LEGAL PROVISIONS FOR THE SETTLEMENT OF INDUSTRIAL DISPUTES IN NEPAL

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ABSTRACT

The present article highlights the legal provisions for the settlement of industrial disputes in Nepal with a view that the concerned parties of industrial relations will be acquainted with the methods and procedure of dispute settlement and establishes industrial peace. Though the process and period of dispute settlement in different methods differ depending on the types of disputes, the dispute settlement mechanism starts from the negotiation between worker and management in individual dispute and between group of workers or trade union and management in collective disputes. However, both of disputes end at judiciary process. The article suggests for voluntarily resolution of disputes by *establishing mutual trust and understanding between the disputants before entering into the legal procedure for the permanent solution of disputes and makes the organisation free from industrial conflict and disagreement.*

Key Words: Adjudication, Arbitration, Collective bargaining, Collective dispute, Conciliation, Individual disputes.

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INTRODUCTION

As an inherent characteristic of groups, conflict cannot be eliminated, but effort can be made to manage it amicably and make it as a tool of adding substantial value to organisations. Effective management of conflict improves quality, reduces costs, upgrades leadership, stimulates brainstorming and teamwork and establishes new procedures for company operations (Mishra and Dhar, 2002). In many countries, the traditional dispute settlement approaches are being questioned and greater emphasis is being placed on labour-management cooperation. The dispute resolution process seeks to assist parties in the employment relationship to settle their disputes with minimum disruption of work.

Amicable settlement of industrial dispute is not a concern matter of workers and management but also the issue of government and society. Since delay and improper resolution of conflict might adversely affect to the profits, wages, production and supply of goods and services and overall peace of the country (Katuwal, 2011).

Non-Addressed Grievances Result into Disputes

Complaints, in general, are the grievances or dissatisfaction expressed by a worker or group of worker or unions in respect to the terms and conditions of employment, working conditions and decisions coming from the management. Monappa (1993: 148-149) called complaints as grievances and the procedure of complaint settlement as a means available to employees to express their dissatisfaction and for management, it is a means to keep a check on relevant diagnosis on organisational climate and maintain good labour-management relations. Submitted and heard grievances create a sense of satisfaction among the workers. Otherwise, it might lead to strike, declined production, increased labour turnover, absenteeism, accident, indiscipline, non-cooperation, carelessness, stiff attitudes towards management and other symptoms of unhealthy labour-management relations in the organisation.

Thus, as the improper handling of grievance or complaints of workers gradually converts into disputes, dispute settlement mechanism is essential to develop in every organisation to boost up the morale and satisfaction of employees and labour-management relations in the enterprises**.**

OBJECTIVE

The objective of this paper is to highlight the status of legal set up governing industrial relations in Nepal by redressing the individual and collective disputes.

METHODS

This paper is prepared based on the experience and the desk analysis of the Labour Act 1992(Nepal) along with the previous works of experts.

TYPES OF DISPUTES

From the perspective of dispute settlement, the governing Labour Act 1992 has classified the industrial conflicts (disputes) into two categories as follows:

(a) Individual Dispute (right dispute) (b) Collective Dispute (interest dispute)

The first category represents the rights disputes (Article 73) and the second represents interest disputes (Article 74). The written forms of claims or complaints submitted to the General Manager by one or more concerned workers regarding the matter concerned with employment and services falls within the category of rights disputes.

When grievances are submitted by a union, or by a large number of workers, it turns into collective disputes, also known as interest disputes. The interest dispute covers such written claims that have been submitted to the General Manager duly signed by at least 51 percent of the total workers/employees of the establishment. However, the individual disputes (right disputes) may still be said to be the interest disputes, if it is backed by more than 51 percent of the workers in the enterprise. Hence, collective disputes may be both interest disputes and right disputes.

APPROACHES TO DISPUTE SETTLEMENT

In application of various methods of dispute settlement, the Labour Act 1992 has followed the "Stepladder Legal Contract" approach rather than the Open Door Policy approach and Human Relations approach. In Stepladder Legal Contract approach, the issue, procedure, time and authority of settling disputes differ in different stages of the dispute settlement. In this

mechanism, the decisions of authority, in some cases, are mandatory to the disputants depending upon the cases specified in the Act.

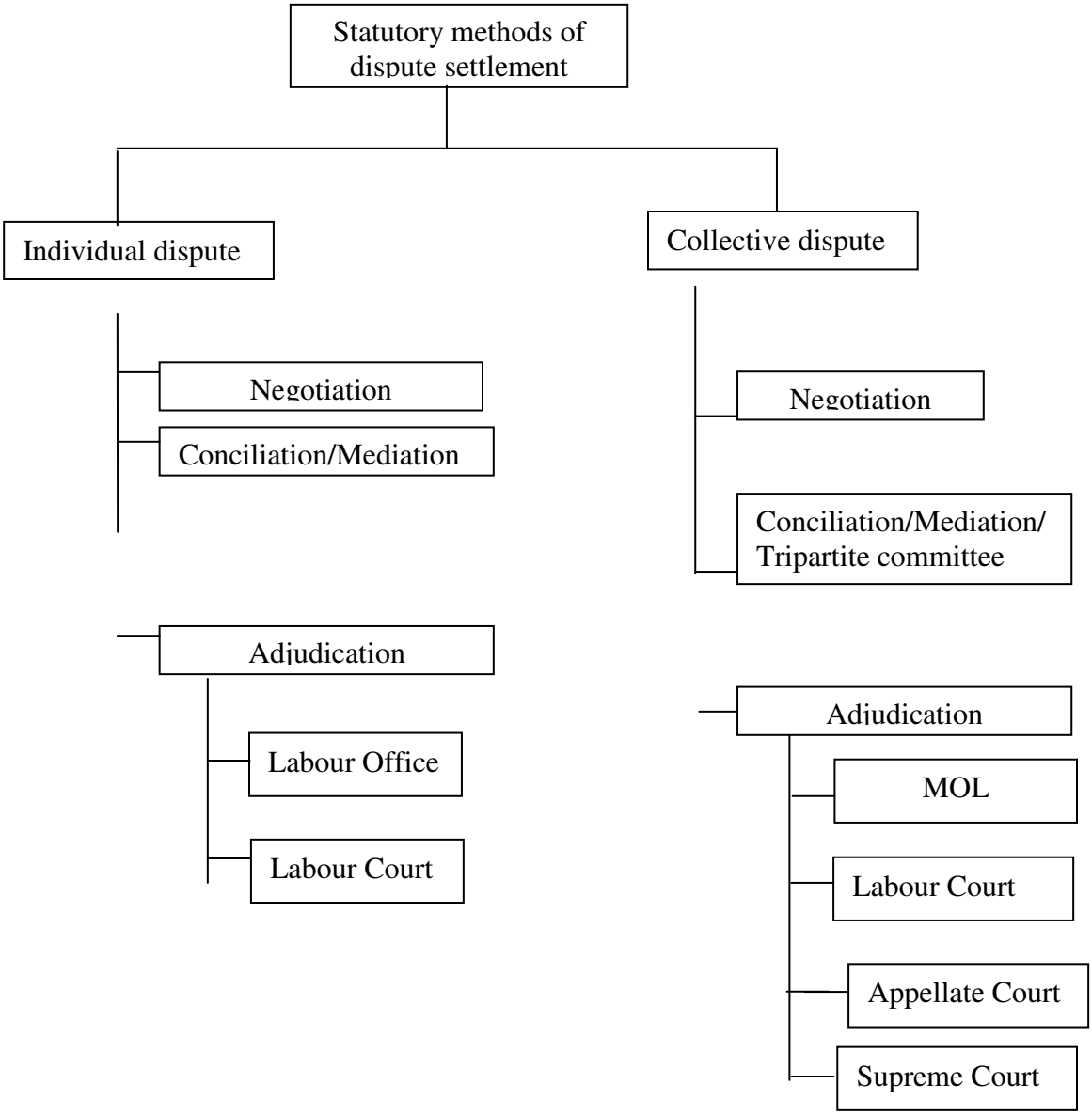
The Open Door Policy approach allows employee to go up to the maximum extent of the desired level of dispute settlement mechanism. The Human Relations approach is not conceived yet in the Act though it was ideal approaches of disputes settlement. Under "Human Relations" approach, complaints of employee are resolved not only by focusing on the problems raised by aggrieved person but also the point is made to resolve the problem by identifying the root causes of problem by focusing on the attitude of employees and implied causes of the complaints (Asdhir, 1994).

In absence of these last two approaches, there is a high chance of repeating the same problems and it is a common nature of the Nepalese industrial disputes that they seem to surface repeatedly even if they were once redressed. Similarly, the workers and employers call strike and lockout respectively without going through the process of dispute settlement.

METHODS AND PROCESS OF DISPUTE SETTLEMENT

In many developing countries, there is a growing concern that the industrial dispute settlement machinery has become too legalistic, expensive and slow. In this fast-changing workplace environment, new and innovative tools, techniques and approaches to negotiation and conflict resolution are now being studied, developed and applied. However, the dispute settlement mechanism, in most of the cases, has recognised the third-party intervention in Nepal by undermining the importance of collective bargaining process. In general, for the purpose of developing and maintaining peaceful industrial relations in the country, the Labour Act 1992 has conceived collective bargaining (negotiation), conciliation/ mediation, arbitration and adjudication as the methods and the process of dispute settlement for the individual and collective disputes. The Chart 1 shows the statutory mechanism of conflict resolution in Nepal.

Chart 1: Statutory methods for the settlement of industrial dispute in Nepal



COLLECTIVE BARGAINING (NEGOTIATION)

In the field of industrial relations, collective bargaing is a key means to improve wages and condition of work and for regulating employment relations (Fashoyin, 2010). It consists of the bipartite process of dispute settlement through negotiations, discussion and exchange of ideas to arrive at the agreed terms and conditions of employment and relationship between employers and

employee. It applies to all organised sector of employment. It is explained by ILO in 1996 as all negotiation which take place between an employer, a group of employers and one or more employers' organisation on the one hand and one or more workers' organisations for determining working conditions and terms of employment, regulating relations between employers and workers (as in Gernigon et al., 2000: 6).

As a process of industrial relations, collective bargaining is a base for workers' participation in decision-making. Though collective bargaining originates only after the some kind of interest conflict, it results in the fulfillment of common interest, sense of partnership between the actors, recognition of dignity and work, social justice and equity, commitment to work, organisation and industrial way of life and finally results in industrial peace and higher productivity in the enterprises (Rastogi, 1989: 46).

However, the success of collective bargaining in the industrial unit depends on the favourable policies and regulations of the state, equal bargaining strength and quality of bargaining power of actors, strong unity of actors, commitment of partners to the process of negotiation and growth of industry and employment.

In the past, bases for the effective and successful collective bargaining in Nepal were insufficient. The major problems of ineffective collective bargaining as pointed by Pant (1988: 6-7) were small size of employment, smaller enterprises, weak labour movement with meager resources, small size of trade union membership and inter-union rivalry and factionalism. Likewise, deep-rooted distrust and misunderstanding between labour and management, lack of consolidated forms of employers' organisation, absence of detailed statutory process of collective bargaining and lack of autonomy of the managers of the public sector enterprises in Nepal (ibid) were responsible for the failure of collective bargaining in Nepal. Similarly, lack of public appreciation, failure of government to provide necessary leadership in the area of industrial relations, absence of industrial relations policy, limited converge of the labour act, weak institutional base of actors, inappropriate attitudes of the employers towards workers and their unions' representative and industrial relations functions had also constrained the development of collective bargaining (Rastogi, 1989: 49). He further pointed out that low level

of income aspirations, commitment and unconsciousness of their worth, rights and strength of the workers were the factors causing low-level collective bargaining in Nepal.

At present, the Labour Act 1992 provides many opportunities for collective bargaining, but the structures to implement the necessary provisions are not in place. However, though there are no precise rules for collective bargaining, fast growing nature of employment and industries, democratic environment, freedom of association, changed outlook of workers and mangers toward each other and transformation of way of life from agriculturally oriented to industrially oriented have made collective bargaining process compatible in Nepal.

Meanwhile, the beauty of the governing Labour Act 1992 lies in minimising the intervention of third party in the arbitration of disputes between labour and management and to resolve the problem amicably. The inbuilt mechanism, of course, is collective bargaining.

According to provisions of the Labour Act 1992, the individual and collective claims submitted by the workers to management in written form are required to settle the individual and collective claims within the 15 and 21 days of the receipt of claims respectively through bilateral discussion and talk between aggrieved party and manager (Labour Act, 1992: 73.2 and 74.2).

Among various methods of dispute settlement, collective bargaining is a popular and most preferred one. The study made by Patil (1977) shows that direct negotiation is more preferred by employers (75 percent) than trade unions (69.8 percent). The study of Nair (1982) has identified the flexibility and broad-minded approach of management, unity of trade unions and the constructive role of the government in employment relationship as the factors contributing to harmonious industrial relations vis-à-vis the success of collective bargaining process at the plant and industry levels.

CONCILIATION/MEDIATION

Conciliation is an extension of the bargaining process in which the parties try to reconcile their differences. A third party acting as an intermediary – independent of the two parties and acting impartially – seeks to bring the disputants to a point where they can reach agreement. The

conciliator has no power of enforcement and does not actively take part in the settlement process but acts as a broker, bringing people together. The attitudes of parties have a significant bearing on the effectiveness of conciliation (Venkataratam, 2003). It is not unusual that they resort to dilatory tactics resulting in an endless chain of joint meetings and conciliation proceedings (Rao, 2001).

It is a process of settling disputes by holding bilateral discussion between warring sides in the presence of a third party. Though conciliation and mediation are interchangeably used, there is slight difference between these two terms. In conciliation, the role of conciliator is only to encourage and assist disputants to solve the dispute themselves through bilateral discussion and to come for their own solutions. In mediation, the third party suggests solution for the settlement of the disputes although of course the same is not binding on disputants. Conciliation may be both compulsory and voluntary in types.

Conciliation is another important method of the dispute settlement. Various studies have shown mixed result about the effectiveness of the conciliation in relations to the maintenance of amicable relations. Study of some institutions indicates that the conciliation machinery on an average is effective and satisfactory. However, Patil (op.cit) reported the functioning of the machinery is unsatisfactory in regional basis in India. Studies of Nagaraju (1981), Murthy et al. (1986) and Asdhir (1987) have concluded that conciliation machinery, overall, has failed to contribute in the sphere of industrial relations by lessening the strikes and by providing adequate machinery for dispute settlement.

In Nepal, the Labour Offices has to play the role of conciliator in both individual and collective dispute settlement process. The period of settling the dispute through conciliation process is different for individual and collective complaints. The Labour Act 1992, Section 73.4 states that the individual complaints, which have not been settled through the negotiation between workers and management, are required to settle in the Labour Office within the period of 7 days of the receipt of the claims of the employee/worker. However, the specified period is 15 days in the case of collective complaints (Section 74.3). In Nepal, the provision of conciliation has been made more specific and compulsory for the collective complaints. Conciliation is the most

necessary step before taking the direct industrial actions, like strike or lockouts and these direct actions are prohibited during the conciliation process (Section 76, 77 and 78). However, if the collective disputes was not settled within the limit of 15 days or, in case where an appeal is filed before the government and the government has not made decision within sixty days from the date of filing such appeal, the workers or employees may call strike by following the procedures specified in the section 73(7).

The terms and conditions agreed at the end of the conciliation process are binding on the parties for industrial disputes. There is a provision of renewing the agreement effective for two years from the date of agreement or to the date agreed in the agreement or two years from the date of registration of the agreement at the Labour Office. This provision makes it mandatory for the warring parties to register the agreement at the Labour Office. Similarly, the Act has also made a provision that no disputants could further put up demands pressing same issues as mentioned in the agreement before two- year's agreement expires (Section 79).

The importance of conciliation in industrial system cannot be overlooked. However, we require more explanation for the success of the machinery. The success of the dispute settlement through conciliation process depends on the attitudes and experience of disputants and other concerned persons. There are very few studies in Nepal regarding the evaluation of the conciliation process. The available studies have attempted to find out the factors that explain the failure of conciliation. Sharma (1978: 146-147) explains that conciliation failed in Nepal due to lack of experience and pro-labour stance of the conciliators.

Management complains that government conciliators often ignore their difficulties, offer maximum possible concession to workers to pacify them, negotiate with any labour-leader whosoever happens to submit the charter of demands and coerce the management into accepting worker's demands (Pant, 2044 B.S.: 43).

ARBITRATION

Arbitration refers to such process of dispute settlement in which a third party intervenes to decide the disputes. However, arbitration is not a preferred means of dispute settlement in Nepal.

It is considered only as an alternative means to conciliations. The Labour Act 1992, section 74.4 has envisioned that collective disputes may be referred to the arbitrator appointed by the mutual consent of disputants. If such arbitrator could not be appointed, the government is authorised to form a tripartite committee representing equal members of the government, labour and management. The committee or arbitrator is required to take decision within a period of 15 days after the complaints referred to the committee or arbitrator. However, there is no such provision of arbitrator for the settlement of individual complaints. The Chief of the concerned Labour Office should take decision on individual complaints within a period of 7 days if problem is not resolved through conciliation. Any party, which is not satisfied in the collective complaints with the decision of arbitrator, may file an appeal to the government within 35 days from the date of the decision. Similarly, the unsatisfied party in the individual complaints may file an appeal to the Labour Court within a period of 35 days from the date of the decision coming from the Labour Office.

Voluntary arbitration has been criticised on the ground of its poor performance. No previous studies have been conducted particularly on voluntary arbitration so far.

ADJUDICATION

Adjudication is the last resort of dispute settlement process. Any dispute, which is not settled by other different means of dispute settlement, is referred to adjudication. Adjudication has dug deep roots in the field of labour. However, collective bargaining caters to long-term peace and organised trade unions and established concerns prefer to bargain and amicably settle labour demands, failure to settle amicably often makes adjudication the preferred trial of strength (Shenoy, 2003:1). Dass (1974) commented that the parties in adjudication process found the judicial process extremely difficult to operate and judiciary in industrial disputes itself was finding it difficult to adjudicate in the complexities of problems and played a mediator role more than that of an adjudicator.

Court or tribunals take final decision on right disputes regardless of whether they are collective or of individual in nature. In true sense, there is a three tire of judicial system to deal with industrial dispute in Nepal. They are:

- Labour Court
- Appellate Court
- Supreme Court
- Special committee

LABOUR COURT

The Labour Act 1992, section 72 has the provision of the establishment of the Labour Court to settle dispute through judicial process at the primary level. Since 1996, Nepal has had a Labour Court to deal with industrial disputes. The court has two jurisdictions: original and appellate jurisdiction. Under original jurisdiction, it handles complaints like:

- The offenses for which a separate authority is not specified to try under the Labour Act Section 59.3,
- A dispute between the trade union and management or establishment on noncompliance of the contract effected between the two parties (Trade Union Act 1993: Section 22.2), and
- A case of misappropriation or embezzlement of the property of trade union by any of the incumbent (Trade Union Act 1993, Section 28.1).

In the status of appellate jurisdiction, the Labour Court discharges the following functions:

- Looks into decisions taken by the Labour Office on the issues of unduly curtailing salary or false allegations under section 26 of Labour Act,
- Looks into decisions taken by Labour Office, Labour Officer or management on the disciplinary action as mentioned in the chapter at of the Labour Act (Labour Act 1992: section 60.c),
- Looks into decisions taken by the Registrar under the Trade Union Act 1992, section 29.2, and

- Looks into the decisions taken by the Labour Office on the issue of bonus under Bonus Act (IV Amendment).

APPELLATE COURT

It is a second tire of ordinary judiciary system. It has the power to give decision on the following matter of industrial disputes:

- Order issued by HMG or Department of Labour about the matter of conduct and punishment (Labour Act 1992: section 60.a),
- The decision taken by the Labour Court under its original jurisdiction for conduct and punishment (ibid: 60.b),
- The decision taken by the Labour Court on the issue of trade union as the court of first instance (Trade Union Act 1992: section 29.1), and
- The decision taken by the Department of Labour under Bonus Act.

SUPREME COURT

This court has supreme power to hear with the appeal against the decision of Appellate and Labour Courts. It has extra-ordinary power to examine orders of government and Department of Labour and constitutionality of labour laws.

SPECIAL COMMITTEE

The section 83 of the Labour Act 1992 has provision for the formation of special committee to settle dispute through judicial process at primary level. According to this section of the Labour Act, government can constitute a special committee or tripartite committee consisting of the representatives of management, workers and government in order to rule out possible disputes between the management and workers or to settle outstanding disputes. It has judicatory power, which means its decision is binding on disputants.

CONCLUSION

As industrial dispute is the outcome of the differences between the employer and the employees or a body of employees (union) regarding the terms of employment or non-employment (i.e. conditions of labour), cooperation between them is essential for success of any firm. The maintenance and promotion of industrial peace is an essential requirement for harmonious industrial relations system. Accordingly, labour policy prescribes measures to secure and sustain cooperation by limiting the chances of conflict between management and union. However, in spite of such policies in favor of cooperation, the workers and employers are often found in conflict situations even in firms known for good labour-management relations.

Various methods of dispute settlement have been suggested ranging from negotiation to judicial settlement of dispute in Nepal. The successful resolution of industrial conflict depends on the measures adopted for the settlement of industrial disputes. The selection of an appropriate method of the dispute settlement, on the other hand, depends on the behaviour and choice of the parties involved in the industrial relations system. Many investigations have been made so far to know the appropriateness, preferences and limitations of the different methods of dispute settlement and the role to be played by different parties of industrial relations system for proper execution of the dispute settlement machineries.

Although the decisions of labour courts and judiciary tribunal have greater importance in the settlement of industrial disputes, the disputants dislike this method of solving dispute on the ground of its ambitious, expensive and time-consuming nature. It is also very difficult to get the benefits of this method of dispute settlement in the country like ours, where a large number of workers are poor, uneducated and are incoherently organised. They could not afford the fee of the lawyer, collect the necessary fact and evidence to support their argument and wait with patience for delayed decision of the court.

At the outset, it must be borne in mind that the role of dispute settlement mechanisms must be seen in the overall context of industrial relations. However, at the same time the mechanism should be efficient, accessible and capable to protect the interests of economic growth and social justice. In Nepal, any reform in the conciliation or labour adjudication system will be largely

cosmetic unless greater attention is paid towards developing a sound industrial relations framework at the national and enterprise levels.

POLICY RECOMMENDATIONS

In the situation where the trade unions ate heavily associated with political parties, and labour and management have no proper knowledge about the labour laws, it becomes difficult to go thorough procedure of adjudication. Thus, the following measures are suggested to make the dispute settlement mechanism practical and effective forever and thereby to promote and maintain harmonious industrial relations and peaceful environment in the country by meeting the aspirations and concerns of the workers, management and society:

- Voluntarily resolution of disputes should be encouraged because norms, which are established and agreed upon by the concerned parties, will be respected better than those norms imposed by third party.
- Negotiation or collective bargaining should be promoted to establish mutual trust and cooperation between antagonistic parties in the organisation and for the amicable settlement of disputes.
- The measures adopted by the state to reform the dispute resolution process should not restrict the development of collective bargaining.
- Moral persuasion through the mechanism of tripartite discussion should be used to stimulate appropriate behaviours/attitudes in dispute settlement.
- The scheme of workers' participation in management should be initiated as far as possible.
- There is a need for improvement of knowledge, skills and competency of conciliation officers to enable them to win the confidence of employers and workers.
- It is also necessary to upgrade the skills of labour adjudicators to enable them to perceive the change in their role as labour adjudicators and the impact of their decisions on the national economy.

- The induction training and periodical refresher courses should be provided to conciliation officers and labour adjudicators, on a regular basis to improve the efficiency and effectiveness.
- The labour adjudication should encourage pre-trial hearing to settle the disputes amicably between the parties without involving any time-consuming procedures of hearing.
- Conciliators and adjudicators should be well equipped with sufficient staff and support facilities, like office equipment, library, transport and communication should be provided to conciliators and adjudicators.
- Organisations and trade unions are suggested to focus on the establishment of works committee, discipline management and grievance handling procedure and voluntary cooperation and system of collective bargaining to prevent disputes in the place of work.

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