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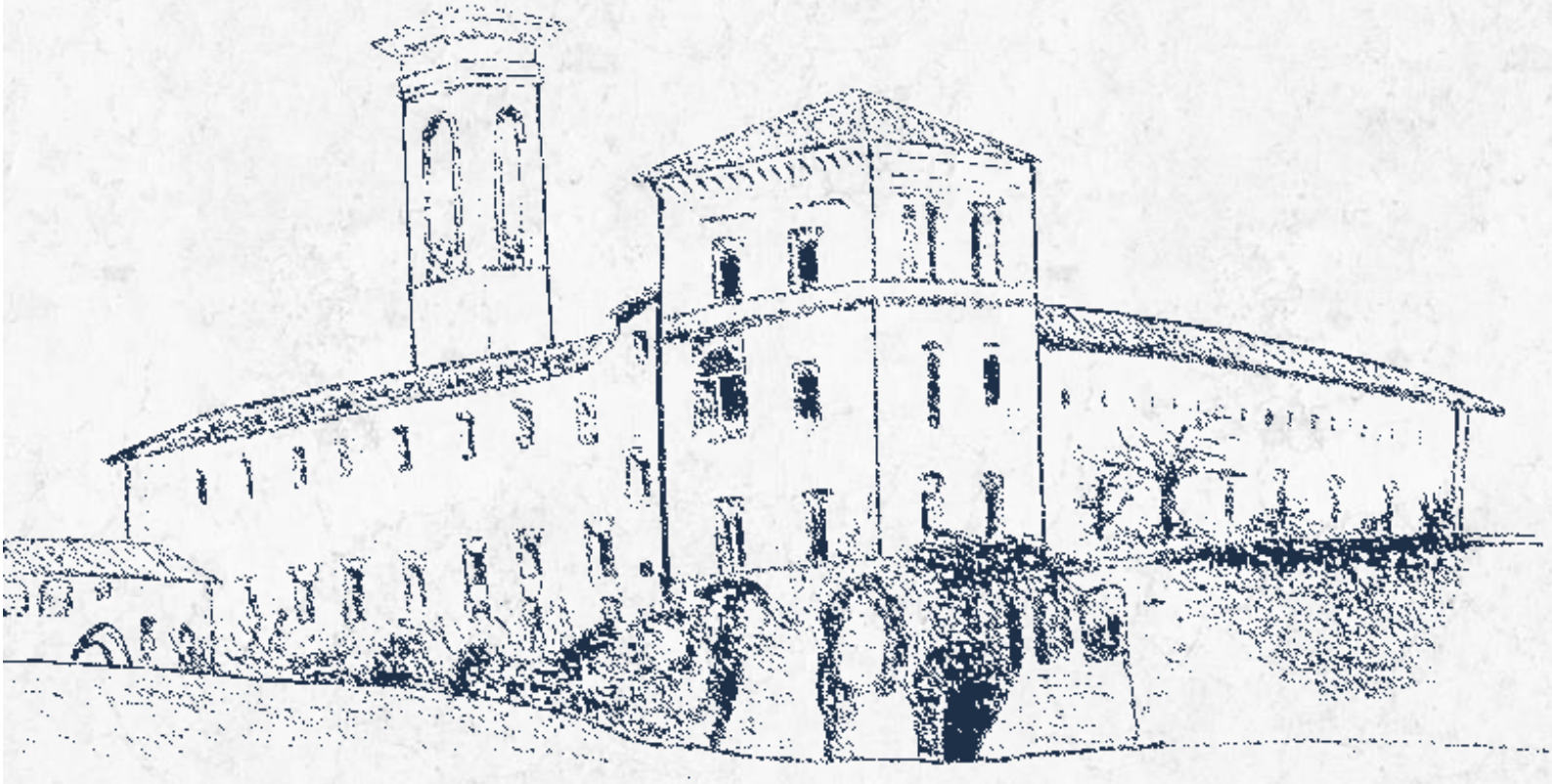

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Conciliation and Arbitration: Dispute Resolution Mechanisms in Bangladesh's Industry

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Abstract

Purpose. This paper examines the different mechanisms used in Bangladesh to solve employment disputes, e.g. conciliation and arbitration, which are devised to maintain peaceful relationships between employer and employee.

Design/methodology/approach. Research draws on legislation – i.e. the 2006, 2013, and 2015 versions of the Bangladesh Labour Act – and other documentation – e.g. conference papers and reports on Bangladesh.

Findings. Overall, the paper points to the successful incorporation of different dispute resolution mechanisms, yet singling out those sectors where the use of conciliation and arbitration should be given careful consideration to prevent possible negative consequences.

Research limitations/implications. The paper looks at the effectiveness of solving labour disputes through alternative settlement procedures prior to the involvement of national employment tribunals.

Originality/value. The originality of the paper lies in its practical approach, as it looks at Bangladesh's both legislation and reports.

Paper type. Research paper.

Keywords: *Industrial dispute, Settlement Mechanisms, Conciliation, Arbitration*

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1. Introduction

Industrial relations play a relevant role for actual economic development and might also have political and social consequences. Traditionally, industrial relations have been understood as bringing together the employer, employee representatives (e.g. trade unions and collective bargaining agents), workers and government representatives. Looking at statistics[2], every year a significant number of labour disputes take place in different industries, among which is Ready-Made Garments (RMG). Significantly, between 2008 and 2014 some 175 collective disputes involved this sector out of an average of 259 cases submitted before employment tribunals. Accordingly, seeking fair decisions is necessary to satisfy the parties. In Bangladesh, industrial disputes are governed by the Bangladesh Labour Act 2006 (hereafter: BLA 2006), which was subsequently amended by Bangladesh Labour Law 2013 (from here on: BLL 2013). This Act incorporated an elaborate framework regarding rules and procedures to settle disputes arising between different actors (e.g. employers, employers and employees and between employees) by resorting to different methods.

2. Industry, Industrial Dispute and Settlement: Some Definitional Aspects

According to BLA 2006[3], "industry" means any business, trade, manufacture, calling, occupation, service or employment. The concept scrutinised here was originally defined in *Bangalore Water Supply & Sewerage Board Vs. A. Rajappa*[4], a landmark case heard in India. Following the decision handed down by the courts, the "triple test" and "the dominant nature test" were established to define the notion of "industry". Specifically:

the Triple Test to decide the scope of the definition of "industry" considers the three criteria below:

(a) Systematic activity;
(b) Co-operation between employer and employee;
(c) Production and distribution of goods and services calculated to satisfy human wants and wishes.

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[2] Jakir Hossain, Afroza Akter, *State of Bangladesh Garment Sector tripartism and the scope of Harmonious Industrial and Labour Relations*, (2nd Edition: Bangladesh Institute of Labour Studies-BILS, December 2016), chap. 2, p. 11.
[3] *Bangladesh Labour Act 2006* s. 2(60).
[4] Air [1978] Sc. 548.

As for the Dominant Nature Test, it is concerned with the following:

- Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' […] the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur, will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status. This also applies to departments discharging sovereign functions, if there are units which are industries and they are substantially severable.

In reference to "industrial dispute", it means "any dispute or difference between employers and employers or between employers and workers or between workers and workers which is connected with the employment or non-employment or the terms of employment or the conditions of work of any person"[5], which is "raised by an employer or by a collective bargaining agent in an establishment and/or industry" [6].

3. Settlement Procedures

Settling industrial disputes is decisive to maintain peaceful industrial relations between management and labour. Against this backdrop, both employer and employee realize their mutual obligations and resort to actions that promote harmony and understanding. Such an approach will smooth the relationship between those concerned, improve product quality and benefit employees in both economic and non-economic terms.
BLA 2006 provides the following definition of settlement: "'settlement' means a settlement arrived at in the course of a conciliation proceeding, and includes an agreement between an employer and his worker arrived at otherwise than in the course of any conciliation proceedings, where such agreement is in writing, has been signed by the parties thee to and a copy thereof has been sent to the Director of Labour and the Conciliator"[7].

There are different methods to settle industrial disputes in Bangladesh, namely:

[5] *Bangladesh Labour Act 2006*, s. 2(62).
[6] *Bangladesh Labour Act 2006*, s. 201.
[7] *Bangladesh Labour Act 2006*, s. 2(60).

- *Negotiation between the Parties*: whenever any dispute arises, a request to enter into negotiations needs to be produced in writing by the employee or collective bargaining agent and submitted to the management. Subsequently, representatives from the management and collective bargaining agents convene to deal with the issues[8]. If the parties reach a settlement on the issues discussed, a memorandum of settlement shall be produced in writing and signed by both parties and a copy thereof shall be forwarded by the employer to the Government, the Director of Labour and the Conciliator[9].

- *Conciliation:* it is concerned with the involvement of a third party in the management of the industrial dispute in the attempt to solve the issues arising from those concerned. If the parties fail to arrange a meeting with other party or no settlement is reached within a period of one month from the date of the first meeting, then the dispute will be dealt with through conciliation. For this purpose, the government of the country appoints a conciliator[10] with expertise in the industry in question. On being approached by any of the parties in dispute, the conciliator will start the conciliation process within 10 days from the approach and arrange a meeting with the concerned parties. If both the parties find a solution, the concerned parties will sign a memorandum of settlement, informing the Ministry of Labour and Manpower about the outcome of conciliation.

- *Arbitration:* if no settlement has been reached or the parties do not agree under any conciliation proceedings, the dispute can be dealt with through arbitration. For this purpose, an arbitrator may be a person from the panel of arbitrators drawn up by the government or any other person agreed upon by the parties. The award issued by the arbitrator shall be final and shall be valid for a period not exceeding two years as may be fixed by the arbitrator[11].

- *Employee's right to strike:* BLA 2006 provides the worker with the right to strike, seen as a last resort for dispute settlement. One requisite for strikes to take place is that three-fourths[12] of collective bargaining agents consent to them

[8] *Bangladesh Labour Act 2006*, s. 210 (2).
[9] *Bangladesh Labour Act 2006*, s. 210 (3).
[10] *Bangladesh Labour Act 2006*, s. 210 (4).
[11] *Bangladesh Labour Act 2006*, s. 210 (17).
[12] *Bangladesh Labour Act 2013*, s. 211(1).

through a secret ballot purposely held. The government can end industrial actions that last more than 30 days[13].

- Employers' Right to Lock-out: The employer can opt for a lockout[14] – namely "the closing of a place of work or a part of such place, or the suspension of work therein, wholly or partly, by an employer, in connection with any industrial dispute or is intended for the purpose of compelling workers to accept certain terms and conditions of employment"[15] for not more than 30 days[16] as a result of an emergency situation.

- Alternative Ways to Prevent a Dispute: the employer can establish a "Participation Committee"[17] consisting of employers' and employees' representatives. Such committees shall be set up taking the following into account: 1) only companies employing at least 50 workers can establish participation committees; they should comprise an equal number of representatives of management and staff. Participation committees endeavour "to promote mutual trust and faith, understanding and co-operation between the employers and the workers"[18]. They can also provide advice on specific topics, with the employer and trade unions that should take necessary steps to follow these recommendations.

4 Comparing and Contrasting Conciliation, Arbitration Procedures and their Implications

As will be seen, arbitration and conciliation are dispute resolution mechanisms seeking to prevent a more formal and often confrontational route. In addition, rather than attributing responsibility, they can be seen as tools to rebuild an employment relationship that lasts in the future.
According to national legislation, they were established with the intention of promoting 'best practices', halting the rising number of employment disputes[19] and, by increasing the recourse to dispute settlement systems, to reduce the

[13] *Bangladesh Labour Act 2006*, s. 211 (3).
[14] A lock out is "an industrial action during which an employer withholds works, and denies employees access to the place of work. In effect, it is a strike by the management to compel a settlement to a labor dispute on terms favorable to the employer. http://www.businessdictionary.com/definition/lockout.html, last accessed 12 August 2018.
[15] *Bangladesh Labour Act 2006*, s. 2(57).
[16] *Ibid* 13.
[17] Bangladesh Labour Law 2006 and 2013, s. 205.
[18] 206 of the *Bangladesh Labour Law 2006 and 2013*.
[19] J. Griffith, '*After the Resolution*', 19th April 2007, www.peoplemanagement.co.uk.

burden on labour courts. Therefore, the attempt is to enhance tripartite dialogue between the government, employees and employers, all of whom are regarded as equal and independent actors. This system should ensure regular exchanges between the parties concerned, which can also include other stakeholders. Arbitration is a formal process used to resolve disputes during which both parties present their case to a neutral third party, who reaches a decision following the same procedures as court proceedings (witnesses can be called upon and evidence can be presented to argue the parties' respective cases). Arbitrators are not permitted to discuss the issues directly or to give any advice on the terms of settlement or on the negotiation with parties. The decision made by an arbitrator is then enforced and, legally speaking, has the same weights as a judgment handed down by a court. An arbitral award is final and binding and no appeal shall lie against it[20].

The Implications of Settlement Procedures in Bangladesh

Bipartite negotiation is followed by conciliation, which in Bangladesh is compulsory before resorting to industrial action. As a government-appointed person, the conciliator may put forward solutions that can help reach a deal between workers and management. Conciliators cannot impose their decision, as only the parties involved have the last say on the matter. In this sense, conciliation can be seen as an extension of direct bargaining and is effectively a process of assisted negotiation[21]. If conflicting parties want to have reasonable chance of settling industrial disputes by retaining the services of expert negotiators, an independent third party should be called in to reach a mutually acceptable agreement to resolve their dispute[22]. Yet sometimes conciliation has been an unsuccessful tool. In this sense, statistics considering the 1990-to-2004 period indicate that out of an average of 310 disputes taken up for conciliation annually, 22.48 percent were successful and 48.06 percent failed[23].

Looking at these figures, one may infer that conciliation is not effective as a dispute settlement tool, because the parties are prevented from reaching agreement. One reason for this state of affairs is that[24] the decision of the conciliator is not binding on the parties. Furthermore, employers benefit from connections with the government and the ruling party; the parties involved lack patience and mutual respect, because there exists little chance to hold

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[20] *Bangladesh Labour Act 2006* updated 2013, s. 210 (16).
[21] ILO, *Conciliation in Industrial Dispute: A Practical Guide*, Geneva, 1973, pp. 3-4.
[22] *Labour Dispute Resolution Systems: Guideline for Improved Performance*, ILO, 2013.
[23] A. Al Faruque, *Current Status and Evolution of Industrial Relations System in Bangladesh*, Cornell University ILR School, International Labour Organization, 2009.
[24] Ibid, 23.

conciliation officers accountable; employers are more willing to bypass conciliation procedures and to refer to labour courts directly. Again, statistics indicate that only a limited number of cases concerning industrial disputes have been taken up for conciliation, i.e. 403 cases/per year from 1990 to 2000; 74 cases/per year from 2001 to 2010; 246 cases/per year from 1990 to 2010. Conversely, from 1990 to 2010 labour courts and labour appellate tribunals heard 4,995 and 274 cases/per year, respectively[25]. The figures above indicate that the labour institutions promoting compliance with labour laws that are in charge of resolving labour disputes lack the necessary authority to provide workers with amicable solutions to grievances. As a result of this state of affairs, industrial disputes are going to put undue pressure on the labour judiciary who is tasked with settling them. According to the Bangladesh Institute of Labour Studies (BILS), a total of 181 industrial disputes took place in 2017, 91 of which were in the garment sector[26]. Statistics also tell us that there were 105 cases that were solved through state involvement in the 2016-2017 financial year,[27] though no other information is available. Yet a comparison of these data with other statistics leads one to infer that the number of cases provided above is of no consequence. Other forms of industrial action include strike, road blockades, demonstrations, sit-in protests and marches. Considering the 2006-to-2010 period, the most common forms of industrial action reported were sit-in protests and protest marches (96 percent) followed by work stoppages or strikes (89 percent), blockades (78 percent), petitions (32 percent) and damage to factories and other properties (31 percent)[28]. In 2017, a total of 68 demonstrations, 21 human chains, 18 strikes, 15 roadblocks and 12 gatherings took place[29]. Though there is no accurate statistic regarding the functions of and the recommendations made by participation committees, BLA 2006 established these bodies for inculcating and developing a sense of belonging among workers and employers operating in the company. In this sense, committees can be used as an effective tool to prevent industrial disputes.

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[25] J. Hossain, A. Akter; *State of Bangladesh Garment Sector tripartism and the scope of Harmonious Industrial and Labour Relations*, 2nd Edition: Bangladesh Institute of Labour Studies-BILS, December 2016, Ch. 2 p. 16.

[26] R. U. Mirdha, *Garment sector saw highest industrial disputes in 2017*, 02 May 2018, https://www.thedailystar.net/business/garment-sector-saw-highest-industrial-disputes-2017; [last accessed 10 July 2018].

[27] Annual Performance Agreement (APA), *Evolution Report, 2016-2017 for the financial division*, Ministry of Labour and Employment (Bangladesh), p.11.

[28] Ibid; *State of Bangladesh Garment Sector tripartism and the scope of Harmonious Industrial and Labour Relations*, p. 12.

[29] 26.

5. Implementation Challenges and Shortcomings

Negotiation, Conciliation and Arbitration

In consideration of the aim of the legislation referred to above, it is important that industrial relations actors adopt a positive attitude at the time of entering into negotiations, with both parties that should strive to make unbiased decisions and find peaceful solutions. In other words, the long-run interests of both workers and management should be sought. To this end, collective bargaining could be an effective tool to help workers – who frequently lack expertise or financial resources – to understand the most viable option in negotiations with their employers. Talks between representatives of management and workers take place to settle diverging views, yet a number of problems could arise. Firstly, a chief negotiator from the management side directs and presides over the process, with negotiations that can be affected by biased views. Sometimes, negotiations fail to produce fair outcomes when the parties in dispute lack equal bargaining power, for example, third party or conciliation intervention may be sought by the stronger party, i.e. the employer[30]. Secondly, when the chief negotiator or the conciliator asks the representative of both parties to present their views, the presumption is that the parties to the employment relationship are equal and capable of participating in the production of individual solutions[31]. Yet when representatives of each party present their case, they are focused on the arguments made by the opposing party and what reasons they should put forward to question the other party's claims. Rather, the aim should be to strike a balance between the interests of all those concerned. Thirdly, collective bargaining might be seen as a tool to harmonise the interests of groups who might mutually benefit from working together. It includes informal talks that take place on a regular basis. The feedback from third parties can also be used as a legal basis which might influence and be binding for the parties.

Strike

The reason of the worker's interest being latent is that workers keep their grievances suppressed since they understand that expression to them might lead to abuse by mid-management or even job-loss[32] (Hossain, 2012). In some

[30] Cheryl Dolder, The Contribution of Mediation to Workplace Justice, (2004), *Industrial Law Journal* 4, 33.
[31] This is the presumption laid down in the constitution of Bangladesh and BLA 2006.
[32] Ibid; *State of Bangladesh Garment Sector tripartism and the scope of Harmonious Industrial and Labour Relations*; p. 13.

research (Hossain, 2012), workers indicated the fear of losing their jobs as the main reason preventing them to engage in collective action.

6. Conclusion

According to Zack (1997:95), alternative dispute resolution (ADR) offers a means of bringing workplace justice to more people, at lower cost and with greater speed than conventional government channels. It also helps to clear the backlog of cases at statutory dispute resolution institutes and is thus assisting government agencies to meet their societal responsibilities more effectively. Therefore, conciliation or arbitration is seen as a fast, cheap and effective way to resolve disputes. Looking at Bangladesh's current legislation, it can be argued that BLA 2006 and BLL 2013 are fairly effective tools to manage and settle disputes. Nevertheless, as things stand now (see APA[33]) it will be difficult to distinguish between different dispute settlement mechanisms. In addition, workers are not aware of their rights, they do not know that they can appoint a collective bargaining agent whose duty is to make their voice heard in industrial disputes. Therefore, it is important that trade unions promote raise-awareness initiatives to make employees aware of their rights and to increase the recourse to conciliation. For the purpose of boosting conciliation, the ILO has put forward the Social Dialogue and Industrial Relations Project, which has been funded by Sweden and Denmark. Working with Bangladesh's Department of Labour, the aim is to boost conciliation capacity because conciliation services play an important role in helping resolve disputes in the workplace and creating harmonious industrial relations[34]. Some 30 labour officials have been trained and coached on the techniques and approaches of conciliation at the ILO International Training Centre (ITC). They will put these skills into practice to settle labour disputes and contribute to improved industrial relations. According to APA[35], Bangladesh's Ministry of Labour and Employment has trained a total of 12,939 persons so far, yet this report does not refer to the number of those receiving specific training on conciliation. Preparing more people to settle labour disputes and contribute to improving labour relations is thus fundamental. As no reference is made whatsoever to the arbitrator and settlement procedures, it is suggested that the Arbitration Act 2010 is taken as

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[33] Annual Performance Agreement (APA), *Evolution Report, 2016-2017 for the financial division*, Ministry of Labour and Employment (Bangladesh).

[34] *Tripartism and social dialogue in Bangladesh; Building better industrial relations through conciliation*; Feature | Dhaka | 16 May 2018; http://www.ilo.org/dhaka/Informationresources/Publicinformation/features/WCMS_629551/lang--en/index.htm [Last accessed 1 August 2018].

[35] *Ibid.* 33, p. 7.

a starting point, which is being used successfully in Bangladesh. One should also remember that industrial disputes can cause irreparable loss to the country's economy, significantly affecting growth and having negative effects on both workers and employers.

To conclude, alternative dispute resolution mechanisms have been using in Bangladesh since 2006 and represent an effective tool to deal with industrial conflict. Besides proper legislation, it is important that all those concerned are willing to solve disputes peacefully, saving time and financial resources. In this sense, one thing that could be done to ensure compliance with settlement agreements is to increase the amount of the fines – which is currently at 10,000[36] TK – to be awarded should arrangements be infringed. Most stakeholders in Bangladesh are in favour of these alternative dispute settlement mechanisms, so their involvement should benefit the dissemination of these tools.

[36] *Bangladesh Labour Act 2006*, s. 292 and 293.

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