Labor Dispute Settlement and Decision Making*

Jonathan P. SALE**

Abstract

Exploring the various methods of labor dispute settlement and decision making and their efficacy and effectiveness in achieving the goals of public policy is at the core of Jonathan Sale's paper. He explores the hypothesis stating that industrial peace is a function of efficacious dispute settlement mechanisms which in turn are a function of decisions based on the logic of appropriateness. In this light, Sale finds that utilization by labor and employer of legalistic and non-cooperatives mechanisms is increasing while use of consent based and cooperative mechanisms is declining, signifying that labor and employer tend to advance rational self-interest rather than exhibit appropriate decision behavior based on trust and reciprocity. Sale also discusses how decision theory can help guide "the authoritative allocation of public goods."

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** A.B., LL.B., M.I.R. (Recipient–Medal for Academic Excellence), and D.P.A. units from University of the Philippines (UP); Professorial Lecturer, UP-SOLAIR; and Law Practitioner.

Introduction

The highest legal framework governing employment relationships is the 1987 Constitution. The Constitution requires the State to ensure the speedy disposition of cases before judicial, quasi-judicial and administrative bodies[1] and to promote the preferential use of voluntary modes in settling disputes, including conciliation.[2] Use of voluntary modes in settling disputes is preferred because consent-based and cooperative approaches could foster the speedy disposition of cases.[3]

However, are the objectives of public policy, that is, the speedy disposition of cases and the preferential use of voluntary modes in settling disputes, being achieved under the present set-up? Are labor disputes spread out among the different forums? Is there system fragmentation and, if so, is it leading to more efficiency or less equality? What will make employers and employees decide to utilize consent-based and cooperative mechanisms? These are some questions that this paper hopes to address. This paper will also attempt to explore how decision theory can help guide, as Frederickson and Smith (2003) would put it, "the authoritative allocation of public goods."

Labor Dispute Settlement

A labor dispute is any controversy concerning terms and conditions of employment or ways by which such terms or conditions are negotiated, changed or arranged, whether the disputants stand in the proximate relationship of employer and employee.[4] Forms of dispute or conflict are presented in Figure 1.

Disputes, whether intra-party (within a party) or inter-party (between or among parties), may take place at the distributive (distribution of economic rewards), structural (organizational structure and processes) and/or human relations (inter-personal or inter-group) levels.[5] Labor standards disputes – those arising from the implementation of statutory minimum terms and conditions of employment – involve rights issues, while labor relations disputes – those emanating from the adjustment or modification of employment terms and conditions above the statutory minimum – involve both interests and rights issues. Rights issues refer to the assertion of existing rights while interest issues pertain to the acquisition of rights in the future.[6] Labor disputes tend to be inter-party.

Figure 1
Conflict Forms Matrix

	INTRA-PARTY DISPUTES (Distributive/Structural/Human Relations Level)	INTER-PARTY DISPUTES (Distributive/Structural/ Human Relations Level)
LABOR STANDARDS DISPUTES (Rights Issues/Disputes)		• Non- and/or underpayment of minimum wage/13th month pay • Commission of prohibited acts regarding wages • Non-compliance with rules on hours of work, service incentive leave • Non- and/or underpayment of additional pay for overtime/rest day/holiday/special day/night work • Discrimination • Non-compliance with health, safety, welfare and other labor standards
LABOR RELATIONS DISPUTES (Interests and Rights Issues/Disputes)	• Intra-union disputes	• Inter-union disputes • Related labor relations disputes • Grievances • Bargaining deadlock • Unfair labor practices (ULP) • Strike/Lock-out • Employment tenure/termination disputes • Productivity Incentive Program (PIP) issues • Wage distortion issues

Collective bargaining agreement (CBA) provisions below minimum standards and wage distortion issues originate as labor standards disputes but are processed as labor relations disputes as may be gleaned from Figure 1. A CBA is supposed to contain employment terms that are above minimum labor standards. There is a wage distortion when a prescribed wage increase in a region results in the severe contraction, if not total elimination, of intentional quantitative differences between pay groups in a pay structure. Strikes and lock-outs may be the outcome of failed conciliation-mediation of bargaining deadlocks or ULP. But strikes and lockouts are viewed as both conflict and symptoms of an

underlying state of conflict.[7] Related labor relations disputes and grievances[8] are among the new terms defined in Department Order (DO) No. 40-03, Series of 2003 of the Department of Labor and Employment (DOLE).

Mechanisms or strategies for conflict handling are presented in Figure 2.

Figure 2
Conflict Handling Mechanisms/Strategies Matrix

	CONFLICT MANAGEMENT (Settlement)	CONFLICT RESOLUTION (Adjudication/Enforcement)
VOLUNTARY	• Collective bargaining (Multi-employer) • Voluntary union recognition • Grievance procedure without CBA • Labor-Management Committee/ Council (PIP issues) • Trade union combination • Consent election • Compromise agreement • Preventive mediation	• Interpleaded Intervention • Voluntary arbitration (VA) of interest/rights issues.
COMPULSORY	• Conciliation-Mediation • Collective bargaining (single enterprise • Strike vote balloting • Improved offer balloting • Grievance procedure under CBA	• VA of rights issues (grievances) under CBA • Compulsory arbitration (CA) by Labor Arbiter • Adjudication by Regional Director (e.g. money claims < or = P5,000) • Compliance order • Med-arbitration by BLR/RO (e.g., inter/intra-union disputes like CBA deregistration) • Appeal (to BLR, Secretary, or NLRC) • Injunction/contempt • Assumption of jurisdiction • Certification to NLRC for CA • Judicial action/review

As stated earlier, public policy requires the speedy disposition of cases and prefers the use of voluntary modes in settling disputes. In conflict resolution the third party hears the evidence and arguments of the disputants and decides the dispute, as distinguished from conflict management where the third party, if any, does not hear and decide but merely facilitates settlement or agreement between the disputants.[9] In conflict management therefore the disputants themselves are the decisionmakers, not the third party. But grievance procedure, voluntary arbitration (of unresolved grievances) and conciliation-mediation tend to assume a compulsory character, because the law compels the disputants to make use of these modes under defined situations.[10]

Briefly, grievance handling procedure is the series of steps that parties to a CBA agreed to take for the adjustment of questions arising from the interpretation or implementation of the CBA or company personnel policies, including voluntary arbitration as the terminal step.[11] The parties, with the use of arguments and evidence, persuade one another to give in to a position or agree to a compromise.[12] The grievance machinery contains a definition of grievance, a statement of the guiding principles and the procedural steps in the settlement and resolution of grievances.[13] If the grievance remains unresolved after seven days from submission to the last step in the grievance handling procedure, the same shall be automatically referred to voluntary arbitration. The period of arbitration begins when the act of persuasion has been exhaustively used and no settlement has been reached.[14] With regard to voluntary arbitration (VA), the arbitrator, who is chosen by the parties from the list of accredited voluntary arbitrators drawn up by the National Conciliation and Mediation Board (NCMB), shall determine the dispute after hearing their evidence and arguments. Both mechanisms are required by law and must be included in every CBA as part of industrial self-governance.

Thus, in *Republic Savings Bank v. Court of Industrial Relations*[15] the Supreme Court held –

> "Some other members of this Court believe, without necessarily expressing approval of the way the respondents expressed their grievances, that what the Bank should have done was to refer the letter-charge to the grievance committee. This was its duty, failing which it committed an unfair labor practice under section 4(a)(6). For collective

> bargaining does not end with the execution of an agreement. It is a continuous process. The duty to bargain imposes on the parties during the term of their agreement the mutual obligation "to meet and confer promptly and expeditiously and in good faith x x x for the purpose of adjusting any grievances or question arising under such agreement" and a violation of this obligation is, by section 4(a)(6) and 4(b)(3) an unfair labor practice. As Professors Cox and Dunlop point out:
>
> Collective bargaining x x x normally takes the form of negotiations when major conditions of employment to be written into an agreement are under consideration and of grievance committee meetings and arbitration when questions arising in the administration of an agreement are at stake.
>
> Instead of stifling criticism, the Bank should have allowed the respondents to air their grievances. Good faith bargaining required of the Bank an open mind and a sincere desire to negotiate over grievances. The grievance committee, created in the collective bargaining agreement, would have been an appropriate forum for such negotiation. Indeed, the grievance procedure is a part of the continuous process of collective bargaining. It is intended to promote, as it were, a friendly dialogue between labor and management as a means of maintaining industrial peace".

Conciliation and mediation are undertaken whenever notices of strike or lockout or requests for preventive mediation are filed with the NCMB. The conciliator, by cooling tempers, aids the parties in reaching an agreement.[16] On the other hand the mediator studies the position of each side and makes a proposal but does not render an award or decision.[17]

Single enterprise bargaining is a duty once the "jurisdictional preconditions" are met, albeit parties are free to negotiate and agree.[18] Trade union combinations (mergers or consolidations), multi-employer bargaining (one CBA covering two or more employers and two or more bargaining units),[19] CBA deregistration and interpleader/intervention[20] are novel processes recognized under

DOLE DO No. 40-03, Series of 2003. Based on Figure 2, the approach to labor dispute settlement is administrative and judicial.

Mechanisms that are based on consent and cooperation are found in Quadrants 1, 2 and 3 of Figure 2, e.g., multi-employer bargaining, preventive mediation, Labor Management Councils (LMCs), VA of issues other than grievances, grievance procedure under the CBA, conciliation-mediation and single-enterprise bargaining. Mechanisms that are legalistic (essentially law-based) and non-cooperative (competitive) are found in Quadrant 4, e.g., compulsory arbitration by Labor Arbiters, adjudication by DOLE Regional Director, med-arbitration by the DOLE Bureau of Labor Relations (BLR) or Regional Office (RO), assumption of jurisdiction by the DOLE Secretary, certification of dispute to the National Labor Relations Commission (NLRC).

Figure 2 also shows that government has introduced several conflict handling mechanisms or strategies, which employers and employees may avail of under conditions established by law. There is a multi-level entries and appeal system available for dispute filing and settlement.[21] The purpose of splitting these disputes into different forums is to spread out the locus of decision making to avoid concentration and clogging in a few.

Here, the author discerns elements of the Tiebout hypothesis. According to the Tiebout model, fragmentation leads to efficiency, responsiveness and lower spending because many agencies compete horizontally (across jurisdictions) and vertically (within jurisdictions).[22] 25 different modes of handling conflict are identified in Figure 2. The multiplicity of forums aim to foster market-like choice, competition and public service efficiency.[22a]

Decision Making

Bureaucratic inefficiency (or efficiency) can be traced not merely to dynamics within, but to dynamics without, that is, the larger environment, which imposes limitations on public organizations.[23] Reyes (1997) refers to this as the pluralist-democracy model.

Sto. Tomas (2004) points out that the long period of labor case resolution is partly due to the many structures that have been built by laws and jurisprudence, which tend to undermine

industrial peace and better labor-management relations.[24] The multi-level entries and appeal system available for dispute filing and settlement should give way to a more simplified labor dispute resolution system.[25] In effect, the Secretary is proposing the systems consolidation approach. Consolidated systems theory suggests that fragmentation results in income segregation and a spatial mismatch in which the poor remain in jurisdictions with limited fiscal capacity but sizeable demand for expenditures (perhaps due to congestion) while the rich escape to enclaves with generous fiscal capacity.[26] Consolidated systems are limited but complete systems that minimize sorting by income and maximize redistribution.[26a]

The contrary view is expressed by Ofreneo (2004). Government can continue strengthening institutions of workers' representation, collective bargaining, conciliation, mediation, labor-management cooperation and voluntary modes of dispute settlement, through Labor Code amendments or through new rules and administrative issuances.[27] Ofreneo seems to support the systems fragmentation approach subject, however, to adjustments to enhance conflict handling mechanisms based on consent and cooperation.

But administrative theory shifted focus from organizational structure and processes to, among others, decision-making.[28] For instance, Herbert Simon argued that decision-making, not organizational structure is the central problem of administration.[29] Choice or decision prefaces all action.[30]

Proverbs brought on by scientific management like specialization, unity of command, span of control, organization by purpose, process, function or place, centralization and decentralization were considered conflicting.[30a] Rather than "maximize" decision-makers actually "satisfice", that is, they make decisions that are "good enough" based on a stimulus-response pattern instead of a choice among alternatives, because rationality is not pure or perfect but is bounded by ambiguity and uncertainty, limited time, attention and knowledge, values, environment, among others.[31] Microeconomics pursued Simon's arguments and began using rigorous methods to prescribe right policy judgments.[32]

Bounded rationality may be based on the logic of consequences or logic of appropriateness.

Individuals and organizations are "intendedly rational" because they try to be rational but are constrained by limited time, attention and cognitive capacity, incomplete information, risks and uncertainty and unclear linkages between decisions and outcomes.[33] Partnerships and contracts may not reduce risk but they spread the responsibility of risk.[34] Formal testing of these bounded rationality generalizations based on the logic of consequences includes game theory.[35]

To handle conflict analytically, such as a labor dispute, game theory is used.[36] In these conflict cases the decision-maker must be concerned not only with his own decisions but also with the decisions of an opponent who may, unlike nature, not be neutral.[37] Game theory provides a framework in which one can think more clearly about these and other conflict problems involving a second decision-maker who can cooperate with or hinder one's operations. [38]

John von Neumann and Oskar Morgenstern (1944) distinguished two types of games, that is, rule-based games (players interact according to specified "rules of engagement" that might come from contracts, loan covenants, or trade agreements, etc.) and free-wheeling games (players interact without any external constraints as when buyers and sellers create value by transacting in an unstructured manner).[38a] In game theory it is important to focus on others ("allocentrism") – to look forward and reason backward, one puts himself or herself in the shoes or heads of other players, and to assess added value, one asks not what other players can bring to him or her but what he or she can bring to other players.[38b] There are five elements of the game: players (i.e., company, customers, suppliers, substitutors, and complementors interact in a pattern of cooperation and competition ["coopetition"]), added values, rules, tactics, and scope.[38c]

Some applications of game theory are Allison's Model III and the prisoners' dilemma.

Graham Allison (1971) articulated three models. Model I presupposes that decisions are based on pure rationality and self-interest, that is, rational actors making rational decisions.[39] In Model II, decisions are made on the basis of organizational theory and standard operating procedures.[40] Model III assumes a plurality of interests and a decision is the outcome of bargaining,

negotiation and compromise based on "rules of the game" that channel power among the players, but central or key players make the important decisions.[41]

The prisoners' dilemma is a heuristic involving two persons accused of a crime who are interviewed separately, but are both rational and self-interested in that each knows the range of choices available to the other.[42] If one confesses, he will get a shorter sentence than the other, and vice versa; if both confess, they will get long sentences; and if they cooperate and neither confesses, both may escape the charges.[43] The resolution of the prisoners' dilemma is based on trust, experience and making sense of the situation.[44] Sense-making involves the social construction or shaping of preferences, identities and reality.[45] Partnerships that endure introduce considerations of reputation, trust, retaliation, and learning into the rationality equation.[46] Experience and trust are expressions of appropriate decision behavior rather than purely rational self-interested behavior.[47]

In bounded decision rationality based on the logic of appropriateness, ambiguity and uncertainty necessitate the social construction of preferences, identity and reality, which in decision theoretic language is sense-making.[48] Ambiguity and uncertainty are reduced into smaller, more manageable sizes by loose coupling (i.e., decentralization, delegation, contracting out).[49] Incrementalism and muddling through help decisionmakers cope with the limits of time and attention, as typified by the process of preparing annual budgets – organizations and individuals do not start from scratch but refer to last year's budget.[50] In muddling through (incremental decisionmaking), organizations and individuals start with their immediate history as baseline for decisionmaking.[50a] Decisions are appropriate when based on shared understandings of the decision situation, the nature or "identity" of the organization, and accepted rules of what is expected in particular situations.[51] Decisionmaking is deeply contextual.[52]

Appropriateness is influenced by laws and constitutions, which are authenticated expressions of collective preferences.[53] Appropriateness is also influenced by emotions, uncertainties, and cognitive limitations.[54] Appropriateness is not only applicable to routine decision problems but also comprehends ill-defined and novel situations.[55]

Adjudication is a form of incrementalism that is bounded by procedure and rules, the interests of opposing parties, and the balance between these interests that fits legal requirements and/or public interest.[56] By going through adjudication in a large number of instances dealing with the same area of public policy, it is possible to build a body of principles that defines public interest.[57] It is also possible to make a series of incremental decisions in a policy area without being fully cognizant of the resultant state of affairs toward which those decisions are leading.[58] The outcome could be conflicting decisions. Prospective adjudication (e.g., application for registration or a license) and retrospective adjudication (e.g., filing of a complaint for an alleged wrongdoing) are two categories of adjudication.[59]

But adjudication need not be the norm. Instead of relying on adjudication, the disputants may cooperate and resort to a settlement or compromise.

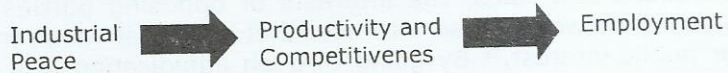
In *Ramnani vs. Court of Appeals*[60] the Supreme Court held that a compromise is intended to prevent or put an end to a lawsuit.[61] The parties adjust their difficulties by mutual consent.[62] Each of the parties prefers the terms of the compromise to their earlier hope of gaining, balanced by the danger of losing.[63] It is intended to end litigation because of the uncertainty of its result.[64]

The concept of bounded rationality is not lost on the Philippine Supreme Court. To paraphrase the decision, through cooperation in the form of a compromise agreement or amicable settlement, instead of competition or non-cooperation, the parties are in a better position to manage imperfect information, ambiguity, uncertainty and risk.

Hypothesis

Sto. Tomas (2004) opines that stable and harmonious labor-management relations foster productivity and competitiveness, which in turn sustain employment.[65] Thus, DOLE's basic intervention toward preserving employment is how it is able to keep industrial peace.[66]

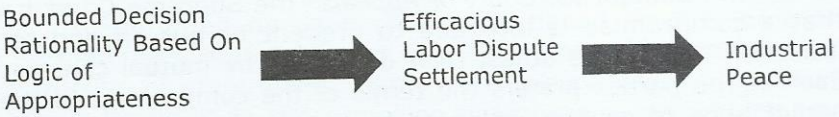
Figure 3



Based on Figure 3, employment is a function of productivity/ competitiveness, which in turn is a function of industrial peace. But industrial peace does not come about unwittingly.

This paper will attempt to explore the following hypothesis: Industrial peace is a function of efficacious dispute settlement mechanisms, which in turn are a function of decisions based on the logic of appropriateness. The hypothesis is illustrated as follows:

Figure 4



Under Figure 4, labor dispute settlement is efficacious if based on consent and cooperation, which in turn are based on appropriate decision behavior as indicated by the decision to make use of the mechanisms in Quadrant 1 (voluntary conflict management), Quadrant 2 (voluntary conflict resolution) and Quadrant 3 (compulsory conflict management) of Figure 2 above.

In other words, appropriate decision behavior is indicated by the use of any of the following conflict handling mechanisms/ strategies:

1. Multi-employer collective bargaining
2. Voluntary union recognition
3. Grievance procedure without CBA
4. Labor-management committee/council (PIP issues)
5. Trade union combination
6. Consent election
7. Compromise agreement
8. Preventive mediation

9. Interpleader/intervention
10. Voluntary arbitration (VA) of interest/rights issues
11. Conciliation-mediation
12. Single-enterprise collective bargaining
13. Strike vote balloting
14. Improved offer balloting
15. Grievance procedure under CBA

Utilization of any one or more of these consent-based or cooperative mechanisms/strategies makes for efficacious labor dispute settlement, which in turn may lead to industrial peace.

Findings and Analysis

The Bureau of Labor and Employment Statistics (BLES) reported that in January 2004 the services sector accounted for about 48% of employed persons in the Philippines, an increase of more than 7% from the 2002 figure.[67]

But the preponderance of low-productivity, low-paying jobs in the services sector underlies doubts about the quality of employment generated.[68] The rise in underemployment in recent years came from the services sector and the extent of underemployment is a measure of the severity of the lack of jobs, which makes workers accept shorter working hours or low-paying jobs instead of open unemployment.[69]

Non-regular, temporary and peripheral workers are increasing in number. Work is temporary if time-bound and peripheral if indirectly related to the employer's main business. BLES reported that as of June 30, 2003, contractor/agency-hired workers and non-regular staff comprised 10.8% and 25%, respectively, of total employment in establishments with 20 or more workers.[70]

The number of establishments resorting to permanent closure/ retrenchment due to economic reasons rose from 2,859 in 2001 to 3,403 in 2002 while the number of displaced workers went up from 71,864 to 80,091, an indication that more regular jobs have been lost.[71] Significantly, in terms of labor turnover, separation rate was higher than accession rate in the first and second quarters of 2002 for the construction, hotel and restaurant, and financial intermediation industries.[72]

Meanwhile, the number of unions registered went down from 910 in 2002 to 647 in 2003.[73] Membership in newly registered unions also declined from 89,187 in 2002 to 44,794 in 2003.[74] The number of CBAs registered decreased from 588 in 2002 to 415 in 2003 while the number of workers covered by new CBAs fell from 114,412 in 2002 to 66,824 in 2003.[75]

The extent of unionism as of June 2003 was also recently reported by BLES. The figures are not encouraging. Of the total number of establishments surveyed, 14.8% were unionized and 14.2% had CBAs.[75a] Also, based on the survey, union membership and CBA coverage reached 20.2% and 19.7%, respectively, of the total 2,582,000 paid employees. [75b]

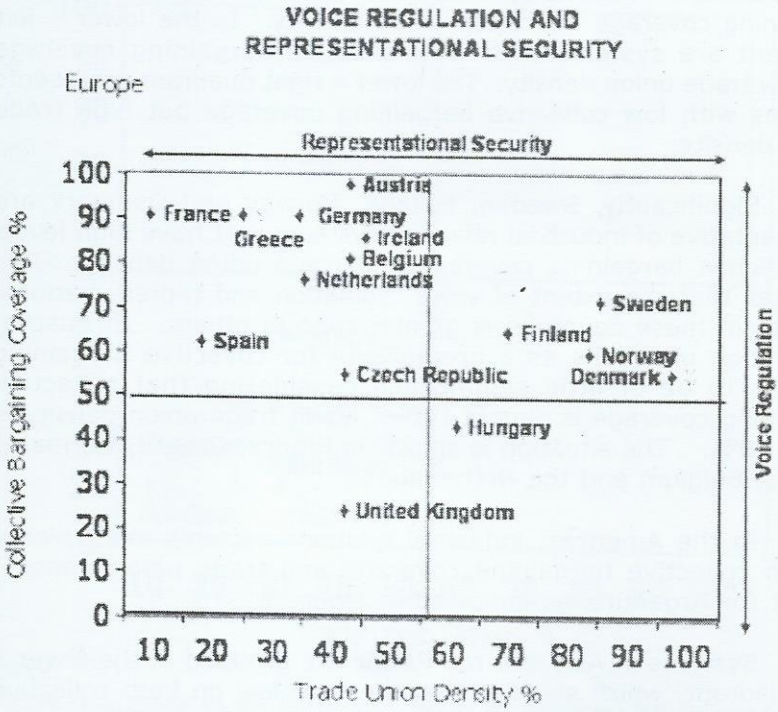
The downward trend in trade union density coincides with the growth of employment in the services sector. There appears to be an inverse relationship between the two, which is explained by the fact that unions usually organize regular employees. The usual source of union members is shrinking. Employers downsize, rightsize, outsource and adopt other measures to increase efficiency and streamline operations in the face of competition. The result is fragmentation of the workforce, that is, various types of work and employment contracts co-exist simultaneously.[76] Atypical forms of employment are replacing typical employer-employee relationships.[77] The falling level of trade union density has also been influenced by increases in company closures over the years.

Another factor affecting trade union density is the dichotomy between the formal and informal sectors. The informal sector is growing. DOLE Undersecretary Benedicto Bitonio explained that as of April 1999, 52% of the total employed was in the informal sector.[78] This is significant since union organizing normally takes place in the formal sector, where employer-employee relationships are discernible, making collective bargaining possible.

Decentralized bargaining contributes to the low levels of collective bargaining coverage and trade union density. The International Labor Organization (ILO) reported in 2000 that countries with centralized bargaining structures have higher levels of collective bargaining coverage and trade union density, as typified by the industry-wide bargaining system of Sweden where ILO reports collective bargaining coverage and trade union density at above 70 percent[79] as may be seen in Figure 5. Conversely,

countries with decentralized bargaining structures have low levels of collective bargaining coverage and trade union density, which is exemplified by the enterprise bargaining system of the United States where collective bargaining coverage and trade union density fall below 20%.[80]

Figure 5[81]



Source:
InFocus Programme on the Declaration, based on data from ILO: *World Labour Report 1997-98* (Geneva, 1997) and *Country studies on the social dimensions of globalization*, Task Force on Country Studies on Globalization (Geneva, ILO, publication forthcoming)

The above figure depicts the relationship between voice regulation and representational security. In voice regulation, systems of consultation and negotiation supplement minimum legal frameworks.[82] On the other hand, representational security at work is based on the freedom of workers and employers to form and join organizations of their own choosing without fear of reprisal

or intimidation.[83] Thus, the greater the coverage of collective bargaining, the higher the level of voice regulation, and the higher the level of trade union density, the greater the extent of representational security.

Figure 5 also has four quadrants. The upper – left quadrant shows industrial relations systems that are high on collective bargaining coverage, but low on trade union density. The upper – right quadrant reflects systems which are high on both collective bargaining coverage and trade union density. In the lower – left quadrant are systems with low collective bargaining coverage and low trade union density. The lower – right quadrant represents systems with low collective bargaining coverage but high trade union density.

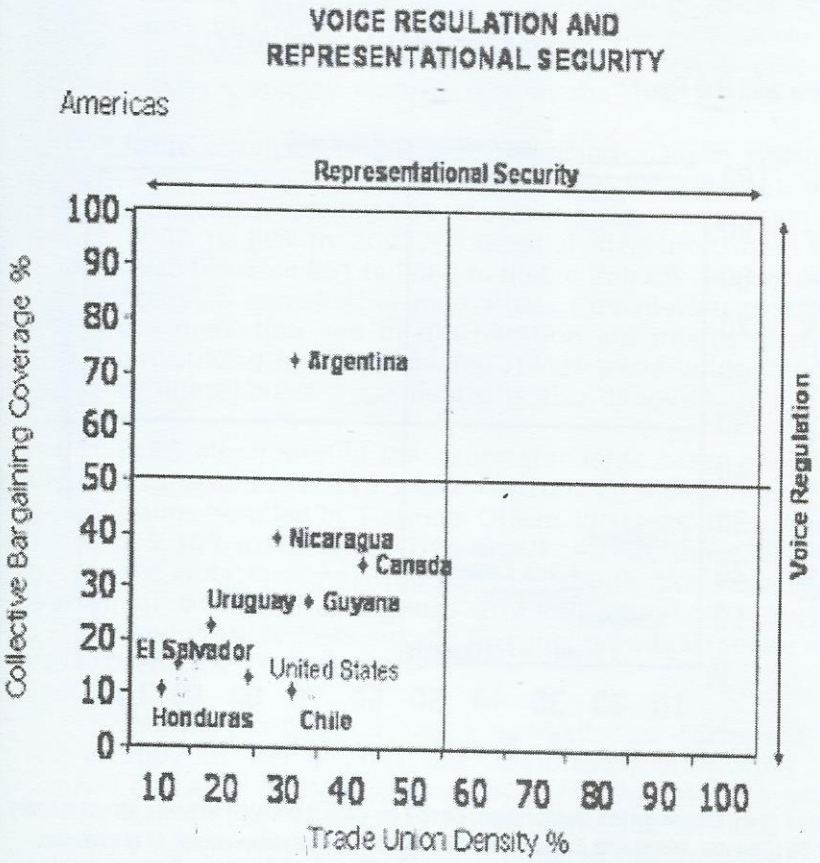
Significantly, Sweden, Finland, Norway and Denmark are representative of industrial relations systems that have high levels of collective bargaining coverage and trade union density. This indicates that the extent of voice regulation and representational security in these countries is greater than in others. In Austria, recognition of unions as a prerequisite for collective bargaining appears to be of little significance considering that collective bargaining coverage is almost 100%, albeit trade union density is below 40%. The situation is similar in France, Greece, Germany, Ireland, Belgium and the Netherlands.

In the Americas, industrial relations systems are typically low on collective bargaining coverage and trade union density, except for Argentina as indicated in Figure 6.

Systems in Asia and the Pacific are grouped in the lower – left quadrant, which signifies that they are low on both collective bargaining coverage and trade union density (Figure 7).

Collective bargaining coverage and trade union density in Asia and the Pacific and the Americas reflect some degree of homogeneity in that the systems therein appear to converge in the lower – left quadrant, with a few exceptions. In this regard, countries in Asia and the Pacific, which includes the Philippines, tend to be homogenous as collective bargaining coverage and trade union density in the region fail to surpass the 30% threshold.

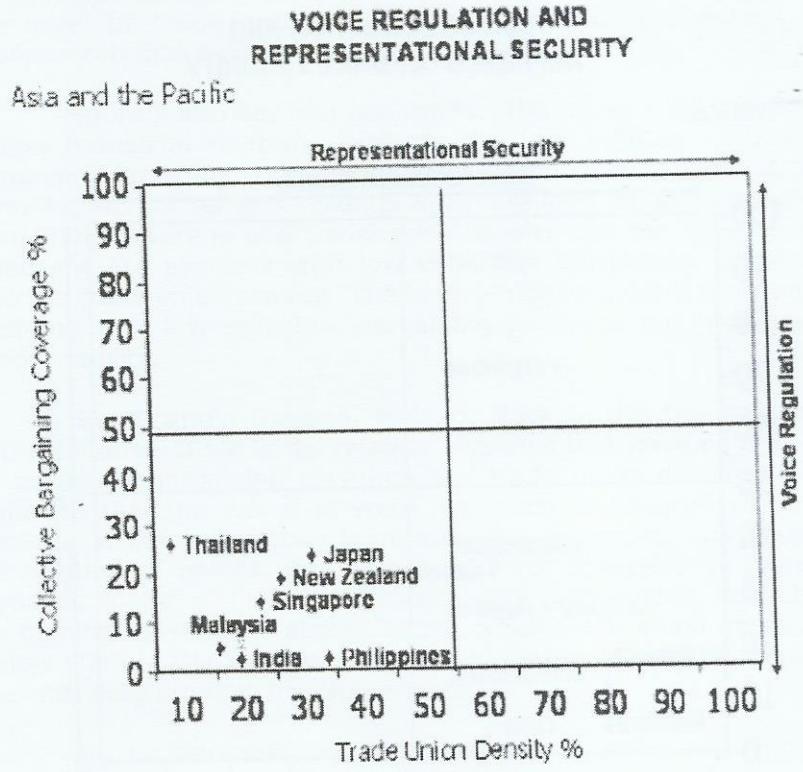
Figure 6[84]



Source:
InFocus Programme on the Declaration, based on data from ILO: *World Labour Report 1997-98* (Geneva, 1997) and *Country studies on the social dimensions of globalization*, Task Force on Country Studies on Globalization (Geneva, ILO, publication forthcoming)

The Philippine system of single-enterprise collective bargaining is similar to that of the United States. Philippine labor relations policy is patterned after that of the United States. This explains the resemblance in patterns of collective bargaining coverage and trade union density in the two countries.

Figure 7[85]



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The declining trade union density in the Philippines is influencing the downward movement in strike activity. Strike, as a measure of industrial conflict, has four dimensions: (i) frequency, the number of work stoppages in a given unit of analysis over a specific period of time; (ii) breadth, the number of workers who participate in work stoppages; (iii) duration, the length of stoppage, usually in man-days of work lost; and (iv) impact, the number of working days lost through stoppages.[86]

BLES reported that the number of new strike/lockout notices fell from 752 in 2002 to 606 in 2003 while the number of

workers involved in new strike/lockout notices decreased from 159,000 in 2002 to 109,000 in 2003.[87] Duration of actual strikes, or man-days lost from on-going strikes, also went down from 358,000 in 2002 to 150,000 in 2003.[88] Strike rate is also going down because company closures are on the rise.

Trade union density is also affecting dispute settlement mechanisms. Strike/Lockout notices handled fell from 815 to 685 whereas preventive mediation cases handled went down from 871 in 2002 to 809 in 2003.[89] Original med-arbitration cases handled also fell from 861 in 2002 to 854 in 2003.[90] Strike/Lockout notices require conciliation-mediation. Conciliation-mediation, preventive mediation and med-arbitration are modes of dispute settlement utilized by trade unions. Since trade union density is declining, utilization of these modes is also diminishing.

BLES also reported that labor standards cases handled by Regional Directors fell from 13,977 in 2002 to 9,893 in 2003, but money claims handled by Regional Offices increased from 4,994 in 2002 to 5,102 in 2003.[91] This signifies that there are labor standards violations not addressed through the inspectorate system of DOLE. The workers affected, most of whom are unorganized, seek redress instead by filing individual money claims not exceeding P5,000 each.

Voluntary arbitration cases handled also decreased from 343 in 2002 to 309 in 2003, but compulsory arbitration cases handled by Labor Arbiters went up by 7.7% from 49,058 in 2002 to 52,833 in 2003.[92] Voluntary arbitration is the terminal step in grievance handling, both of which are mandatory in CBAs. Since the number of registered CBAs and of workers covered by CBAs is going down, individual employees who are not organized resort to compulsory arbitration. This is the tendency when company closures are on the rise and strike rate is going down. The burden of keeping industrial peace is shifted to compulsory arbitration and other legalistic avenues.[93] This is because compulsory arbitration is the mechanism for resolving labor disputes involving individual workers and non-unionized groups of workers.[94]

But labor and management cooperation is on the rise, although not widespread. This is indicated by the increase in the number of Labor Management Councils (LMC) from 162 in 2002 to 175 in 2003 and by the increase during the same period in the number of workers covered from 2,655 to 5,057.[95] LMCs organized

from January to March 2004 were concentrated in CAR and Region I.[96] A few were established in Regions II and XI. These "partnerships" may have been induced by the desire to spread the responsibility over risk and uncertainty.

The efficacy of the conflict handling mechanisms can also be analyzed by looking at the disposition/settlement rate of cases handled[97] –

Table 1

Type of Case	Disposition Rate (%) 2002	2003	Cases Handled 2002	2003
Strike/lockout notices	90.3	89.6	815	685
Strike/lockout notices (settlement rate)	69.9	72.7	-	-
Actual strikes/lockouts	92.3	100.0	39	41
Actual strikes/lockouts (settlement rate)	53.8	58.5	-	-
Preventive mediation	94.0	94.7	871	809
Preventive mediation (settlement rate)	73.9	83.4	-	-
Original med-arbitration	72.6	77.5	861	854
Original labor standards	80.9	84.8	13,977	9,893
Money Claims – DOLE Regional Offices	85.0	87.9	4,994	5,102
Voluntary arbitration	62.4	56.0	343	309
Compulsory Arbitration	60.5	62.5	49,058	52,833
Compulsory Arbitration Appealed To NLRC	56.8	52.5	16,530	16,350

The highest disposition rate in 2002 was posted by preventive mediation and in 2003 by actual strikes/lockouts. But the wide disparity between the number of compulsory arbitration cases (52,833 in 2003), on one hand, and preventive mediation cases (809 in 2003) and actual strike/lockout cases (41 in 2003), on the other, creates doubts about the efficacy of labor dispute settlement in the country. The disposition rate of compulsory arbitration is below 65% because of the concentration and clogging of cases in that forum. In contrast, the disposition rates of

preventive mediation and actual strike/lockout cases have remained high at over 90%. Fewer cases are entering the consent-based and cooperative mechanisms of preventive mediation and conciliation-mediation because trade union density is declining fast.

An upward trend though is noticeable in the disposition rate of legalistic and competitive mechanisms save for voluntary arbitration and appealed compulsory arbitration cases.

But there is a need to improve the allocation of cases among the different conflict handling mechanisms. The allocation of cases is influenced by the employee or employer act of using specific conflict handling mechanisms in particular situations. Decision precedes action[98] and appropriate decision behavior is influenced by laws and constitutions.[98a] To promote appropriate decision behavior, therefore, the State must intervene in the relations between labor and employer through laws. In this era of short-term and flexible employment arrangements, labor organizing and collective bargaining must be strengthened through laws.

Conclusion

Generally, utilization by labor and employer of legalistic (essentially law-based) and non-cooperative (competitive) mechanisms is increasing, while use of consent-based and cooperative mechanisms is declining. This signifies that labor and employer tend to advance rational self-interest rather than exhibit appropriate decision behavior based on trust and reciprocity.

Government seems to show signs of appropriate decision behavior given that preventive mediation and conciliation-mediation – mechanisms that are based on consent and cooperation – ranked highest in terms of disposition rate in the two periods observed, in consonance with the Constitutional preference for voluntary modes in settling labor disputes. But this may also be a function of the low utilization rate of preventive mediation and conciliation-mediation as compared to, say, compulsory arbitration. Preventive mediation and conciliation-mediation are modes of dispute settlement available to trade unions.

Trade unions usually organize regular employees or those who are employed for an indefinite period. But the number of

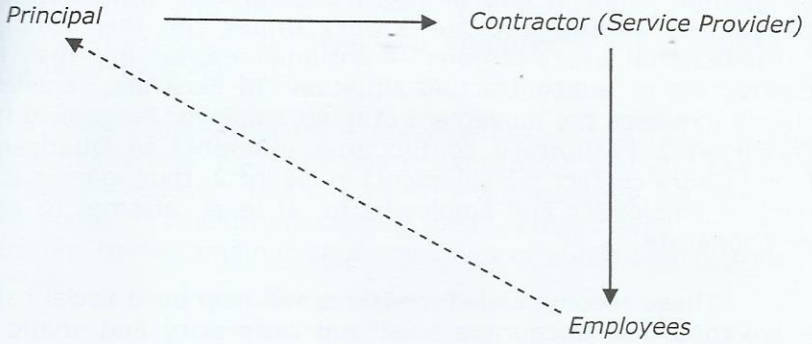
regular employees is declining (as of June 30, 2003 they comprised about 64% of those employed in establishments with 20 or more workers) due to contracting and subcontracting arrangements, hiring of non-regular staff and company closures. The contingent portion of the workforce is growing.[99] Because of this, the number of trade unions and unionized workers is going down, and so is the number of CBAs and workers covered by CBAs. This means that the non-legalistic, consensual and cooperative modes of settling disputes, such as preventive mediation, conciliation-mediation and grievance machinery, are being practiced less and less. The burden of keeping industrial peace is then transferred to compulsory arbitration and other legalistic, non-cooperative approaches.

Considering that decision precedes action and the appropriateness of decision behavior is influenced by laws and constitutions, trust and experience, and making sense of situations, public policy should encourage trade unions to organize contractor/agency-hired workers and non-regular staff – to broaden the base of union organizing and widen the scope of worker participation. This may require the relaxation of union registration requirements in the area of prospective adjudication. Particularly, legislation should be passed removing the requirement under Article 234 (c) of the Labor Code that unions must comprise at least 20% of all the employees in the bargaining unit where it seeks to operate. This requirement is a tall order for unions that are just starting out.

Also, through public policy, the duty to bargain collectively under Articles 251, 252 and 253 of the Labor Code should be extended to multi-employer situations where direct hires (regular and non-regular staff) work side by side with indirect hires (contractor/agency-hired workers). Particularly, the Labor Code must provide that the moment the "jurisdictional preconditions" are met in a multi-employer situation the duty to bargain collectively commences. This presupposes that the contracting and subcontracting situation is legitimate (Figure 8). As a general rule, in legitimate contracting and subcontracting no employer-employee relationship exists between the employees of the contractor and the principal. Thus, multi-employer bargaining shall apply.

Figure 8

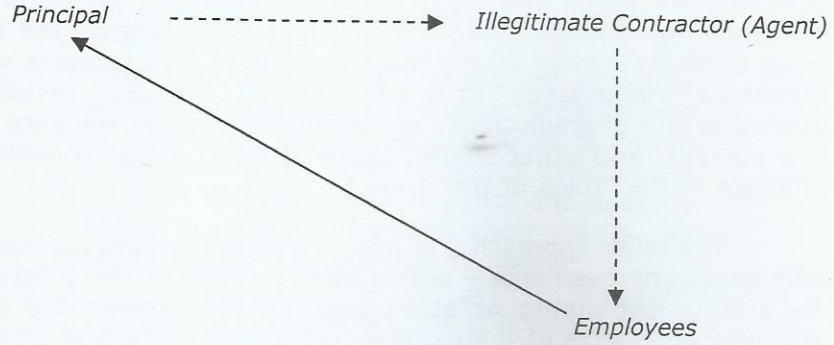
Trilateral relationship in legitimate contracting / subcontracting



On the other hand, if the contracting or subcontracting situation is not legitimate, the law should provide that single-enterprise bargaining will apply (where the "jurisdictional preconditions" are present) since the contractor becomes a mere agent of the principal who in legal contemplation is treated as the direct employer of the contractual employees (Figure 9).[100] The relationship is transformed into a bilateral one to protect the putative employees of the illegitimate contractor.

Figure 9

Bilateral relationship in illegitimate contracting / subcontracting



In a contracting or subcontracting situation which is legitimate, multi-employer bargaining is conceivable. A multi-employer CBA may cover two or more certified or recognized bargaining units in two or more enterprises. Multi-employer bargaining should become a duty under the law once the "jurisdictional preconditions" mentioned earlier are met in a contracting or subcontracting situation. To illustrate, legislation should influence the movement of multi-employer bargaining from Quadrant 1 (voluntary conflict management) to Quadrant 3 (compulsory conflict management) in Figure 2, thus making it the duty of employees and employers to, at least, attempt to agree or cooperate.

These recommended measures will help build social capital – linkages that encourage trust and reciprocity and shape the quality of social interactions[101] – while promoting consensual and cooperative modes of dispute settlement. This could lead to the speedy disposition of cases. The tendency for compulsory arbitration and other legalistic, non-cooperative (competitive) approaches may be reduced, thereby unclogging dockets and raising disposition rates in the process. The effect is to spread out or distribute the locus of decision making across the different conflict handling mechanisms.

Efficacious labor dispute settlement means efficiency without sacrificing equality, that is, equality in the relations between employees and employers.

Efficiency and equality may still be the outcomes even if there is no system consolidation. The application of systems consolidation theory at this time could be resource-intensive and inopportune given the tight fiscal situation of the national government. System consolidation might entail unexpected and huge outlays to cover employment benefits of civil servants who would be "redundated" in the process. It may also result in confusion and unpredictability of outcomes, more expenditure for the players, and other "externalities" that accompany sudden changes in the "rules of the game."

The other approach – of maintaining system fragmentation with some improvements – seems more suitable at this juncture. By simply enhancing or strengthening the consensual and cooperative aspects of the existing fragmented system of conflict management and resolution, the burden of keeping industrial peace could shift back to the private sector, that is, to the employees

and employers themselves, which is preferred by public policy to begin with. Reforms that facilitate the organization and representation of the contingent portion of the workforce, which is unorganized and unrepresented, will foster equality in the relations between employees and employers and strengthen industrial democracy.

The result could be a balance between efficiency and representativeness, economy and responsibility, and effectiveness and responsiveness. In the end, "the authoritative allocation of public goods"[102] would have been guided, perhaps even improved. Invariably, these remain cogent objectives of public administration theories.

Endnotes and References

[1] Article III, Section 16 of the Constitution provides:

> "All persons shall have the right to a speedy disposition of their cases before all, judicial, quasi-judicial, or administrative bodies." (Underscoring supplied)

[2] Article XIII, Section 3 provides:

> "The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.
>
> It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.
>
> The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling

> disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.
>
> The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth." (Underscoring supplied)

[3] According to the 1986 Constitutional Commission, the intention of the provision is to express preference for the use of voluntary modes in settling disputes without disallowing compulsory arbitration in certain cases where the national interest is involved. (Primer, The Constitution of the Republic of the Philippines, p.19)

[4] LABOR CODE, art. 212 [l]

[5] Sale, *Industrial Conflict*, Manila Bulletin, January 31, 2003, p. B-7, col. Business Focus, citing C.J. Margerison.

[6] National Conciliation and Mediation Board, Primer on Grievance Settlement and Voluntary Arbitration, 1993.

[7] Feuille, Peter and Wheeler, Hoyt N., 1981, Will the Real Industrial Conflict Please Stand Up? in *U.S. Industrial Relations 1950 – 1980: A Critical Assessment*, University of Wisconsin, U.S.A.: Industrial Relations Research Association, p. 256.

[8] Under Department Order (DO) No. 40-03, Series of 2003 of the Department of Labor and Employment (DOLE), "Related Labor Relations Dispute" refers to any conflict between a labor union and the employer or any individual, entity or group that is not a labor union or workers' association, while "Grievance" refers to any question by either the employer or the union regarding the interpretation or implementation of any provision of the collective bargaining agreement or interpretation or enforcement of company personnel policies.

[9] P. Feuille and H. N. Wheeler, *op. cit.*, note 7 at 259.

[10] LABOR CODE, art. 260, 261, 263 (g).

[11] National Conciliation and Mediation Board, *op. cit. supra*, note 6.

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

[15] 21 SCRA 226 (1967)

[16] 2 C. Azucena, The Labor Code With Comments and Cases 19 (5th ed., 2004).

[17] *Ibid.*

[18] In *Kiok Loy v. NLRC*, G.R. No. 54334, January 22, 1986, the Supreme Court held that the duty to bargain collectively commences when the following preconditions are met – a demand to bargain under Article 250, par. (a), Labor Code, possession of the status of majority representation by the demanding union and proof of majority representation.

[19] DOLE DO 40-03, Series of 2003 provides under Rule XVI -

> *"Section 5. When multi-employer bargaining available.*
>
> Legitimate labor union(s) and employers may agree in writing to come together for the purpose of collective bargaining, provided:
>
> a) only legitimate labor unions who are incumbent exclusive bargaining agents may participate and negotiate in multi-employer bargaining;
>
> b) only employers with counterpart legitimate labor unions who are incumbent bargaining agents may participate and negotiate in multi-employer bargaining; and
>
> c) only those legitimate labor unions who pertain to employer units who consent to multi-employer bargaining may participate in multi-employer bargaining".

[20] Under DOLE DO No. 40-03, Series of 2003, "Deregistration of Agreement" refers to the legal process leading to the revocation of CBA registration; "Interpleader" refers to a proceeding brought by a party against two or more parties with conflicting claims, compelling the claimants to litigate between and among themselves their respective rights to the claim, thereby relieving the party so filing from suits they may otherwise bring against it; and "Intervention" refers to a proceeding whereby a person, labor organization or entity not a party to a case but may be affected by a decision therein, formally moves to make himself/herself/ itself a party thereto.

[21] Sto. Tomas, Patricia A., 2004, Labor and Employment, in *Macapagal-Arroyo Presidency and Administration*, Volume 1, eds. Abueva, Bautista Tapales, Domingo, and Nicolas. Quezon City: U.P. Press, 2004.

[22] Frederickson, H. George and Smith, Kevin B., 2003, The Public Administration Theory Primer, U.S.A.: Westview Press, p. 195.

[22a] *Id*, at 83-84.

[23] Reyes, Danilo R., 1997, Controversies in Public Administration: Enduring Issues and Questions in Bureaucratic Reform, *Philippine Journal of Public Administration*, XLI (1-4) (January – October), p. 283.

[24] P. Sto. Tomas, *op. cit. supra*, note 21.

[25] *Ibid.*

[26] H.G. Frederickson and K. Smith, *op. cit.*, note 22, p. 84.

[26a] *Ibid.*

[27] Ofreneo, Rene E., 2004, Re-Thinking the Job Creation Strategy, Re-Thinking the Agro-Industrial Strategy, in *Alternative Views and Assessments of the Macapagal-Arroyo Presidency and Administration,* Volume 2, eds. Abueva, Bautista Tapales, Domingo, and Nicolas. Quezon City: U.P. Press, p. 231.

[28] Kettl, Donald F., 2002, The Transformation of Governance, Baltimore, Maryland: The John Hopkins University Press, pp. 10, 13.

[29] *Ibid.*
[30] Simon, Herbert A., 1997, Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations, U.S.A.: The Free Press, pp. 1-3.

[30a] *Id*, at 29-43.
[31] *Id*, at 72-139.
[32] D. Kettl, *op. cit.*, note 28, p. 12.

[33] H.G. Frederickson and K. Smith, *op. cit.*, note 22, pp. 167-172.

[34] *Ibid.*
[35] *Ibid.*
[36] Quade, E., 1982, Analysis for Public Decisions, pp. 146-147.
[37] *Ibid.*
[38] *Ibid.*
[38a] Brandenburger, Adam M. and Nalebuff, Barry J., 1999, The Right Game: Use Game Theory to Shape Strategy, in *Harvard Business Review on Managing Uncertainty,* Boston, MA, U.S.A.: Harvard Business School Press, p. 69.

[38b] *Id*, at 70.

[38c] *Id*, at 73-78.

[39] H.G. Frederickson and K. Smith, *op. cit.*, note 22, p. 49.

[40] *Ibid.*
[41] *Ibid.*
[42] *Id*, at 172.

[43] *Ibid.*
[44] *Id*, at 182.
[45] *Id*, at 176-177.
[46] *Id*, at 182.
[47] *Ibid.*
[48] *Id*, at 176-177.
[49] *Ibid.*
[50] *Id*, at 240.
[50a] *Ibid.*
[51] *Id*, at 166.
[52] *Id*, at 174.
[53] *Id*, at 72.
[54] *Ibid.*

[55] *Ibid.*
[56] Rosenbloom, David H. and Kravchuk, Robert S., 2005, Public Administration: Understanding Management, Politics, and Law in the Public Sector, New York: McGraw-Hill, p. 331.
[57] *Ibid.*
[58] *Id*, at 333.
[59] *Id*, at 331-332.
[60] 360 SCRA 645 (2001)
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.*
[65] P. Sto. Tomas, *op. cit. supra*, note 21.
[66] *Ibid.*
[67] Bureau of Labor and Employment Statistics, Department of Labor and Employment, 2004, Current Labor Statistics, p.12.
[68] Congress of the Philippines, 2001, Human Capital in the Emerging Economy, p. 27.
[69] *Id*, at 32-35.
[70] Bureau of Labor and Employment Statistics, Department of Labor and Employment, 2004, LABSTAT Updates, *Statistics on Non-Regular Workers*, 8 (21) (December), p. 2.
[71] Bureau of Labor and Employment Statistics, *op. cit. supra*, note 67, p.19.
[72] *Id*, at 18.
[73] *Id*, at 76.
[74] *Ibid.*
[75] *Ibid.*
[75a] Bureau of Labor and Employment Statistics, Department of Labor and Employment, 2004, LABSTAT Updates, *Extent of Unionism*, 8 (13) (October), p. 1.
[75b] *Id*, at 2.
[76] Szal, Richard, 2000, Globalization, Employment and Industrial Relations: The Case of the Philippines, in *Philippine Industrial Relations for the 21st Century: Emerging Issues, Challenges and Strategies*, Quezon City: UP SOLAIR and PIRS, p. 56.
[77] *Ibid.*
[78] Bitonio, Benedicto, 2000, Unions on the Brink: Issues, Challenges and Choices Facing the Philippine Labor Movement in the 21st Century, in *Philippine Industrial Relations for the 21st Century: Emerging Issues, Challenges and Strategies*, Quezon City: UP SOLAIR and PIRS, p. 135.
[79] International Labour Office, 2000, *Your Voice at Work*, Geneva, Switzerland, p. 20.

[80] *Ibid.*
[81] *Ibid.*
[82] *Id*, at 19.
[83] *Id*, at 13.
[84] *Id*, at 20.
[85] *Ibid.*
[86] Sale, *op. cit. supra*, note 5, citing M. Poole.
[87] Bureau of Labor and Employment Statistics, *op. cit. supra*, note 67, p.78.
[88] *Ibid.*
[89] *Id*, at 80.
[90] *Id*, at 81.
[91] *Id*, at 67, 81.
[92] *Id*, at 80, 83.
[93] P. Sto. Tomas, *op. cit. supra*, note 21.
[94] Congress of the Philippines, *op. cit.*, note 68, p. 84.
[95] Bureau of Labor and Employment Statistics, *op. cit. supra*, note 67, p. 84.
[96] *Ibid.*
[97] *Id*, at 67, 78, 80, 81, 83.
[98] H.A. Simon, *op. cit.*, note 30, pp. 1-3.
[98a] H.G. Frederickson and K. Smith, *op. cit.*, note 22, p. 72.
[99] Verma, Anil, Kochan, Thomas A., and Lansbury, Russell D. (eds), 1995, *Employment Relations in the Growing Asian Economies*, USA and Canada: Routledge, p. 25.
[100] LABOR CODE, art. 106.
[101] International Labour Office, *op. cit.*, note 79, p. 21.
[102] H.G. Frederickson and K. Smith, *op. cit.*, note 22, p. 7.