Royal*, Case# 22/04 (2004). Please visit: www.arbitrationcouncil.org/awards/22.04-Le%20Royal_e.pdf

replace those terminated. This fact provided the employees to insist that the employer's act was to replace the strikers.

The employees claimed that the hotel selected new shop stewards and made another collective bargaining agreement with the shop stewards without the participation of the old union. However, the employer claimed that no new employees were recruited from April 5, 2004 up to now. Actually, there were certain trainees from educational institutions who were allowed to train at the hotel. The employer gave the actual number of the trainees and apprentices, and the exact length of time the training would take place without any documents in hand. However, a witness of the employer party claimed that he knew the employer actually replaced strikers with 20 employees from Siem Reap and a certain new number of workers during the strike.

On April 26, 2004, the Ministry of Labor met with both parties and asked the employer to recommence the collection of service charge. However, the employer refused to follow the ministry's recommendation. According to the hotel, the 97 employees were dismissed on the reason that they failed to return to work within 48 hours after the issuance of a verdict in an urgent situation (No. 16F of April 9, 2004) which declared that the strike on April 5, 2004 was illegal. The employer assessed that security forces was prepared to register those striking employees who wished to return to work within 48 hours, but only two of them registered. Thus, the employer decided to lay off the 97 employees and refused to reinstate them.

With respect to the election of the new shop stewards and the signing of the new collective bargaining agreement, the employer refused to consider this issue during the hearing process of the Arbitration Council based on the reason that the issue was not stated in the non-conciliation report dated on April 30 2004. Moreover, the employer did not prepare presenting the relevant documents of the new shop steward committed and the new collective bargaining agreement. In addition, the employer walked out of the hearing as the AC decided to consider this issue. A witness confirmed that seven or eight shop stewards were selected in April and May 2004.

The question arises as to what extent the council can help protect and promote the right to organize and the right to bargain collectively. As long as the effect of the arbitral award is dependent on the decision of the parties to choose to be bound, it will affect the function of these two rights. In this light, the AC award is just a dead letter and the right to bargain is still defeated by the employer. Finally, workers could only seek for justice in the court.

This thesis argues that these two rights will be ineffectively protected and promoted under the current AC presence due to nature of its award. The reason is that flexible arbitral award can open the way for the parties to decide. The right to organize and the right to bargaining collectively should be provided much better protection due to the important nature of these rights. Therefore, further disputes related to abuse the rights to organize and to bargain must achieve an effective resolution mechanism.

Even though the arbitral awards have a binding effect once the parties choose it to be so, there is still the possibility for any party to refuse this decision afterward. With such a problem, the other party can seek for the intervention from the court to recognize and implement the decisions of the Arbitration Council.⁴⁰⁶ Therefore, the function of the court in such an example is critically needed to empower the decisions of the council.

For the new approach of the unfair labor practice, it is unclear from the law if such a case will be under the jurisdiction of the court or the council. As discussed in the case of Japan that it is not clear regarding overlap jurisdiction on the case of unfair labor practice. In Japan, either unfair labor practice cases or discipline or dismissal cases can be directly referred to the court and these cases will be handled by a special labor bench.⁴⁰⁷ There is no absolute power provided to the LRCs to deal with the unfair labor case. This legal approach is quite different from that in the US where the doctrine of exclusive jurisdiction on unfair labor practice case is provided to the NLRB. This doctrine was expressed by the Supreme Court that

⁴⁰⁶ Prakas 099/04, Clause No.46

⁴⁰⁷ Gould, *supra* note 179 at.45

“all unfair labor practices “arguably” protected or prohibited by sections 7 and 8 of the National Labor Relations Act are within the exclusive jurisdiction of the NLRB.”⁴⁰⁸

Within this regard, the exclusive jurisdiction of the AC to deal with the case of unfair labor practice cases is unclear. This absence of legal provisions leads to the legal possibility of the parties to bring the case either to the court directly or to the AC especially in case of right to organize of individuals.

There is the possibility for the party to bring the case directly to the court without passing through further alternative dispute resolution mechanism. It can be an individual dispute when the employer dismisses any workers on the ground of their membership in any unions. This constitutes an unfair labor practice act committed by the employer. However, an individual labor conflict is under the jurisdiction of the court under the current law. If the current law is interpreted in this way, there is wider scope of the Court jurisdiction dealing with labor case. This case appears to be similar with the case in Japan where the court covers various types of cases including individual contract of employment, an unfair labor practice case and dismissal cases. The court has the power to hear these types of labor cases. However, it is quite different from the approach applied in the US where only the NLRB that has exclusive jurisdiction on unfair labor practice case.

The settlement mechanisms of unfair labor practice case in Japan are workable at either the LRCs or the courts. The main reason that the parties decide going to the court is because they believe in its speediness in dealing with the case. The disputed parties seem to be annoyed by the same invoked procedures at both the local and central LCRs.⁴⁰⁹

In Cambodia, there is no clear-cut jurisdiction provided to each competent body. This unclear jurisdiction constitutes further doubts for skeptics toward the implementation of the new approach of unfair labor practice. In fact, if the law clearly provides that unfair labor practice cases could be brought either directly

⁴⁰⁸ *Id.*

⁴⁰⁹ Gould, *supra* note 179, at.48

to the court or to the AC, the AC would be better place for the parties to file the complaints. The reason is due to credibility of this body in dealing with labor cases with an appropriate period and provides more satisfied decisions, and the most important thing is due to the trust of the capacity and ethics of the arbitrators from the public as well as the parties in conflict. In contrast, the court has no such qualification for current circumstance due to its well-known corruption reputation and incapability in providing just decisions for the parties. Needless to say, there are further possibilities to file cases so that the AC would be a more favorable place for the parties to have their cases settled.

In short there is no well-articulated jurisdiction between the court and the AC toward the unfair labor practice cases in the laws.

The effect of the decisions of the Arbitration Council is similar to that of the NLRB and LRCs. Once it is decided by those authorities, it will be bound on the parties. In addition, it is the case for Cambodia when the parties consent to be bound by the awards of the AC. The difference rests on the case in which the parties agree not to be bound by the awards. This indicates a softness of this body in dealing with labor cases.

The dominant type awards for the AC decisions remain non-binding.⁴¹⁰ Within the current practice, once the employer tends to deny the decision of the authority, then unions or shop stewards who are illegally dismissed agree to accept further compensations paid by the employer. If such practice is allowed without further strong measurement on the employer, then the right to organize and the right to bargain will be hindered.

Another example can be found in the case of the *Raffle le Royal Hotel* where the employer denied the decision of the AC ordering the employer not to conclude the collective bargaining agreement with new shop steward committee. Once the employer decided not to obey, there was no alternative measure to upgrade the right to organize and the right to bargain collective in this case. The parties could only pursue

⁴¹⁰ Chea, *supra* note 403, at.9

the case into the court. However, the parties are reluctant to do so due to fame of the Court. The hesitation of the parties indicates weakness of the current legal remedy and labor dispute resolution mechanism during the absence of competent labor court. Furthermore, since there is no enforcement mechanism by a trustworthy or capable court as in other countries, then either the right to organize or the right to bargain collectively under current ADR system will be ineffective.

The effect of the AC awards on the parties and consequences stemming from any abuse from the parties towards the decisions are still questionable.

So far, when workers do not respect the decisions of the AC, they will go on strike. Once the strike is announced by the court as illegal then workers must be obliged to return to work within 48 hours.⁴¹¹ Therefore, this kind of court measure can prevent illegal conduct by workers once there is no suitable solution by the council. However, if there is an abuse the decision from the employer, then the law has no effective measure to put pressure on the employer.

Regarding the case of abusing the right to organize and the right to bargain collectively, there is no effective remedy incorporated in current labor legislation in Cambodia. Due to such legal absence, victimized workers have tended to accept compensation from the employer once they are illegally dismissed. However, the right to bargain cannot be compensated by payment. This indicates that the right to bargain is not highly protected under the current system. The way the parties can choose to be bound or not by the AC award encourages more room for such abuse on these two rights. The court will play crucial role in this case. However, a bad image by the disputed parties as well as the society of the court is really a big problem. In addition, to have an independent, capable, and trustful Labor Court is a very challenging task for Cambodia. Therefore, a suitable task is to make the current ADR system more effective.

⁴¹¹ Article 337 of the Cambodian Labor Law 1997 provides that “if the strike is declared illegal, the strikers must return to work within forty-eight hours from the time when this judgment is issued. A worker who, without valid reasons, fails to return to work by the end of this period is considered guilty of serious misconduct.”

The current labor dispute resolution has its limit effect in dealing with the cases though the existence of the AC reveal its relative successful in dealing with the cases. As already mentioned, the parties are allowed to choose not to be bound by the decision of the council. Whatever the decision by the AC is made, then it has no any effect on the parties. Therefore, this is a weak nature of the AC once its decision is seen as a dead letter by the parties especially by the employer. The effort to deal with the case and issue decisions ordering the parties to respect the content of existing collective bargaining agreement is nonsense.⁴¹² Therefore, the state of not compliance by one party in the conflict with the current CBA as well as AC award by the employer still remains. Accordingly, the existence of the AC in dealing with the labor cases cannot represent big success of current ADR in labor field. Workers are still the victimized party by the attitude of the employer. The right to organize and the right to bargain is still limited in terms of protection.

2. Recommendations

2.1 Need for clear jurisdiction on unfair labor practice cases

The purpose of the introduction of unfair labor practice principle within Cambodian industrial relations context is unclear. Though this principle shows a positive move by the government in dealing with the labor relations especially to protect and promote the right to organize and the right to bargain collectively, there should be concrete reasons by the relevant authority in such doing. Actually, the significance of this principle can be found through the establishment of very special body to handle with all aspects of unfair labor practice case which is so-called the National Labor Relations Board in the United States. However, this significance can only be found within the context of the NLRA. Within this legal framework, the doctrine of exclusive jurisdiction is provided to this NLRB in handling with unfair labor practice cases. Such exclusive jurisdiction doctrine; however, is hardly found in other countries where this principle of unfair labor practice is also applied in Japan.

In Japan, even though the principle of unfair labor practice was extracted from that of the US, the Japanese did not follow every aspect concerning the ULP. For instance, the doctrine of exclusive jurisdiction is not

⁴¹² AC case No.29/03 dated on February 02, 2004, Raffles Le Royal Hotel vs. Union of Raffles Le Royal

applied within Japanese labor relations. Instead of providing the exclusive jurisdiction to the LRCs in dealing with the ULP cases, the courts also can deal with ULP cases. Actually, the LRCs were legally set up by previous law in dealing with all labor cases. There was no specific body to exclusively handle the ULP cases though this principle was introduced in Japanese legal framework. Instead, Japan made use of the current institution by merely inserting more language to stress that this existing body will extend jurisdiction to ULP cases as well.

A thorough examination of the nature of unfair labor practices indicates that it closely relates to the right to organize and the right to bargain collectively. Therefore, the deficient legal provisions toward competent authorities to deal with the ULP cases mean that the core collective rights are narrowly protected. For the time being, Cambodia could not rely mainly on the court system. Instead, Cambodia should have other alternative to provide more effective dispute resolution mechanism in respect with the ULP cases. The jurisdiction of the Arbitration Council to deal with ULP cases should be considered for this purpose since there is no other body trustful to the public and interesting parties.

Experience from Japan in which the LRC extends its jurisdiction on the ULP cases should be a lesson for Cambodia. The ground for such suggestion is due to the fact that Cambodia is still poor in human as well as financial resource to set up other institution for special cases of ULP. Accordingly, the consideration to extend jurisdiction of the AC over the ULP cases should be a proper choice. Moreover, current effect of the AC award should be taken into consideration. If the parties are allowed to decide on their own to be bound or not by the AC awards, this leads to a weakening of the council to uphold the concerned rights. As a result, the right to bargain collectively will be impeded in some fashion. Therefore, either the right to organize or the right to bargain is still undermined even though there is such a council. This matter should be taken into particular caution.

Arbitration is believed to provide a very satisfied outcome for the parties due to its speediness and efficiency. Therefore, if an award is not binding then this non-binding award will contribute to crisis in labor relations since there will be no further proper solutions for concerned disputes. In this sense, a

decision of the AC likely becomes a dead letter or just a recommendation offered at previous settlement process (conciliation).⁴¹³ With the absence of specialized Labor Court, the AC plays very vital role in dealing with labor case. Hence, the AC weakness should be corrected to make it more effective institution to solve labor disputes.

2.2 Judicial reform

As already discussed, establishment of a competent Labor Court with a very good reputation in producing justice for the parties is very important. This requires government action in reforming judicial system to grasp trust from all parties and society as a whole.

For current circumstance in Cambodia, the current ADR namely the Arbitration Council cannot absolutely provide effective settlement for labor cases. Absence of a trustworthy and capable Labor Court produces hardship to implement further decisions issued by the AC. Once the party chose to be bound to the AC award but later on one party reverses his or her decision and denies obeying the decision, this will constitute critical circumstance. In this case, there is no other suitable measure to deal with such deadlock besides the approach to the court.

However, the reputation of the court is very well-known for being corrupted, incapable, time consuming, and costly. These reasons set rigid barriers for the party especially for the workers or unions to have their cases finally settled at this stage. The mentioned reputation of the court explains why it becomes a practical solution for workers or union leaders to decide not to have their case finally heard at the court. Instead, a dismissed employee decides to accept compensation paid by the employer and leave the workplace to find another one. In such circumstance, the right to bargain collectively is severely impeded since it could not be compensated through compensation. This situation requires a strong legal protection and effective mechanism to handle. Therefore, current situation impedes the core right of organization and the right to bargain collectively. Within this analysis, the right to organize and the right to bargain are not effectively

⁴¹³ Steven M. Auster Miller, *Alternative Dispute Resolution in Cambodia: A Textbook of Essential Concepts*, January 2010, at.149

upgraded, protected and solved through current labor dispute resolutions system. The main obstacles are based on the fact that the decision of the AC does not absolutely bind the parties and the absence of the competent labor court.⁴¹⁴

In sum, there are many deficiencies along with the attempt of the introduction of the principle of unfair labor practice within the Cambodian legal framework. The most important deficiency in such introduction occurs in the fact that the law does not provide clearly the jurisdiction of any institution to deal with the unfair labor practice case. Whether the case will be brought to the Arbitration council or somewhere else is ambiguous. A question arises once the case of unfair labor practice case that relates to discriminatory acts toward individual right to organize. Whether or not this mentioned case will be solved through the same procedure like other case of unfair labor practice is questionable. The current circumstance where an individual labor case will be dealt under the AC jurisdiction is doubtful and unclear. Instead, the court is the right place for such a case. However, bases on the experience of other countries that apply such principle of unfair labor practice, all aspects of unfair labor practice whether it is individual or collective case, will be handled through common competent authorities namely the LRCs or NLRB. The law should be clear on the jurisdictions of the AC and the court concerning the case of the unfair labor practices. For the current situation, the parties have two possible ways to have their ULP cases handled if this principle is finally adopted. The parties can bring it directly to the court or to the AC due to unclearness of the law regarding the unfair labor practice cases.

However, the current silence of the law provides opportunity for the parties to follow current system of labor dispute resolutions system. Accordingly, the introduction of a new ULP principle seems to exist of little but terminology.

In short, this thesis welcomes any attempt trying to protect and promote the right to organize as well as the right to bargain collectively. As already discussed, the approach to reach this goal can be found in a form of setting a principle of unfair labor practice which is adopted in other jurisdictions. Though the experiences

⁴¹⁴ As long as it is bound on disputing parties, then it will become collective bargaining agreement that the parties must obey.

of countries such as, this principle constitutes specific mechanism dealing with the cases. To some extent, this principle can constitute a speedy process in dealing with concerned cases. This principle was also attempted to be incorporated in Cambodia labor legislation namely the draft TUL 2010.

III. Suggestions for further studies

The ULP is only applied on the employer's side in Japan. This one-side application of this principle leaves more rooms toward further studies in order to understand the rationale behind such implication in Japan. Within this regard, understanding the reason why the ULP principle applied on either the employer or the union in Cambodia is worthy. Historically, in the US this ULP was imposed on the employer due to its harsh attitude toward the labor movement. Later, this ULP expanded its application on unions as well due to too much power of the unions that producing further troubles for businessmen. However, whether the current labor movement in Cambodia is strong enough to trouble business is doubtful.

The introduction of the ULP principle in Cambodia is doubtful because of unclear purpose of the government towards this principle. Though this principle was introduced in Cambodia, a particular procedure to deal with the ULP cases was not set up in the draft. The unclearness of such a particular procedure constitutes barriers to distinguish the ULP and other labor cases.

The approach in Japan also produces doubts within regard to its adoption of the ULP principle. The reason why Japan did not include the application of this principle on unions as well is questionable. The original attempt was to rebuild equity in labor relations especially within the bargaining relations. For the time being, the power of unions has been empowered constantly by the law. This power might lead to aggressive attitude of unions toward bargaining relations; for instance the refuse to negotiate with the employer on some issues and might cause trouble for the business.⁴¹⁵

⁴¹⁵ There is also an answer to this attitude of the unions. For the case of impasse, the law allows the employer to enter a unilateral decision without the agreement from unions. This case is also allowed in the case of the US. However, this sort of solution can be used only when the employer puts all effort in good faith to deal with union in bargaining relations. In the US, the employers are allowed to make unilateral decision before discussing with the union to avoid any urgent measures for their

Furthermore, type of remedies to correct the situation is doubtful within the Cambodian context. Within the current labor law, the remedies regarding the abuse of the right to organize are clearly provided. This remedial system is silent for the case of any abuse on the right to bargain collectively. The attempt to protect the right to bargain can be found only within the framework of the draft TUL 2010. Though this new attempt was to provide better protection and promotion of both rights, the provisions regarding the remedies were silent. There is neither a clear remedy set by the draft nor specific institution to issue the remedy even though there was an introduction of the ULP principle. In addition, the power of the court to issue its decision to handle the case within this draft is vague. There is absence in the draft in regard with remedies whether the offender is fined or imprisoned or both.

Without further penalty provisions incorporated clearly in the law, the right to bargain collectively is still fragile since there is no clear remedy imposed by the court. In this sense, there should be a rigid stand on whether the law should provide concrete provision or open room for the court to determine penalty. This will need more study to comprehend which approach is appropriate for Cambodia.

In the US, there is no clear provision toward remedies by the court regarding the case of ULP. In contrast, there is a clear provision toward this matter with Japanese TUL 1949. These are two main examples for Cambodia to study and apply where possible. Exploring further reasons behind each kind of that approach is worthy. Accordingly, Cambodia should learn which approach would be best suitable for labor industrial relations.

In short, the issue of how to set a punishment on those who violate the ULP rule must be on the table for further discussion. A new principle without measurement to deal with its consequences will mean nothing for such a new introduction of the ULP principle.

business which might suffer if it is needed for discussion with unions. Therefore, it is suitable for this case to discuss about its impact later on with unions.

CHAPTER SIX

Conclusions

After the civil wars, Cambodia began from point zero to become reintegrated into the global condition which was full of intensive competition. The change of a national policy from a planned market to free market paved a path-way toward gradual development. As a result of such a change, the flow of foreign direct investment (FDI) has been constantly increased in Cambodia resulting in a growing national economy. This circumstance created more jobs for low-educated people in particular through the blooming of the garment sector. Low-educated women accounted for around 85 per cent in garment sector. This sector has become a core pillar for whole national economy as well as whole social welfare because it provides thousands of jobs especially women.

Once more relations are created where more disputes are visible and occur inevitably especially those between management and workers. At its first stage of growth in this garment sector along with immaturity of parties in labor relations, most of collective disputes often ended up by strikes, demonstrations, and even violence.⁴¹⁶

In order to deal with industrial strife and to find out better means to keep industrial peace, the RGC has been working on vital labor policies. As such, the amendment of the existing Labor Law in 1992 was conducted with the successor Labor Law 1997. Furthermore, Cambodia has ratified the core ILO Conventions. Various supplemental legislations have been enacted to fulfill gaps in the existing labor law. Further legal provisions regarding the right to organize play important role and are considered as a positive incentive for workers to perform their rights and roles in industrial atmosphere. The existence of many unions can be found in the Cambodian workplaces. The bilateral trade agreement between the RGC and the US provides wider road for workers in using their rights in labor field. Working conditions in the garment industry have improved accordingly. In addition, the establishment of the Labor Arbitration Council

⁴¹⁶ Demand for Good Governance, Project Proposal Support to the Arbitration Council, November 20, 2008, at.10. Available at: <http://www.ajicl.org/AJICL2007/Sibbel%20article.pdf>

indicates a positive move of the government to secure industrial peace. Through this special body, collective labor disputes will be handled by a tripartite arbitration panel which is providing high trust to the parties during the absence of the specialized Labor Court. This organ has been producing confidentiality for all interested parties and this council was suggested to be a model for judicial reform.

Illiteracy among workers has become a factor leading to main problems in labor field. Most workers which are around 85 per cent are women are very low-educated. In this respect, healthy workplace relations must depend seriously on their representatives or their unions. Worker representatives and unions are strongly suggested to be aware of their roles to protect the interests of workers. Moreover, they are strongly recommended to value prosperity of the enterprises.

One of the most difficult factors toward smoother workplace relations is the existence of many unions in one workplace. This might be very advantageous to workers if those unions are working for real interests of workers; not for their own fame. Unity and solidarity among labors is very decisive element toward a strong labor movement. However, the weak characteristic of the Cambodian industrial relations is the non-existence of cooperation spirit of interesting parties in particular among labors. Division of collective strength will diminish worker position toward their employers. The existence of diverse unions also weakens ability of unions to represent collective interests.⁴¹⁷ The knowledge of the workers toward the importance of the cooperation in the workplace is still very limit. If unions understand clearly their roles in upgrading the working conditions, worker interests, and raising the economic status of the workers, industrial strife could be minimized. This awareness can be primarily achieved through more training to these concerned parties.

Regarding the means to secure industrial peace, the collective bargaining cannot be forgotten in this respect. Workers depend on a large extent on opportunity and ability to act collectively which includes the capacity to negotiate in order to uphold and defend their rights and interests. Among other ways to find peace in

⁴¹⁷ International Labor Office, Geneva, Trade union pluralism and proliferation in French-speaking Africa, 2010, at.2. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_143551.pdf (Last visit: October 19, 2010)

labor relations, collective bargaining does provide a peaceful relation between the parties that can keep a very sound relation in the workplaces. Flexible outcomes can be achieved within collective bargaining agreement. Furthermore, within the current modern industrial relations, the government should encourage parties to undertake negotiation since it can produce mutual understanding. In addition, the collective bargaining helps minimizing industrial strife. As such, the collective bargaining can assure very peaceful workplace relations once diverse interests can be comprised through mutual agreements. The activities of unions can be considered as a success so long as the interests of the members are improved. This success can be accomplished through the process of collective bargaining. Accordingly, further labor policies to upgrade this right are perceived as vital tools for the mentioned purpose.

The opportunity and ability to negotiate is rooted mainly in positive legal provisions. As discussed in this study, current legal provisions are not sufficient to provide proper protection especially toward the right to bargain. Current labor laws focus its attention mainly on the right to organize. Without the right to bargain collectively, the right to organize cannot effectively protect the interests of workers. This new attempt to introduce the UPL principle in labor relations does not provide any specific perception toward better protection and promotion of this right. The main deficiencies rest on the absence of provisions regarding clear distinction between the ULP case and other labor dispute. On the other hand, there is no clear-cut provision toward jurisdiction of the Arbitration Council on ULP case. Without clear-cut provisions regarding the AC jurisdiction will create complexity once this principle finally adopted. In addition, without an independent court with full ability in producing justice, the right to bargain collectively as well as other labor matters could not be solved effectively. However, the attempt to introduce ULP by the government is indicating positive move toward labor relations even though there are some deficiencies.

In summing up, on the one hand, current positive legislations are still weak and insufficient in protecting and promoting the right to bargain collectively in Cambodia. This weakness in the law leads to a consideration of stronger legal measurement to correct the situation. Stronger and clearer legal grounds in protecting further labor rights are very vital for industrial peace. Therefore, the law must be clear and sufficient to protect these rights. Furthermore, weaknesses in the relevant authorities should be corrected in

order to respond to the mentioned purpose. Moreover, a specialized Labor Court with high credibility should be established as soon as possible to provide much stronger mechanism in dealing with labor cases.

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