ETHIOPIAN EMPLOYMENT LAW

NOTES, CASES AND MATERIALS

A Textbook

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Addis Ababa, Ethiopia
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Preface

The idea to prepare a text book on Employment Law was conceived long time ago. However, due to time and financial constraints it remained only a vision. Recently the USAID- *Feteh* (Justice) Activity in Ethiopia, in consultation with the Consortium of Law Schools across Ethiopia, expressed an interest to finance the preparation of law text books among which preparation of textbook on employment law is one. Consequently, it issued an open tender to qualified and interested researchers to take up the task.

We felt that an opportune moment has come to convert the idea into reality. We thus decided to grab this golden opportunity and submitted our proposal for consideration by the Project Office. Fortunately, our proposal got acceptance by the *Feteh*. Incidentally, we would like to appreciate and thank the USAID- *Feteh* (Justice) Activity in Ethiopia for initiating, supervising and financing the preparation of this text book. In a country where industrialization is becoming at the top of its economic agenda, materials on industrial relations are pertinent and timely.

The material covered in this text is allotted in terms of what should be discussed and achieved in a semester of three credit hours. Thus, setting priority for coverage is warranted. Although Ethiopian employment regime has two broad categories (namely; the private sector and the civil service sector employment regimes), due to mainly time constraint, it is the former which has been given much emphasis in course designing and class deliberations in our law schools. This is also the experience I gathered from my course offering on "Employment Law" for almost two decades at the Addis Ababa University-School of Law.

The reason for focusing on private sector, other than time constraints is, in the Ethiopian context, it is the private sector employment regime which mainly regulates the profit-making sector that is more controversial and more litigated. Thus, for the benefit of practical importance, the private sector employment regime will be the main focus of this text book. The civil service employment regime is designed to achieve uniformity in determining rights and obligations together with conditions of employment of civil servants. Furthermore, the remuneration of civil servants has financial implications that have to be reflected in public budgets, which are approved by such bodies as parliaments and municipalities. Thus, it prohibits or leaves little room for negotiation; and it is more of an administrative law type rather than contractual engagement. Hence, to a certain extent, the civil service employment regime is accommodated under "Administrative Law" courses. It does not however mean that the civil service employment regime will be uncharted territory in this text. Infact, for purposes of comparison, there may be instances where consulting the Federal Civil Servants' Proclamation may be appropriate.

As I said, this text book is a result of accumulated experience and observation in teaching and research on the subject for more than two decades. Since the time allocated for the course "Employment Law" is one semester of three credit hours (five ECTS) in the national curriculum, provision by provision discussion in the form of explanatory note would be unfeasible. Hence, I took the liberty to pick and choose the provisions of the law that are frequently "tried and tested" in the world of practice before our courts and labour tribunals. Issues coined and developed in long years of class discussions with many of my students have been incorporated in the text with a view to provoking further deliberations in future classes with incoming students. It is hoped that this text will offer a modest contribution in harmonizing course delivery in the various law schools across the country.

In terms of structure and organization, this text is organized under eight chapters. Chapter I contains general introductory remarks and offers general exposition on historical development of employment law in general and in Ethiopia in particular. Understanding historical development is important because if we do not have an idea as to where we began; and where we are now; we may not have an idea as to where we are heading. From this perspective, studying historical development is a worthwhile exercise.

The remaining part of the text, other than the final chapter, is broadly divided into two parts (i.e. Part I and Part II). The first part covers "Individual

Employment Relations" while the second part takes care of issues associated with the so called "Collective Employment Relations".

Within the framework of individual employment relations, we will deal with issues of individual nature such as contract of employment; rights and obligations of the parties; termination of a contract of employment together with its effects; treatment of special group of employees such as women, young workers, employees with disabilities and foreign workers under the law; and the minimum employment conditions available to every employee as well. The employee as an individual will be the main focus in this part of the text.

Part II of the text is devoted towards analysing collective concerns of labour such as freedom of association and collective bargaining and the procedures for their implementation. Association brings in organized voice that would countervail the stronger bargaining power of the employer over an individual employee. As a result, it has been badly needed by employees. However, on the face of organized labour, an individual employer would be weak as well. Thus, within the International Labour Organization (ILO) and the Ethiopian domestic regulatory framework, freedom of association is available both to employers and employees though it is more desirable by employees.

In the sphere of labour relations, association is not an end by itself. It is with a view to obtain better concession from the other party through bargaining that social partners desire to associate. Thus, more often than not, association is followed by collective bargaining; and the latter leads towards collective agreement. Collective agreement is one of the private instruments through which better benefits to the employee than what is provided by law or contract of employment may be obtained. These all will be considered under this part.

Finally, the concluding chapter will elaborate the nature of employment disputes together with their modalities of prevention, management and resolution. It is well known that no matter how well articulated, clear and detailed legal provisions may be, disputes in understanding, interpreting and implementing them may occur among stakeholders. Therefore, how to resolve such disputes if and when they arise need to be put in place and in advance. Hence, under this chapter, organs of dispute settlement and their respective jurisdictions shall be considered as well.

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Chapter I

General Introductory Remarks

In this chapter, students will be introduced to issues associated with the nature and basic features of employment relations. Emergence and development of employment relations in Ethiopia and elsewhere together with the economic basis for its existence will be considered.

Generally, employment law is a branch of law that regulates employer and employee relations. Literatures mostly employ phrases such as “labour law”; “law of industrial relations” and “work law” interchangeably with employment law. Employment relation is a contract to render service in return for wages. Relatively speaking, this branch of law is of recent origin compared to other branch of laws of civil nature such as marriage, property, succession and others. The latter branch of laws has been in existence since pre-industrial societies. But capital and labour are economic prerequisites for employment law. Capital (surplus product) and ‘free labour’ that can contractually sell out one’s service were not available in pre-industrial societies. Hence, this branch of law is a manifestation of industrial societies. Although employment law is a law regulating a special contract to provide service in return for wages, it should be noted that not all service provision contracts in return for remuneration are employment relations. There are employment-like social relations. Their distinctions will be elaborated in due course.

Herein below is an extract from “Privatization in Ethiopia: Its impact on Unionization and Collective Bargaining” PhD thesis by Mehari Redae (University of Warwick-UK-2015)-footnotes omitted. (Available at http://wrap.warwick.ac.uk)

1.1. Development of Employment Relations in General

This section examines the historical development of employment relations elsewhere and in Ethiopia and the economic policies and legal frameworks that have been operative at different periods in Ethiopian history. Although broadly speaking employment relation has manifested itself in the form of private sector and civil service sector employment regimes, it is the private sector which is more controversial and a source of much litigation. The main reason for this, as we stated above is, while the civil service sector is being regulated by hard and fast rules which are inflexible and non-negotiable; the private sector has ample room for flexibility and private ordering. Instruments of private ordering such as work rules and collective agreements that govern significant portion of employment relations are non-existent in the civil service sector employment regime. Even the terms of a contract of employment in the civil service sector have little or no flexibility. Its terms are more prescribed than negotiated. Thus, the civil service sector employment regime is more of an administrative law type than a contractually established employment relationship. Therefore, it must be clear from the outset that our major focus in this text is the private sector employment regime. However, where appropriate and in order to have comparative insight, we may, at times, be compelled to consult the regulatory regime of the civil service sector as well.

Documentation of the historical development of employment law is essential to an understanding of its present form and content together with anticipating its future trends. Indeed, it is difficult to understand the current situation properly without reflecting on the past. From this perspective, documenting historical development is a worthwhile exercise. Actually, in order to situate the Ethiopian labour development within the context of a broader framework, it is informative to draw on insights from other sources, in particular those relating to the development of employment relations elsewhere and internationally.

In pre-industrial societies, as the economy was subsistence in character and mainly agrarian in nature, it was predominantly dependent on family labour for its operation. It was industrialization that led to the emergence of what we know as "employment relations". Industrialization's economic basis was the interface between capital and labour. As family labour was no longer sufficient to operate the then cottage industries or to cultivate sizeable farms which were market oriented, the labour deficit was needed to be filled from the labour market. Thus, it was with the emergence of industrialization and industrial development that the demand for surplus labour outside the familial or kin-related labour supply was seriously felt. This situation called for resort to a labour market to satisfy the demand for labour, where 'free person' who can freely negotiate to hire (sell) their labour were available in the market. In a sense, the capital and labour interaction came into being in which capital badly needed labour for economic growth; while labour relied on capital for livelihood and survival.

Since industrialization was either largely non-existent or quite relatively new in the rest of the world, employment relation traces its roots from the historical antecedents in Europe and North America. Although the evolution of employment relations had witnessed considerable national variety even in Europe, the general pattern of development displayed many similarities. As a general path of development, the status-oriented vassal-serf, landlord-tenant and the guild society of the feudal mode of production gradually gave way to a capitalist system where capital-labour mode of production prevailed. As a result, the labour and capital relationship came to the forefront to expressing itself through freedom of contract and formal equality. Thus, it was a transformation from status to contract.

Under the freedom of contract principles that grew up around industrial revolution in Europe, the formally equal parties designated themselves as employer and employee; and freely bargained to stipulate their terms of engagement. The length of engagement of the parties, the amount of wages, any limits on working hours and other related employment issues were left to the determination of the contracting parties. Each party was at liberty to terminate the contract of employment with cause or with no cause at any time, or in some cases only upon giving notice. The role of the State then was mainly contract enforcement (i.e., enforcing the parties' promises); if and when requested.

The then prevailing ideology was that economic affairs were matters for private ordering. The interaction of capital and labour was being considered as merely and purely economic affairs. It was thus to be regulated solely and exclusively by market forces and free bargaining. Labour relations were treated as contracts to sell or lease services in return for remuneration. For all practical purposes, labour, like any other factor of production, was treated as a commodity whose value was to be determined on a supply and demand basis. It was argued that "efficient equilibrium would result if the legal framework simply allows market forces to follow their natural course".

In such an engagement, capital, with its stronger bargaining power had the advantage over the weaker bargaining position of labour. As a result, wealth created through the interaction of capital and labour was being apportioned in an inequitable manner under the veil of "freedom of contract". In a sense, capital managed to appropriate the "lion's share" from the wealth generated therein, in the name of business profit, while labour received the minimal amount of it in the form of wages.

Indeed, it was not only a matter of appropriation profit; power in labour relations was also exclusively possessed by capital in that the employer had absolute prerogative in hiring and firing the labour force as it pleased. Hence, in the freedom of contract regime, profit and power were placed under the full authority of capital (the employer).

It could be contended that freedom of contract is fair and just. Because it treats the contracting parties on equal footing and leaves the parties on their own to determine the terms of their relationship. However, when applied to capital and labour interaction freedom of contract more often than not resulted in subjecting labour to employment insecurity and bare minimum wages. Moreover, labour was exposed to excessively long working hours coupled with unsafe and unhealthy working conditions.

It thus became manifestly clear that freedom of contract between economic non-equals would not bring about mutually beneficial outcomes. Therefore, it meant market did not work well. This market failure called for some sort of state intervention with a view to rectifying same. In fact, there was also a complimentary contention that what should be left to market is price of commodities. But labour is not a commodity and hence leaving it to market forces is unwarranted. Personhood must be respected beyond productive work capacity. The argument goes, behind labour there exits human dignity which is not marketable.

As a result, pressing for state intervention in determining matters such as minimum wage levels, maximum working hours, employment security and safe working condition moved to the top of the agenda of many emergent labour movements around the world. With this object in view, employees began to express their discontent towards the so called "freedom of contract" and to militate against it through organised and unorganised means. At times, the discontent was being expressed through wild-cat strikes, thereby beginning to destabilize industrial peace. Such collective voice of protest and frequent strikes not only adversely affected productivity and industrial peace but also endangered social stability particularly in areas where industrialization and organisation of labour movements were at their more advanced level.

In fact, in some parts of Europe, in tandum with instability in industrial peace, a socialist ideology that militated against the very existence of the capitalist system began to emerge at the level of political orientation. The political basis of the capitalist system began to be challenged by Marxist philosophy. As a result, the adverse impact of freedom of contract on economic, social and political interactions obtained wider visibility which warranted state intervention. It was understood that market has been inefficient in addressing the social and political dimensions of the relationship between capital and labour.

Thus, the notion that employment relations are purely economic affairs began to be revisited. Many governments began to re-assess the appropriateness of leaving employment relations solely to the mercy of market forces. The need to enact social legislation in order, among other reasons, to counteract the "structural injustice" between capital and labour was found appropriate.

As state power began to emanate from the ballot box instead of through blood lines, securing favourable votes of employees was a factor which competing parties could not afford to ignore. In a system of universal suffrage and votes of equal value, employees inevitably have been numerically attractive. Consequently, the inclusion of pro-labour programmes in electoral campaigns became the norm in party politics. Hence, it may be safe to state that the need for industrial peace, social stability and the desire to obtain electorate backing pressed political parties and national governments to intervene in regulating industrial relations that had formerly been left to private ordering.

However, the manner of state intervention differed from jurisdiction to jurisdiction. In some jurisdictions, governments allowed freedom of association (unionization) so that the low bargaining power of individual employees would be compensated through "organized voice". Once they rectified the negotiation inequality, they withheld state intervention then and there (*collective laissez-fair*). Nevertheless, they later realized that there were limits to what could be achieved through collective bargaining and that additional legal intervention was needed to fulfil various economic and social policy goals of the state.

In other jurisdictions, minimum labour conditions in the form of "floor of rights" were stipulated by law below which a contract of employment cannot prescribe. Terms of a contract of employment which deviate downwards from the legal minimum shall be replaced by the legal prescription. The commonality of the different interventionist approaches however is they appreciated the need for some sort of state intervention and acted accordingly.

Be that as it may, initial attempts of state intervention in labour matters were national in scope and domestic in application without resorting to international cooperation and coordination. It may be argued that appreciating the need for state intervention and actually intervening could in itself be considered as a step in the right direction. The limitation with a country specific approach, however, was felt with the proliferation of international trade. While countries began to trade among each other internationally, it was felt that heterogeneous labour standards would impact competitiveness in international trading systems. Those countries with labour friendly regulatory frameworks could stand to lose in international competition. In fact, many countries that adopted labour protective legislation reconsidered their measure and began to repeal such laws until their competitive peers introduced laws of equivalent effect so that equilibrium would be established.

For instance, there was time when a French law limiting daily working hours to ten hours for all workers was repealed after five months in force due to the fact that other competing countries were reluctant to follow suit and France was not ready to sacrifice its competitiveness by so doing. However, it does not necessarily follow that low labour standard is associated with competitiveness. In fact, low labour standard would rather be associated with low productivity due to labour demotivation, thereby a comparative disadvantage. Nevertheless, it should be noted that perception is not something to be ignored altogether. Thus, the reality on the ground demanded internationally coordinated action.

1.2. International Cooperation in Employment Matters

The establishment of the International Labour Organization (ILO) in 1919 under the Treaty of Versailles provided a permanent international and institutional space for dealing with the welfare and well-being of labour at the international level. From its inception, the ILO was entrusted with the responsibility of establishing international labour standards on a wide range of issues with a view to implementation by member states in their respective jurisdictions. Hence, labour issues obtained international sponsorship and supervision within the ILO's mandate.

Since its establishment the ILO has had a unique tripartite organization. Unlike most, if not all, international organisations whose members are exclusively state officials (public actors), ILO has consisted of private actors (representatives of trade unions and employers' associations) within its core representation. For instance, as per Article 3 of the ILO Constitution, member states should constitute their respective core delegation with two government representatives, one employers' association representative and another trade union representative in order to have formal participation at the ILO Annual Conferences. The Conference deliberates on international labour standards and adopts legal instruments to be ratified or considered by member states for subsequent implementation. With this arrangement, it could be said that the rule making process under the ILO has been within the tripartite framework of stakeholders' participation.

The preamble of the ILO Constitution made it clear that the need for international cooperation and the establishment of the ILO was initiated by a desire to address internationally social, political and economic concerns of the time. These were: "social injustice"; "social unrest (revolution)"; and "social dumping".

As regards the struggle against social injustice, the ILO Constitution underlined that social justice would not be attained without respecting labour rights of both an individual and collective nature. It further reaffirmed that, "*universal and lasting peace can be established only if it is based upon social justice*".

With regard to prevention of "social revolution", though the ILO Constitution did not expressly spell it out (it rather employs the phrase "social unrest"), it should be noted that the circumstance under which the ILO came into existence more or less coincided with the assumption of power of the "Bolsheviks" in Russia in 1917. It was thus feared that so long as hardship, exploitation and injustice towards labour existed, the ideology of the "dictatorship of proletariat" of the "Bolsheviks" would widen its sphere of influence beyond Russia. Hence the capitalist world was convinced that the "Russian Socialist Revolution" would be at least contained within the Russian borders if sympathetic and systematic concessions for the resolution of confrontations in industrial relations were introduced.

As a result, devising a general framework for international "floors of rights" to employees was considered as one way of pre-empting social revolution. The fact that the "Russian Revolution" of 1917 and the establishment of the ILO in 1919 occurred at around the same time is difficult to explain away as being mere coincidence. It can be claimed with some confidence that though pre-emption of socialist revolution may not have been the sole motive for the establishment of the ILO, its establishment was accelerated by the occurrence of the "October Revolution" in 1917.

The commitment of member states of the ILO to withstand "social dumping" was much more explicit in the ILO Constitution than the other two missions mentioned above. The third paragraph of the preamble placed an emphasis on this issue: *"(…) failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries".* If adopting humane conditions were to require extra cost and thereby increase the cost of production, such products would be less competitive when introduced into a market where they were competing with products produced in less humane working conditions. Then if such "regulatory competition" were to prevail among states at international level, this could discourage humane concerns towards labour until other competing states embarked upon a similar disposition. In order to avoid this practice of "social dumping," responsibility for setting up international labour standard was entrusted to the ILO.

The three pillars on which the ILO has been entrenched tend to address the tripartite interests and concerns of the three important stakeholders in labour relations (i.e. employees, employers and government). Struggle against "social injustice" and expressing a voice for the prevalence of social justice reflects a predominantly social issue and mainly benefits the labour force due to labour's vulnerability to hardship and exploitation (i.e. social justice). Fear of "social revolution" is predominantly a political issue and therefore principally concerns governments in power since social unrest or even revolution would mainly target assumption of state power.

The issue of "social dumping" has economic implications and mainly and directly affects the interests of capital (employers) as it harms their competitiveness though this can of course have detrimental consequences for the interests of labour as well. Thus, it is important to note that not only at national level but at the international sphere as well; labour relations have social, political and economic dimensions.

What emerges from the preceding discussion is that the employment relationship has undergone significant transformation over-time. Initially, it was treated as a private contractual matter to be regulated by freedom of contract. With passage of time, state intervention at national level became desirable. Thereafter, the inadequacy of intervention at nation state level paved the way for international cooperation and establishment of a permanent international institution. Therefore, the general trend of employment regulation has gone through different stages of transformation: from a pure subject matter of private contract of service, it became a subject of national concern where states began to intervene. Finally, it attained the status of an issue of serious international concern.

With these brief introductory remarks, we will hereafter consider the development of employment relations in Ethiopia with the object of shedding light on its similarity with or difference from the general trend of development indicated above.

1.3. Evolution of the Economic Basis for Employment Relations in Ethiopia

Ethiopian labour relation is in some degree an outcome of a slow and prolonged economic and social transformation. Historical records indicate that Ethiopian labour development was very much associated with the emergence of industries and industrial production systems. For a long time, Ethiopia was mainly an agrarian economy existing alongside handicraft activity. Due to this, the capitalist mode of production was slow to develop and limited in coverage. Guadagni argued that the cultural and legal conditions that prevailed in the country at the time had negatively contributed to the slow development of the capitalist economy.

Culturally, Ethiopian society had undervalued labour and labourers and indeed tended to despise both trade and manual work. There has, for instance, been an Ethiopian (Amharic) proverb which states that *kemesrat barnet, kemenager getnet* (literally meaning - from cleverness of hands comes serfdom and from cleverness of tongue, the master). It was recorded that this adverse societal attitude towards labour had annoyed the early twentieth century ruler of the country, Emperor Menelik II, who proclaimed the following in 1908:

> *Let those who insult the worker on account of his labour cease to do so. You by your insults and insinuations are about to leave my country without artisans who even make the plough. Hereafter any one of you who insults these people is insulting me personally* (Mahteme Selassie, 1949:432).

As legal prescriptions would be less likely to provide a lasting remedy to countervail deep rooted cultural biases, cultural transformation through formal education and awareness raising activities would have offered more chance of success. But the proclamation of the Emperor was not accompanied by any of these measures. Thus, the negative attitude towards labour persisted thereby adversely affecting industriousness and industrial development.

Through passage of time however, at the beginning of the twentieth century, a capitalist mode of production began to emerge in Ethiopia. The victory by the Ethiopian forces at the Battle of Adwa (1896) against the Italian invasion was a significant success for Emperor Menelik II. The military success enhanced Ethiopia's international visibility and enabled the Emperor to discuss on equal footing with European powers matters of common interest and concern on equal footing. As a consequence, the Emperor began to establish formal diplomatic ties with the European super powers of the time (Britain, France and Italy) all of whom had a colonial presence bordering Ethiopia.

The neighbouring countries were by then under the occupation of these European powers. Eritrea was then under Italian colonial administration; the Sudan was under British rule, while Djibouti was under French domination and Kenya belonged to the British colonial system. Moreover, two of the colonial powers had colonial presence in present day Somalia (Italian Somaliland and British Somaliland).

These colonial territories by then had a relatively advanced capitalist development than the feudal but non-colonised Ethiopia. Through the long and porous borders of the country, capitalist elements, ideas and attitudes were being introduced through the medium of missionaries and missionary schools, merchants and diplomatic envoys. Thus, initial capitalist modes of production in Ethiopia were transplantations and a spill-over from the neighbouring colonial territories rather than the result of an internally cultivated dynamism and economic transformation.

The conventional path towards capitalist development as observed in many industrial countries has been a transformation from peasant farming to mechanised agriculture and from artisans and handicrafts to factory and machinery establishments. In the African continent too, industries for primary products mainly mining and agricultural estates were the economic basis for initial industrial relations. In a sense, it was the agriculture and the manufacturing sectors that developed first and a service sector (the third generation of economic development) emerged and developed at a later time in economic transformation.

Conversely, in Ethiopia, railway, telecommunication and banking services were the earliest capitalist establishments. The commencement of the construction of the Ethio-Djibouti Railway (in 1889) by the Franco-Ethiopian Railway Company, the project for the establishment of telephone and telegraph connections along the railway lines by the same company and the incorporation of the Bank of Abyssinia by the National Bank of Egypt were the earliest capitalist establishments in Ethiopia. The establishment of these service provider economic entities at the initial phase of the country's capitalist development illustrated that Ethiopia's early capitalist development was not a result of an internal dynamism; rather primarily and predominantly an imported one. It could thus be contended that the Ethiopian capitalist development was atypical both in the type of economic activity and in its foreign origins.

The infrastructure projects referred to above attracted appreciable numbers of labourers from the countryside. But as the projects had a defined life span, the employment status of the Ethiopians was temporary in nature. Consequently, most were compelled to return to their respective agricultural plots after the completion of the projects. Thus, they neither had the opportunity to upgrade their skills nor to acquire workplace discipline on a permanent basis. As a result, the local labour profile at those times was mainly unskilled and casual. In a sense, agricultural activity remained the employer of last resort for a long time.

Through time, however, many foreigners showed heightened interest in the Ethiopian economy and engaged in concessionary arrangements with the Ethiopian government in mining and agriculture. Since the attempt to occupy and colonise Ethiopia by force proved unsuccessful, concessionary and consensual ties became feasible ways of tapping the country's unexploited resources. In 1899 a Swiss Company, owned by Alfred Ilg, a political adviser to the Emperor, invested in the mining industry in Wollega (in the western part of the country) while around the same time an English company engaged itself in an agricultural investment in Kaffa (in the south-western part of the country) and mining in Wollega. Furthermore, a French company established a farm intended for fibre plantation in the eastern part of the country in Harar.

Those economic initiatives were complemented by the emergence and development of urban centres. Emperor Menelik II seemed determined to have a permanent Imperial seat from which central administration would emanate and handed down. Unlike his predecessors who used to change their Imperial seats frequently, due to various factors including problems of security; the availability of drinking water and firewood, he eventually opted for a more permanent settlement for his administration.

Based on this more sedentary approach, the beginning of the twentieth century was characterized by the construction of palaces, churches and hotels in and around Addis Ababa which has ever since been the capital city of the country. The Grand Palace of Menelik, Taytu Hotel and the various churches such as Saint Mary, Saint George and Saint Raguel located in and around Addis Ababa were all constructed during those times. Moreover, the completion of the Djibouti-Addis Ababa railway led to the establishment of towns such as Dire Dawa along the railway route within the Ethiopian hinterland.

Those various economic and social activities in service, agriculture, mining and construction sectors in the country brought about the emergence of significant numbers of the workforce detached from an agrarian economy towards an urbanised one on a relatively permanent basis. The establishment of the urban centres, for their part, paved the way for a more permanent and settled urban livelihood and hence founded the main economic basis for the emergence of employment relations in Ethiopia.

1.4. Development of Employment Law in Ethiopia

1.4.1. Employment law during the Imperial Era

The cultural attitude towards labour and labourers and its adverse effect to labour development of the country has already been mentioned above. The unfavourable legal environment at the time was responsible for hindering the development of employment relations as well. Although Ethiopia, as noted previously, is one of the oldest members of both the League of Nations and the ILO, having acceded to both institutions in 1923, slavery was an entrenched and legally recognized social relation in the country until it was abolished by law in

1942. It was pursuant to Slavery Abolition Proclamation of 1942 that the legal status of slavery was formally abolished.

Admittedly, prior to this proclamation, there was a Proclamation issued in 1931 which attempted to abolish slavery. The relevant provisions of that proclamation stated as follows: '*All slaves who wished to be free could become free by asserting their freedom before a judge'.* It further provided *for the punishment of persons who bought and sold slaves or who sought to prevent slaves from asserting their freedom*. However, this was not bold enough to abolish slavery altogether. First, the proclamation addressed itself to slaves 'who wished to be free' but not to all slaves. If for whatever reason people wanted to remain slaves, the law had no objection. Second, even for those 'who wished to be free', the freedom was not automatic and as of right; it rather required the blessing of the judge because the law expected them to assert their right before a judge. Third, the Proclamation did not put enforceable sanctions on those who might sought to prevent slaves from asserting their freedom. Of course, the law claimed to have provided for punishment but the then criminal law had no explicit provision in this regard. It is a well established criminal law maxim that *no crime and no punishment without law.* It was with the promulgation of the Slavery (Abolition) Proclamation No.22/1942 that the legal status of slavery was declared to be abolished (Article 3). Even then, due to absence of sanction, it had no dissuasive effect. It was after 15 years and with the coming in to force of the Penal Code of 1957 that "Enslavement" was validly criminalized. Article 565 of the same stipulated the following:

1) *Whosoever:*
   a) *Enslaves another, sells, alienates, pledges or buys him, or trades or traffics in or exploits him; or*
   b) *Keeps or maintains another in condition of slavery, even in disguised form*

   is punishable with rigorous imprisonment from five to twenty years and a fine not exceeding twenty thousand dollars.

2) *Those who knowingly carry oft, transport or conduct, whether by land, by sea or by air, persons thus enslaved, in order to deliver them at their place of destination, or who aid and abet such traffic, whether within the territory of the Empire or abroad, are liable to the same punishments.*

As employment relationships presuppose the availability of "free" persons who can freely bargain over their labour, the prevalence of slavery as a legally recognized mode of social relation was incompatible with the emergence of employment relations. Thus, the negative cultural attitude of Ethiopian society towards labour; and the legal recognition of the status of slavery were among the factors responsible for the slow and limited development of employment relations in Ethiopia.

However, the Italian invasion over Ethiopia at the beginning of the Second World War (1936) led to the emergence of labour intensive industries supportive to the war efforts of the invading force (such as oil, flour and saw mills; textile, leather, cement, food and beverage factories). Due to the labour intensiveness of those manufacturing enterprises and the relative permanent employment status of their labour force, the number of people who earned their livelihood through employment increased. Moreover, with the formation of garrison towns in different parts of the country, appreciable number of people detached from agricultural activity began to emerge.

Even though the labour force showed a significant quantitative increase, there existed no legal framework designed to regulate the employment relationship. By default, "freedom of contract" became the legal basis for the parties' relationship and employees then were to a significant extent at the mercy of their employers. It has been even contended that for all practical purposes the relationship was more of master and servant rather than an employer and employee.

Three years after the defeat of the Italians, and two years after the 1942 proclamation of the abolition of the status of slavery in Ethiopia, the government promulgated the Factories' Proclamation No. 58/1944, an important legal instrument relevant to employment relations. By virtue of this Proclamation, the then Ministry of Commerce and Industry was entrusted with the power to issue rules on:

- the working hours in factories;
- the prevention of accidents in factories;
- the health and safety of all persons employed in factories;
- the conditions under which buildings to be used as factory housing may be erected and constructed;

In addition to these measures, the Ministry was empowered to appoint "labour inspectors" to carry out supervision and monitoring activities over the factories with a view to ensuring the observance of the rules. Those measures showed that the government realized the need for a limited state intervention in labour relations mainly on limiting working hours; safety and health issues in factories. In real terms, however, records indicated that the Factories' Proclamation of 1944 did not have any impact on the ground. This was because for one thing the way it was drafted was not self-executing. The legislature merely delegated power to the Ministry to issue rules rather than spelling out precise and enforceable provisions by its own. Second, the Ministry did not make use of any of the powers entrusted to it, nor did the legislature monitor the exercise of such power by the Ministry.

Apart from the controversy as to the articulation of the Factories' Proclamation, a further limitation was that its scope of application was confined to working conditions in factories (i.e. the manufacturing sector). The employees at agricultural plantations or in mining and other sectors of the economy who were equally vulnerable to risks such as excessive working hours, and threats against their health and life at workplaces were outside of its coverage as their places of work were not technically "factories". In fact, the first recorded workers' protest in Ethiopian history had been undertaken in 1915 by construction workers in Addis Ababa whose main discontent was associated with unsafe working conditions.

Notwithstanding the limitations referred to above, it can be argued that the Factories' Proclamation was an appreciable measure. It showed that the government realized the desirability of some level of state intervention in labour affairs. In particular, the adoption of the Factories' Proclamation only two years after the abolition of slavery indicated that the government recognized the abolition of slavery and replacing it by "contractual freedom" was not enough assurance to protect labour. Nevertheless, since the Ministry entrusted with the responsibility did not act upon its powers, the legislative measure was merely a public relation exercise and not much more than a mere expression of concern or interest.

Until 1960, the 1944 Factories' Proclamation was not supplemented in any way with further legislation. It was only in 1960 that the Civil Code was enacted. The 1960 Civil Code comprehensively regulated many of the social and pecuniary relations of private life such as marriage, succession, contracts and property. As part of this comprehensive regulatory effort, the Code devoted a section (Title XVI) on "Contracts for the Performance of Services", which mainly addressed issues of contracts of employment.

With the coming into force of the Civil Code, minimum labour conditions which had the effect of modifying the application of the terms of contractual freedom were spelt out. Pursuant to the Civil Code, the principle of no termination of a contract of employment "without good cause" was introduced, and failure to comply with the law would entitle the dismissed employee to compensation, thereby seeking to protect the employee from arbitrary dismissal. The practice during the pre-Code era in which an employee was not entitled to wages for the days he did not render any service to the employer for whatever reason was revised. Social entitlements in the form of paid annual leave, maternity leave and sick leave were being introduced by the Civil Code into the Ethiopian employment regime for the first time.

Provisions were also incorporated in the Civil Code obliging the employer to provide safety and protective equipment with a view to preventing employment injury and obligated to compensate the employee wherever employment injury was sustained. A notable omission, however, was that despite these formal contributions, the Civil Code failed to lay down the legal framework necessary for the establishment of associations for the employers and employees. As a result, issues of unionization and collective bargaining remained unregulated until the adoption of the Labour Relations Proclamation No. 210/1963.

The 1963 Labour Proclamation mainly addressed issues of freedom of association and collective bargaining. It tried, among other things, to regulate unfair labour practises. Moreover, it entrusted the then Minister of National Community Development and Social Affairs with the power to issue regulations for the proper implementation of the law. In fact, pursuant to the power given to it, the Minister issued the Minimum Labour Conditions Regulations No. 302/1964 more beneficial provisions to the labour force the contents of which will be elaborated later on.

It is interesting to note that the first half of 1960 in Ethiopian labour history had been a period when many legal instruments pertaining to labour matters were being issued. Although Ethiopia has been a member of the ILO since 1923, until 1960, it had managed to adopt only two instruments (Abolition of Slavery of 1942 and Factories' Proclamation No. 58/ 1944) pertinent for employment relations. But during the first half of the 1960 (1960-1966) the following were adopted:

- *the Civil Code of 1960 (Title XVI);*
- *Labour Relations Proclamation No. 210/1963 (initially issued in the form of Decree, later converted into a proclamation);*
- *Minimum Labour Conditions Regulations No.302/1964;*
- *Labour Inspection Service: Order No.37/1964;*
- *Labour Standards Proclamation No. 232/1966.*

Besides, ILO conventions No.87/1948 on Freedom of Association; and the Right to Collective Bargaining No. 98/1949 were ratified by Ethiopia in 1963.

1.4.2. Employment law during the Military Rule

On 12 September 1974, Ethiopia entered a new era, one of military rule, after its longstanding Imperial administration through hereditary line. A Military Council, locally known as the *Derg (*literally a "Committee") seized political power in 1974 by ousting the Emperor from the Imperial Palace. The assumption of power by the military 'put an end to a dynasty that traced its origins to King Solomon and the Queen of Sheba'. Immediately after its assumption of power, the Derg dissolved the then existing bicameral parliament; and restricted by law, any form of dissent including peaceful assembly and demonstration. Furthermore, in terms of political and economic philosophy, the 'West' oriented capitalist path of development of the feudo-capitalist system of the Imperial era was redirected towards a socialist path of development.

At the initial phases of the military reign, it appeared that the Derg did not have a clear 'road map' as to the direction of its economic policy and ideology. With a view to rallying public support, it declared that its motto was to be '*Ethiopia Tikdem* (literally 'Ethiopia First') an apparently ideology-neutral motto but a nationalist and patriotic slogan. However, the military gradually transformed its way of thinking and slogan into a more ideologically influenced motto of 'Ethiopian Socialism' in response to the pressure of left leaning groups including the Ethiopian student movements. Gradually the Derg moved to becoming a communist-oriented. Marxist-Leninist writings which were prohibited until then began to officially appear at the book stores. Pictures of Marx, Engels and Lenin were erected at the main squares of the major cities of the country.

In parallel with the political and ideological development mentioned above, a new economic policy for the country was adopted in February, 1975 and an extract from the Economic Policy reads as follows:

> (…) the major and immediate economic goals of Ethiopian Socialism cannot be but the elimination of poverty through the development of productive forces and the consequent expansion of production, and the prevention of exploitation of the Ethiopian people. <u>This can be achieved</u>

> only when the government as the representative of the people, and in the interest of the mass of Ethiopian workers and peasants, directly owns and controls the natural resources and key industrial, commercial and financial sectors of the economy. *(Underline added-* GOE, 1975:3).

Accordingly, the military government adopted practical measures of "nationalisation" of private property. Privately owned major means of production and distribution were transferred to government ownership in January and February 1975. In March of the same year, it was proclaimed that rural land was placed under state ownership to be followed by the nationalisation of privately owned urban land and extra houses in July 1975. This takeover of the private property and means of production by the government made the latter the major employer, not only in the sphere of public services, but on the economic front as well. Thus, the State transformed itself from an organ of regulatory power into an economic entity engaged in owning and managing business enterprises retaining its regulatory power intact at the same time.

As a reflection of this political and economic transformation, a new labour law was issued in February, 1975 (Labour Proclamation No. 64/1975). The political rhetoric, at the time, was that the employee is at the same time the owner of the nationalised enterprises. Employment generation to the working class was taken as an objective of prime importance. As a result, the Labour Proclamation mainly addressed the issue of employment security by stipulating strict labour market provisions on hiring and firing procedures. First, it required 'every enterprise to report all job vacancies to an Employment Office as soon as they occur' and it was only from the registered job-seekers that the enterprise was allowed to hire. At the level of firing, it laid down the principle stating that 'any contract of employment shall be deemed to have been concluded for an indefinite period'. Based on this principle, even if the contract of employment was concluded for a definite period, it was considered to have been concluded for an indefinite period, if the job was of a continuos nature. Consequently, it was the nature of the job rather than the terms of the contract of employment that determined the duration of employment. Second, the law exhaustively enumerated what were considered to be lawful grounds for termination of employment; and any termination outside of those listed were held unlawful and hence entitled the dismissed employee to reinstatement with back pay.

This marked a paradigm shift from the Civil Code era where the employer had the prerogative to terminate employment with “good cause”. And what amounts to “good cause” for termination was a matter to be determined by the employer. Of course, the decision of the employer was subject to revision by a court if the case was brought to the court’s attention by the dismissed employee. Even if the court held that there was no good cause for termination, the employer was never compelled to reinstate the employee. Payment of compensation to the maximum of three (six months wage based on the English version of the Code. But the Amharic version has been the prevailing version) months’ wage of the employee was the sole remedy for terminations without “good cause”. The amount of compensation was revised by Regulation No.302/1964 in which the terminated employee was eligible for one month’s wage for one year of service; and 25% of such amount to be added for every addition year of service in the form of severance pay the maximum being wages of 180 days.

Conversely, the labour law of the military regime legislatively determined and exhaustively spelt out the lawful grounds for termination. Thus, the employer or the court had little or no room for case-by-case determination. In cases where the dismissal was found to be out of the lawful grounds of termination, the sole remedy (unless the employee did not want to be reinstated) was awarding of reinstatement to the employee even against the objection of the employer. In fact, reinstatement was to be accompanied by back pay as the contract was deemed not to have been terminated.

Incurring the cost of back pay without the enterprise obtaining service from the reinstated employee had serious cost implications for the enterprises. Hence, cost of firing was very high. Moreover, employers had no power to dismiss employees on disciplinary grounds unless prescribed by a collective agreement in which case the trade union would have to agree on the measure. Consequently, during the military rule, the employment relationship became a relationship far more 'intimate' than a legally regulated contractual relation, thereby providing higher employment security to the employees. It is interesting to note, however, that as the major employer at those times was the public sector, the government incurred the cost of this rigid labour market arrangement.

As regards the social entitlements, the paid annual leave, maternity leave and sick leave, which have been introduced by the Civil Code of 1960, were maintained by the new proclamation in a prolonged duration and with higher pay benefits. The fact that the military regime adopted a socialist-oriented path of economic development seemed to have shaped the content of its labour proclamation towards apparently pro-labour prescriptions. In fact, the preamble of the Labour Proclamation of the military regime provided that "…the worker [employee] is the source and foundation of all production and as such his rights to work free from exploitation and the proper protection of his safety and health must be assured in order to improve his standard of living". The role of capital was not equally emphasized in the same preamble though it is equally and economically relevant input.

1.4.3. Employment law during the post-Military Rule

Soon after the overthrow of the military regime in 1991, Ethiopia adopted a market-oriented economy. Privatization programme was introduced and the state began to roll-back from the economy. Most of the state-owned enterprises were privatized mainly owing to the prescriptions of the multilateral lending and donor institutions such as the World Bank (WB) and the International Monetary Fund (IMF). The WB and IMF prescribed "privatize as soon as possible; and as much as possible" as a condition to obtain loan and technical assistance therefrom. The state had little option than to comply with their prescriptions as it heavily relied on loans and donations.

In light of the new economic circumstance of the country, a relatively private sector friendly, labour law was enacted in 1993 (Labour Proclamation No.

42/1993) which superseded the labour law of the military government. The labour law of 1993 maintained the social provisions such as annual leave and sick leave with pay which were available to the employees on the basis of the previous law in similar length. In fact, maternity leave has even been extended in duration. The presumption of indefinite employment relationship in which a contract of employment of definite period has been deemed to have been concluded for indefinite period was retained as well.

There were, however, some changes. One area of the law where the new Labour Proclamation brought a change from that of the military regime is related to free procedure of hiring of employees by the employer as opposed to the military rule when hiring was to be made through Public Employment Office. The other area of variation pertains to grounds of termination of employment and their legal effects. Under both legal regimes grounds for termination have been provided by law and any termination outside of any of these grounds is unlawful. However, there exist three points of difference between the two laws. First, the new law has a longer list of grounds for termination, thereby providing the employer with wider latitude for managerial discretion.

Second, even if termination has been undertaken on a ground other than provided by law, unlike the previous law where reinstatement was the sole remedy, this is no longer the position. It is only when termination is initiated on specific "prohibited grounds" that the new law provides for reinstatement as a sole remedy. Article 26(2) has enumerated these grounds. In all other cases, the labour tribunal is empowered to award either reinstatement or compensation as it deems appropriate on a case-by-case basis.

Thus, unlike during the military regime where the remedy was dictated by the law itself, the new law gives room for a margin of flexibility to labour tribunals to render case-by-case decisions, whether to award reinstatement or compensation instead. The third point of difference is that under the current law even if the labour tribunal awards reinstatement it is not to be accompanied by full back pay as there is no payment without rendering service. Regardless of how long the litigation for reinstatement takes, it is only a maximum of six months' wage that will be paid in the form of back pay at the level of first instance court.

Even though Labour Proclamation No.377/2003 and Labour Proclamation No.1156/2019 have been relevant for our discussion, since they are of recent instruments and presently operative instruments, it was considered advisable to explore them in more depth at a later part of this textbook.

1.4.4. Summary

It is hoped that the narrative on historical development of employment relations both nationally and internationally has provided an insight as to the stages it passed through. It has been shown that the economic basis for employment relations has been accumulated capital (no matter how meagre it may be) which demand surplus labour on the one hand; and free person (emancipated from slavery and tenancy) who can contractually hire their labour freely on the other hand. This was made possible with the emergence of capitalist mode of production.

In common with the experience of other countries, employment relations in Ethiopia were initially left to private regulation within the framework of "contractual freedom". State intervention in employment issues, through directly legislating substantive employment protections, took place at a later stage mainly since 1960s.

Unsurprisingly the economic policy and the political orientation of the successive Ethiopian governments (the Imperial era, the Derg era and the post-military rule) have had an impact on the content of the legal framework for employment relations. Although the three successive governments replaced one another by force rather than through democratic transfer of power, all of them realized the need for some sort of state intervention in labour affairs. Nevertheless, the degree of intervention they adopted reflected their economic policy and political orientations.

It is certainly possible to identify even before the 1960s the international influences on Ethiopian labour relations and the emerging legal framework. The colonial presence of the great European powers in the early 20th century adjacent to Ethiopia and the five years of Italian occupation in the late 1930s helped introduce capitalist economic relations. The early ILO membership of Ethiopia and the modernisation of its legal system in early 1960s contributed in bringing about labour laws in the country.

As a reflection of this, the 1960s operative labour law adopted a less rigid position with a view to providing labour market flexibility through which, among other things, the cost of hiring and firing was less costly. On the other hand, the influence of the communist ideology during the military regime to a great extent influenced the legal framework of labour relations of the time which over-emphasized employment security presumably consistent with its socialist-oriented path of development policy.

During the post-military period, due to the influence of the WB and the IMF prescriptions of 'deregulation' including labour market deregulation, on the one hand; and the commitment towards the ILO principles on the other, the government issued an employment law that manifested such a dilemma. It tried to formulate a legal framework that enabled labour to retain what it gained during the military rule on the one hand; and to provide labour market flexibility towards private sector development as prescribed by the multilateral lending institutions on the other.

Problem for discussion

1. How has Ethiopia's historical development influenced the scope of employment law? What about the foreign experience? Did it have any influence on the contents of our employment law?

2. Please think of and identify relevant economic, political and other factors, if any, which led the Ethiopian government of the 1960s for the heightened concern towards labour in the period under consideration (1960-1966)?

1.5. Sources of Employment Law in Ethiopia

For the purpose of this text, source of law is understood in two ways. These are the material and formal sources. Material source denotes to the origin from which legal rules are derived. From this perspective, legal rules may originate from other non-legal norms such as customs, religious prescriptions or moral values. This understanding of source of law is mainly important for studying legal history.

In this section, we are rather interested on the so called "formal sources of law." This means legal instruments expressed in various forms which have state backing for their validity and binding effect. In a sense these are instruments which should be authoritatively consulted in regulating employment relations and in resolving employment disputes if and when they occur. In light of this, sources of employment law may be broadly categorized into international and national sources.

The ***international formal sources*** mainly consist of ILO conventions to which Ethiopia is a party. International human rights instruments which are ratified by Ethiopia are relevant as well, since they enshrine provisions necessary for employment relations. These are international because they are the outcome of consultation among international public actors (i.e. representatives of various governments). They are not made by any national legislature unilaterally as well.

In fact, in the making of ILO conventions, in addition to public actors, uniquely, private actors such as representatives of employees' and employers' organizations have been involved. These are laws because they have binding effect due to the fact that any international agreement (convention in this case) ratified by Ethiopia is an integral law of the land (Article 9(4) of the Federal Constitution of Ethiopia).

The ***national formal sources*** comprise various instruments with different levels of hierarchy. They are national because, unlike the international ones, they emanate from a national organ (legislature) or an organ authorized or delegated by it. Their issuance by a pertinent organ grants them validity and binding effect.

In this regard, the ***Federal Constitution*** is placed at the top of the hierarchical ladder. Although the constitutional adoption and amendment process is mostly different from other ordinary laws; and though in the Ethiopian context, constitution does not emanate from the legislature, the validity and supremacy of the Constitution is uncontested. In fact, it is the only legal instrument that binds even the legislature. The Constitution has incorporated many fundamental principles relevant in formulating legal framework for employment relations.

Problem for discussion:

It is assumed that you have already studied Constitutional Law in your previous years of law studies. Please identify the principles incorporated in the Ethiopian Constitution which have relevance to employment relations. Please come up with as many principles as possible; and explain why you hold that the principles are relevant to the subject matter.

In this category and below the Constitution, ***proclamation*** is an important source of law. Particularly, the Labour Proclamation almost comprehensively regulates employment relations in the private sector; and hence it is a comprehensive instrument. In many jurisdictions, employment relation is regulated by pieces of legislation such as; law of individual employment relations, law of dismissal, freedom of association act, collective bargaining act, the law on strike, law on occupational safety and health, workmen's compensation act, labour inspection service law etc. The Ethiopian labour law consists of all of these in a single document, essentially a code. However, there are other proclamations which regulates newly emerging issues, such as "the Private Employees Organization Social Security Proclamation"; "Employment of Persons with Disability Proclamation" which are also relevant for employment relations. The relevant provisions of the Civil Code have also a gap filling mission.

An important point to determine, at this level, is whether issuance of labour is a federal matter or state matter or of concurrent jurisdiction. In federated states, state power is being exercised at different levels: at the level of the federation and at the level of member states. Such power is apportioned by the Constitution. One of the state powers is law making. Thus, where the power rests need to be resolved. This requires us to consult the Constitution. Based on the constitutional power allocation, enactment of labour code is an exclusive federal power. It is neither state matter nor within concurrent jurisdiction. Therefore, as the Constitution now stands, if states issue labour law, it would not be a valid source of law.

However, in some jurisdictions, labour law is within concurrent jurisdiction. For example, in the United States, there are both federal and state employment laws. Federal laws set out minimum standards for the entire country. For instance, the US Federal Fair Labour Standards Act, prescribe a minimum wage for the nation. An individual state might decide, however, to increase protections to workers beyond the legal minimum. As such, a state might decide to raise minimum wage beyond the federal minimum to reflect local economic conditions and the cost of living within the state.

Problem for discussion:

Why should labour law be under federal jurisdiction?

In the US where a federal structure is in place, labour matters, as indicated above, are within concurrent jurisdiction. Would the US approach be much more convincing than ours? Why? Why not?

In terms of legislative competence, the situation is different when it comes to the civil service employment regime. The federal government and the regional states are empowered to organize their respective civil service institutions and administer their civil servants. Consequently, the source of law for the civil service employment regime would be both at federal and state levels. The Federal Civil Servants' Proclamation will govern federal civil servants; while the regional civil service laws shall govern civil servants in their respective regions.

Another source of law for employment relation is a ***Council of Ministers Regulations***. Almost all proclamations, including the Labour Proclamation and the Federal Civil Servants' Proclamation delegate the Council of Ministers to issue Regulations for the proper implementation of the Proclamations. In fact, the Council has already issued some Regulations on the basis of the delegation. For instance, pursuant to the power given to it under Article 3(3)(b) of the Labour Proclamation, the Council of Ministers issued Regulation No.342/2015 that governs employment relations established by religious and charitable organizations.

Directive is also another regulatory instrument which is delegated to the Minister of Labour and Social Affairs (MOLSA) (recently the Ministry has been renamed as "Ministry of Labour and Skills") with a view to the proper implementing the Labour Proclamation. For instance, the Minister, by virtue of the power entrusted to it under the Labour Proclamation has issued Directives such as: "procedure for reduction of work force"; "procedures on the establishment of Permanent

Advisory Board"; a directive prescribing activities prohibited for young workers; and a directive prescribing activities prohibited for women workers.

Similar delegation has been granted to the Civil Service Commission with respect to the implementation of the Federal Civil Service Proclamation. In fact based on the Proclamation providing for employment of persons with disability, since it regulates disabled persons both the private and public sector employment, it gives concurrent directive issuance power to the Ministry of Labour and Social Affairs and to the Civil Service Commission. The intention is the Directive to be issued by the Ministry will be applied on the private sector employment regime (including state owned enterprises), while the Directive to be issued by the Commission is meant for the civil service sector employment regime.

Finally, since recently (2005), the judiciary has become another source of law. Of course, court decisions at all levels are binding on the concerned parties to the litigation before them. That decision cannot, in principle, bind third parties to the dispute. However, the Ethiopian legal system has introduced judicial precedent where the interpretation of the Federal Supreme Court Cassation Division shall be binding on courts at all levels in future similar factual and legal situations (Proclamation No.454/2005; Article 2(1). Thus, C***assation Division decisions*** are currently source of laws.

In another note, in connection with the private sector employment regime, there are additional private regulatory instruments which need to be complied with. These are: ***individual contracts of employment, collective agreements*** and ***work rules***. The first two are bilateral instruments while the third one is unilateral. Technically, these are private instruments emanating from private actors.

Individual contract of employment a contract entered into by and between an employer and employee which regulates their employment relations. Similarly, collective agreement is a contract entered into by an employer and trade union representatives at enterprise level or between employer associations on the one hand and trade unions on the other. They are the result of negotiation and agreement of the parties. These parties are private persons and hence the instruments made by them are private instruments as well. But, though they are not made by public actors, the legislature has promised to enforce them as they were law, pursuant to Article 1731 of the Civil Code. Thus, they are as good as law though they are aspects of private ordering.

There is also another private instrument of employment relations that deserves brief explanation. This is a ***work rule***. Unlike the above two, it is a unilateral instrument. The employer, in its prerogative as an employer, has been authorized to issue internal rules pertaining to working conditions at enterprise level that should be observed by employees. In this sense, it is binding on the employees though they did not consent to it. Its limitations will be discussed in due course.

1.6. Scope of Employment Law

Generally, employment law regulates a commitment to provide service in return for remuneration. But, it does not mean all commitments to provide services in anticipation of payment are employment relations. There are other "employment-like" relationships. Therefore, in order to determine the scope of the law, there is a need to distinguish employment relations from other similar engagements. In fact, determining the nature of the relationship is not only relevant to employment law. It is relevant to other branches of law as well. For instance, determining the nature of the relationship is essential to establish tax liability. If the relationship is employer-employee, the employer is obligated to deduct the income tax due to the employee at payroll; whereas if the relationship is other than this, no such liability is imposed upon the service recipient. Moreover, in extra-contractual liability cases, vicarious liability arises in employer-employee affairs while the others provide service at their own risk. Finally, under the law of bankruptcy, employees have priority of claims over other creditors in settling debts.

Be that as it may, there has been similarity and, at times, confusion in differentiating between employer-employee relationship; client-contractor relationship and principal-agent relationships. These three relations are defined and spelt out under the Civil Code of 1960. For the benefit of clarity, it seems appropriate to reproduce the relevant provisions hereunder.

> *Article 2179: Sources of authority*
>
> *The authority to act on behalf of another [agency] may be derived from the law or a contract.*
>
> *Article 2199: Definition*
>
> *Agency is a contract whereby a person, the agent, agrees with another, the principal, to represent him and to perform on his behalf one or several legally binding acts'.*
>
> *Article 2512: Contract of employment*
>
> *A contract of employment is a contract whereby one party, the employee, undertakes to render to the other party, the employer, under the latter's direction, for a determined or undetermined time, services of a physical or intellectual nature, in consideration of wages which the employer undertakes to pay him.*
>
> *Article 2610: Definition*
>
> *A contract of work and labour is a contract whereby one party, the contractor, undertakes to produce a given result, under his own responsibility, in consideration of remuneration that the other party, the client, undertakes to pay him.*

As can be gathered from the provisions above, the agent, the employee and the contractor are committing themselves to render some sort of service to the other party; the principal, the employer and the client respectively. The agent is to provide service of "representation" while the employee undertakes "to render services of physical or intellectual nature." The contractor for his part is to provide the service of "producing a given result." These being their commonality, there are variations among them as well.

Principal-agent relationship may emanate either from the operation of the law or contract (Articles 2179 and 2199) while the source for employer-employee and client-contractor relationships is solely a contract. It may also be possible that principal-agent engagement could be a free service as payment is not part of the definitional elements of the relationship. Employer-employee and client-contractor relationships are entered into for consideration as their definition included payment (i.e. wage for employee; and remuneration for the contractor). Thus, there is no *pro bono* service in employer-employee; and client-contractor relationships.

Another difference could be the nature of service. An agent's service to its principal is entering into one or more legally binding acts in the name and on behalf of the principal. In this sense its service is very specific and limited to performing of juridical acts (i.e. representation). On the contrary, employees and contractors render service of any sort to their employers and clients respectively without binding the latter.

Up to now, we have seen the differences between principal-agent relationship on the one hand; and employer-employee and client-contractor relationship on the other. This does not however mean that the latter two relationships are identical. They rather have differences. One such difference is the degree of authority the one party has over the other.

In client-contractor relationship, the contractor is to offer its service "*under its own responsibility*" while in employer-employee relationship, the employee is required to render its service "*under the employer's direction.*" Thus the degree of authority the client has over the contractor is loose in the sense that the client is interested on a given result. A contractor is one who engages to perform a certain service for another, according to his own manner and method, free from the control and direction of his client in all matters connected with the performance of the service, except as to the result of the work.

Conversely, in the employer-employee relationship the employer is not only interested on the given result but on the manner of achieving the result as well.

The employer may be interested to have control as to what to do; how to do it; with whom to do it; when and where to do it. Hence the level of authority the employer has over the employee is very high which amounts to vertical (superior- subordinate relationship) rather than a horizontal one.

Moreover, the modality of payment for the services provided by the employee and the contractor typically differs. The employee is to receive wage (i.e. regular [mainly periodical] payment) while the contractor is to receive remuneration in the amount of price of service to be paid mainly through lump sum payment or in instalments.

Any ways, the main task at this level is to show that there are similarities and differences between these relationships. Pin pointing the differences enable us to demarcate the scope of application of employment law. Employment law applies only on employer-employee relations and not on the others. Principal-agent relationship and client-contractor relationships are civil or commercial contracts to which employment law does not apply.

We shall herein below examine the nature, content and form of a contract of employment and other related issues in order to closely and fully understand the subject matter.

PART I

THE INDIVIDUAL EMPLOYMENT RELATIONSHIP

Chapter II
Contracts of Employment

2.1. General

Broadly, employment relations can be categorized into two types. These are individual employment relation and collective employment relations. These relations reflect the nature and interests of the social partners in industrial relations. As it is well known, in a production process, there are tasks which are to be performed individually; and there are tasks assigned to employees collectively as a group as well. These modalities of discharging workplace tasks bring about multiple rights, duties and interests. The rights and interests manifest themselves in individual and collective forms. In this chapter, we will examine the individual ones and the collective aspects will be handled at a later part in this text. Indeed, individual contracts of employment through which an employer and employee engage each other and determine their respective rights and obligations is the basis for the employment relationship.

2.2. Definition

For the purpose of the private sector employment regime (under the Labour Proclamation) a contract of employment is defined as follows.

> *A contract of employment shall be deemed formed where a natural person agrees directly or indirectly to perform work for and under the authority of an employer for a definite or indefinite period or piece of work in consideration for wage* (Article 4(1) of Labour Proclamation No.1156/2019).

It must be borne in mind that first and foremost employment relations are basically contractual relations. It is a special contract to provide service in return for wages. Thus, the general principles of the law of contract apply to this relationship. Hence, issues such as capacity, legality, possibility and formality are relevant to the relationship. It is only when employment law comes up with its own special principles different from the general principles of contract that the application general of contract law principles would be avoided. In that case, the principle that the special prevails over the general applies.

For instance, to enter into a valid contract, the general principle of contract, among other things, requires that the contracting parties should be capable of contracting. Capability is usually associated with attainment of the age of majority. For the purpose of Ethiopian law, majority is attained at the age of eighteen. Thus, based on the general principles of contract law a valid contract is to be entered into upon attainment of eighteen years. However, employment law has deviated from this general principle by allowing persons to enter into an employment contract upon reaching the age of fifteen (Article 89(2). Hence, the latter prevails for employment law purposes.

Definitional elements of a contract of employment

a) *Agreement*

The source for employment relation is an agreement of the parties; and hence it is a wilful engagement. This excludes forced labour from the ambit of employment relations. Slavery and tenancy do not depend on agreement. Someone would find oneself in the status of being a slave or a tenant regardless of their agreements or will. Therefore, unlike slavery and tenancy, employment relations are consensual relationships that puts the parties on formal equality.

The manner of expressing agreement could be direct or indirect. For instance, a person may directly and personally sit and bargain with their employer and conclude a contract of employment thereafter. The other possibility is public or private employment agencies may serve as intermediaries between the parties in the form of "matching of offers." Thus, the agreement may be expressed directly or indirectly through employment agencies.

Admittedly, there are two types of employment agency tasks recognized by law. The first type of agency is not a party to the contract. Its role is limited to posting of vacancies and selecting potential candidates while the actual contract is concluded directly with the service user. The second type of agency enters in to a contract in its own name with the employee. In the latter case the agency itself is the employer of the employee concerned. Therefore, it is for the former case that the phrase "indirectly through employment agencies" refers to.

b) For the performance of work (provision of service)

The other element under the definition is, the commitment from the side of the employee is to "perform work" for the benefit of the employer. This makes an employment contract a contract of service since performing work is an aspect of the provision of service. In fact, the service expected from the employee is a personal service. Although an employee may express her agreement indirectly, her service is to be provided personally. It is the skills and the work discipline of the specific employee which is of interest to the employer. It means, she cannot as of right, without the consent of the employer, send a substitute on her behalf. Unlike a contractor who can delegate unless provided otherwise, employment is a service of personal nature.

Similarly, unlike a contract of sale of object where the seller delivers a tangible object to the buyer, the employee is making her services (i.e. something intangible) available to the benefit of the employer. The nature of the service could be physical and/or intellectual in content. Through this arrangement, the employee is putting her skill and working capacity at the disposal of the employer. Hence, it is important to note that behind this personal service there exists human dignity which makes the relationship unique and "de-commodified."

c) Under the authority of the employer

The service to be rendered by the employee which is also for the benefit of the employer is to be provided under the authority of the employer. Working under the authority of the employer is one of the distinguishing factors between a contractor and an employee. Both the contractor and the employee render service for the benefit of their counter parts (i.e. client and employer respectively). But the contractor performs such service "under its own responsibility" in the sense that he is not under the strict guidance and control of the client. The client, under this arrangement, is interested on the attainment of a given result and not on the manner of how the result was achieved.

In relation to this, the Federal Supreme Court Cassation Division entertained the case between *Addis General Hospital and Dr. Misrak Tilahun (File No.101396; Vol.17).* Dr. Misrak was a licensed radiologist who had provided service to the hospital for two hours every day. He worked for some years under this arrangement. When his contract was terminated by the hospital, he took his case to court in order to obtain compensation and other entitlements associated with unlawful termination of a contract of employment.

The hospital, among other things, contended that the plaintiff was a duly licensed professional who worked for only two hours per day under his own professional responsibility. Hence, the hospital had no full authority and supervisory power over him. Thus, argued the Hospital, the relationship is not governed by the labour law. However, the lower courts held that the relationship between the parties was employer and employee relationship; the termination was unlawful and award compensation to the plaintiff.

Finally, the hospital took its case to the attention of the Cassation Division. The Cassation Division while reversing the decision of the lower courts reasoned that as the service provider (the plaintiff) was rendering service under his own professional responsibility for only two hours per day out of the eight regular working hours per day, he cannot be considered as an employee. Rather their relationship is to be governed by the Civil Code under the contract to hire intellectual work in which it is provided that "the client may at any time terminate the contract" (Civil Code; Article 2637(1).

An employee is expected to render her service "under the authority of the employer". Some ILO literatures try to differentiate these categories by using the phrases "dependent worker" (employee) and "independent worker" (contractor). In a sense, the employee is dependent on the employer. This implies, as noted earlier, the employer is not only interested on the result but rather on the manner of achieving the result as well. It means the employer will have the power to determine what to be done; when to be done; where to be done; how to be done; and with whom to be done.

In any case, where someone has authority over another, the relationship will be a vertical one rather than horizontal. It is one of superior-subordinate relationship under which the employer will have the prerogative to instruct the employee (allocating work-load); to supervise whether the employee complied with such instruction; and to discipline (including dismissal) if and when its instruction is not observed. In effect, the employer is conferred with the power "to command and control" an employee.

It is important to note, however, that the authority granted to the employer over the employee is not an absolute master and servant type. As the relationship between the parties is based on a contract, it is within the framework of the terms of the contract that the scope of authority of the employer over the employee will be determined.

d) Length of employment

As regards to the length of engagement of the parties, there are three possibilities of determining this issue. It may be determined from the perspective of a set amount of time, in which case it would be a fixed term employment. There may also be task-based determination in the sense that the engagement will come to an end upon completion of the task assigned to the employee. Finally, there may also be an open-ended duration where the engagement could be for indefinite period. Therefore, a contract of employment could be entered into for a definite period; for piece work or for indefinite period. In fact, as we shall see later in this text, even the contract of employment for a definite period may not be terminated upon the expiry of the specified period if the job is of continuous nature. As we all know marriage, in principle, is a life-long engagement. This is not the case for employment relation. There is no as such life-long contract of employment.

e) Wage

Finally, among the definitional elements for a contract of employment is wage. As the employee is committing herself to render personal service for the benefit and under the authority of the employer, the employer will have a corresponding duty to discharge. It will be required to pay wages to the employee. Employment relations are not a *pro bono* (free service) service. On the contrary, it is a service in return for wages. As we shall see later in this text, Ethiopia has no minimum statutory wage for the private sector employment regime. Thus, the amount of wage is an agreed sum by the parties though the level of agreement may not be on equal footing. Due to economic supremacy, the employer may dictate its own terms in this regard.

Be that as it may, for purposes of this law “wage” is defined as a *regular payment* to which an employee is entitled in return for the performance of the work that he performs under a contract of employment (Article 53(1). The mode of payment for wage could be in cash or in kind though in modern world almost all payments are to be effected mainly in cash.

As regards to the mode of determination, it could be on hourly, daily, weekly, bi-monthly etc. basis or it could be outcome based (piece rate) mode of payment. What makes it wage is its regularity rather than its periodicity. It means wages are not necessarily periodical payments. Owing to this broad definition of wages, piece rate payment which is not a periodical payment (but still a regular payment) is an aspect of wage determination. The fact that an employee is paid on daily basis or on piece rate does not deny her an employee status. So long as the other definitional elements are fulfilled, the modality of payment does not make any difference on the status of the employee.

In a certain case, *Meftiha Mummie et al v. Usman Ali (File No.105555; Vol.17),* the Cassation Division was asked to determine whether a person who was paid on piece rate basis was in fact an employee. The facts of the case were: an individual (deceased) whose dependents were the applicants in this case was gunned down by unknown assailants while driving between Addis Ababa and Dire Dawa. The applicants instituted an action for dependents' benefit due to employment injury of the deceased. The deceased was paid Birr 800 for each trip from Dire Dawa to Addis Ababa. Although the defendant argued that the deceased should not be considered as employee since he was not given periodical payment in the form of wages, the Cassation Division did not accept the argument. The Cassation Division held that piece rate is a valid mode of payment in employer-employee relations.

Problems for discussion:

1. *How do you characterize the position of a priest working in a church? Is his relation with the church an employer-employee relationship or otherwise? Why? Why not?*

2. *What about your tailor with whom you agreed to make a three pieces suit for you? Is he your employee or a contractor? Why? Why not?*

Herein below is an extract from ILO (2003) "The Scope of the employment relationship" International Labour Conference: 91st Session 2003.

The determination of the existence of an employment relationship should be guided by the facts of what was actually agreed and performed by the parties, and not by the name they have given to their contract. That is why the existence of an employment relationship depends on certain objective conditions being met (the form in which the worker and the employer have established their respective positions, rights and obligations, and actual services to be provided), and not how either or both of the parties describe the relationship. This is known in law as the principle of the primacy of fact, which is explicitly enshrined in some national legal systems. This principle might also be applied by judges in the absence of an express rule.

Some legal systems rely on certain indicators, evidence or factors to determine whether or not there is an employment relationship. These include compliance with the employer's instructions; being at the employer's disposal; socio-economic inequality between the parties and the worker's economic dependency. In common law countries, judges base their rulings on certain tests developed by case law, for example "control test", "integration test" and "economic reality test" and "mutuality of obligation test". In all systems, the judge must normally decide on the basis of the facts, irrespective of how the parties construe or describe a given contractual relationship.

Notes:

In practice, differentiating employer-employee relationships and client-contractor relationship is difficult. All the same, differentiating them is crucial as it determines the applicable legal framework. Employment law applies to the former and civil or commercial law applies to the latter. Confronted with such a problem, courts have crafted indicators that are helpful in determining the relationship. Some of them are the following:

- *The control test*: the extent of control one of the parties has over the other. The stricter the controlling power one of the parties has over the other, it is more likely that the relationship is employer-employee relationship than client-contractor.
- *Who provides working tools*? is also an important parameter. If the party is committed to report for duty with his own working tools, it is likely

that he is a contractor than an employee. In fact, even under the Labour Law, "… to provide implements and materials necessary for the performance of the work is the primary duty of the employer unless otherwise provided in the contract of employment" (Article 12(1)(b). In principle, the employee is expected to report for duty merely in fit physical and mental condition. Working tools and raw materials are to be made available by the employer.

- *Who pays tax?* The administration of tax liability is helpful in determining the relationship as well. If in their contract, the service provider is to pay income tax by his own, it is highly likely that the party is a contractor; whereas if the service recipient is empowered to deduct tax due at payroll, it is highly likely that the other party is an employee.
- *Integration test:* If the job position of the party is within the core business of the enterprise, it is highly likely that the person is an employee. Conversely, if the job position of the party is incidental to the business of the enterprise, it is highly likely that such party is a contractor.
- *Length of engagement:* the longer the engagement of the parties, the higher the probability that their relationships are employer-employee. Relatively speaking, client-contractor relationships are meant for shorter duration.
- *Personal nature of the service:* If the service provider has the right to delegate its service provision under the arrangement, it is highly likely that the relationship is client-contractor relationship. An employee is expected and required to render the agreed service in person.
- *Mode of payment:* more often than not, in employer-employee relationships, wages are determined on a periodical basis. If the service recipient resorts to paying in a lump sum or in a piece rate arrangement, it is highly likely that the relationship is client-contractor relationship rather than employer-employee.

- *Multiple clients at a time:* In employer-employee relationship, the employee is attached to a single employer. In a sense, a substantial part of his working time is to be at the disposal of the employer. Thus, if the service provider has the right to have the possibility of multiple clients at a time, it is highly likely that the relationship is client-contract relationship.

<u>In any case, it is important to underline that "no single indicator is conclusive". There is a need to look into them in a holistic manner and arrive at a "dominant impression."</u>

2.3. Form of Contract of Employment

Now that we have spelt out the definitional elements of a contract of employment, let us see how they should be expressed in order to obtain legal validity. The relevant provision provides as follows:

> *Unless otherwise provided by law, a contract of employment shall not be subject to any special form (Article 5;* Labour Proclamation*).*

Pursuant to this stipulation, the general principle is that a contract of employment does not require any special form. It can be created orally, by conduct or in any means so long as the parties have attained the so called "meeting of minds". In fact, this is more or less identical with the principle of the law of contract which stipulates that unless otherwise provided, no special form shall be required and a contract shall be valid where the parties agree (Article 1719(1); Civil Code).

In practice employees may feel insecure in their employment whenever their employers fail to give them written instrument as to their status as employees. Their fear emanates from the fact that if and when a dispute arises with an employer, employees will not have evidence to show that they indeed had an employment contract. Some unscrupulous employers may, they hold the view that they can avoid employer's liability if they deny any written evidence showing contractual relation with the employees.

Both views, however, are misconceptions. For the purposes of the law, the existence of employment relations can be proved by any means such as witnesses, employee ID cards or payroll sheets. A written contract of employment is not a mandatory requirement except for exceptional cases. This does not mean that written contracts are irrelevant. Written instrument are generally more durable and reliable in resolving possible disputes at a later stage. Thus, the law encourages the parties to make their agreement in writing and to be signed by the parties.

For the purposes of the law, written contract of employment can be achieved in either of the two ways. These are: a contract of employment or a letter of employment. If the parties managed to reduce their agreement into writing that is well and good. However, though the law does not mandatorily require a contract of employment to be made in writing, it requires the employer to issue a letter of employment within 15 days from the conclusion of the [unwritten] contract which should be delivered to the employee (Article 7(1). If such letter is not partly or wholly objected to by the employee within 15 days of receipt, it shall be deemed that a contract of employment is concluded between the worker and the employer (Article 7(2). In a sense, it seems that the contractual principle for pre-existing relationships which states that silence amounts to acceptance applies in this regard. At any rate, it means, the legal preference is that there should be a written instrument evidencing their engagement.

There is also another element to note in this regard. It is important to underline that the law does not say a contract of employment does not require a particular form. It rather states that, "*unless otherwise provided by law…*" a contract of employment does not require to be made in writing. This implies that if the law somewhere stipulates the need for a written instrument, such stipulation would need to be complied with in order to obtain legal validity. For instance, Article

11(3) prescribes that when the parties agree to have probation period, the agreement shall be made in writing. Moreover, where the parties to an employment contract agree to terminate their relationship, such an agreement shall be binding on the employee if and only if it is made in writing (Article 25(2). A contract of apprenticeship is required to be made in writing and attested by the Ministry as well (Article 48(3). Agreement to amend conditions of employment (Article 15(2) and deduction from employee's wage (Article 59(1) require written instrument as well. Interestingly, the general principle of the law of contract prescribes that "any contract required to be in writing shall be of no effect unless attested by two witnesses" (Article 1727(2). The Labour Law has also inserted the phrase, *subject to the provisions of the relevant law* which seems to refer to the general principle of contract that requires two witnesses for validity.

Problem for discussion:

1. *What about if the contract of employment is concluded through a letter of employment rather than written contract of employment? Does such a letter require attestation of two witnesses at a pain of nullity?*

2. *Let us assume that the law does not require a written form for a particular contract of employment. Let us further assume that the parties decided to make it in writing anyways. Does this instrument require attestation of two witnesses for its validity? why? why not?*

2.4. Exclusions

In order for employment law to be applied, there is a need to establish the existence of employer-employee relationship between the parties as per the above mentioned legal and factual parameters. However, even where the parameters are met, not all employment relationships are governed by employment law. There are some employment relationships that are excluded from the ambit of employment law. The Labour Proclamation adopted two ways of exclusions (express exclusion and conditional exclusion).

Under the express exclusion, the labour law listed certain employment relations and expressly excluded them from its ambit (Article 3(2). As to the conditional exclusion, the law listed certain employment relations and stipulated that they will be excluded from the coverage of the labour law provided that certain conditions are fulfilled. It means if the conditions are not satisfied, they will be subject matters of the labour law. At any rate, let us review some of them one by one.

2.4.1. Express exclusion

As noted earlier, the Labour Proclamation has expressly excluded its application to certain employment relations. The most important ones which are frequently litigated before courts and labour tribunals are the following:

- **Managerial employees**

Who are managerial employees? How do we distinguish managerial employees from non-managerial ones? Why are managerial employees excluded from the ambit of the Labour Proclamation? What protections, if any, would they have?

In order to determine who managerial employees are, Ethiopian legal system adopted two approaches at different periods; namely structural and functional approaches. Structural approach of distinction focuses on the organizational structure of the enterprise. For instance, the Labour Relations Proclamation No.210/1963 employed a combination of structural and functional approaches. It defined managerial employees as "*a manager, director, superintendent or representative of an employer or a person performing similar duties on behalf of an employer*" (Article 2(f)(i) of Proc. No.210/1963). Under this definition, persons designated as a manager, director or superintendent, regardless of their actual functions, (structural) were categorized as managerial employees and any other employees performing similar functions (functional) were considered as managerial employees as well.

Conversely, Labour Proclamation No.64/1975, the proclamation under the Derg regime, followed solely the structural approach. Under this approach, *managerial employees in an enterprise are the Manager or the deputy manager of an undertaking or any of its branches and all those officials accountable to the Manager or the deputy manager* (Article 2(27)(g). Therefore, in this approach, the answer to the question who is a managerial employee will be deduced by looking at the organizational structure of the undertaking.

If within the organizational structure of the enterprise, an employee is accountable to either the Manager or the deputy manager, regardless of the nature of her job functions, the individual will be categorized as a member of the management staff. This approach, though easier to identify and cheaper to administer, has the risk of associating employees who do not perform genuine managerial functions with the management team.

The functional approach, which has been incorporated in our labour proclamations since 1993 focuses on the function of the employee rather than on the title (form) assumed, or the position where the employee is situated within the organizational structure of the enterprise concerned. If her job tasks are aspects of managerial functions, she will be part of the management team, if not, regardless of her job title in the organizational structure of the company she will be treated as an ordinary employee. Hence, it is the content (function) not the form (name) that matters. Whereas structural approach relies on the organizational chart of the undertaking, the functional approach focusses on the job description of the concerned employee. The Cassation Division in *Southern Nations and Nationalities Housing Development Enterprise v. Yohannes Bizuneh (File No.117076; Vol.19),* reviewed the job description of an employee to determine whether the person was a managerial employee or not.

The next issue is, what are managerial functions? In order to avoid heterogeneous understanding of the concept, the labour law has already but indirectly defined what managerial functions are. Accordingly, Article 2(10) has provided the following definition:

"Managerial employee" means an employee who, by law or delegation of the employer, is vested with powers to lay down and execute managerial policies, and depending on the type of activities of the undertaking, with or without the aforementioned powers an employee who is vested with the power to hire, transfer, suspend, layoff, dismiss or assign employees, and includes a legal service head who recommend measures to be taken by the employer regarding such managerial issues, using his independent judgment, in the interest of the employer.

Thus, an employee would be categorized in to management team if the worker by law or employer's delegation, is engaged in decision making task in any or many of the following activities:

- *laying down and executing management policies;*
- *hiring and firing employees;*
- *promotion and demotion of employees;*
- *dismiss, suspend, transfer and layoff of employees;*
- *Legal Service Head.*

It is assumed that these measures are to be undertaken in the name, on behalf and for the benefit of the enterprise (employer). Thus, these positions are to be occupied by people who have gained the confidence of the employer. In a sense, these job positions are "services of trust." After all, managerial employees are stationed at the workplace to protect the interest of the employer. Any employee who undertakes these functions associates herself with the employer rather than with the employees. Since one of the objectives of labour law is to protect the employee from possible mistreatment of the employer, managerial employees may not need such protection as they already secured the confidence and protection of their employers. This is one of the reasons why their exclusion from the coverage of the law is warranted.

Another reason for their exclusion is related to employer's concern. If managerial staff is to be covered by the Labour Proclamation, the employer will not have full power of terminating them whenever its confidence over them is eroded because grounds of termination of employees are narrowly formulated out of which all terminations are held unlawful thereby entitling the terminated employee in many instances to reinstatement. This approach will compel employers to be represented by a personnel team on whom they have no or little confidence. This will have undesirable consequences from the perspective of employers' interests. Thus exclusion is justified in this regard as well.

In fact, in connection with freedom of association, ILO jurisprudence recognizes the validity of the exclusion of managerial employees from joining trade unions for the employees. In this regard the Committee on Freedom of Association stipulates that

> *it is not necessarily incompatible with the requirements of Article 2 of Convention No.87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to form their own associations to defend their interests and, second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present or potential membership.*

Moreover, this distinction between managerial and non-managerial employees appears to be also appropriate in order to avoid "divided loyalty" of the managerial staff. On the one hand, the job position of managerial staff requires them to ensure and protect the interests of the employer. On the other hand, if they unionize themselves with the non-managerial labour force, they may be inclined to ensure and protect the interest of the workers. This will put them in an ambivalent position. As a result, exclusion seems the appropriate policy response in this regard. After all, as many of the managerial employees are skilful and are technocrats, they may have the strength to bargain in a manner that best serves their interests. Given all these reasons, there may not be a serious injustice in excluding the managerial employees from the protection of the Labour Proclamation.

In principle, an employee who merely limited himself to offering recommendations to the management staff without making any decision is categorized as a non-managerial employee. However, there is an exception to this rule where a legal service head of an enterprise though they may be confined to providing recommendations are still categorized by law as a member of the management staff. This position of the law may be debatable, but it seems a policy decision.

At this juncture a legitimate issue may be flagged up. If managerial employees are excluded from the applicability of the Labour Proclamation, what safeguard would they have? First, their contracts of employment will be the main basis for their protection. Second, since the Civil Code applies to all employment relations, including managerial employees, the relevant provisions of the Civil Code may be of some help in protecting the rights managerial employees. In fact, in this regard, the Cassation Division in *Nib Transport Share Company v. Ato Tegenu Meshehsa case (File No.18307; Vol.2)* and *Wegagen Bank v. Ato Anagaw Gebeyehu (File No. 130685; Vol.21)* held similar view. Nevertheless, it is ruled that if the managerial employee and the employer agree to regulate their relationship by the provisions of the Labour Proclamation; or a work rule provides for the applicability of certain provisions of the Labour Proclamation, this should be given effect (*Ambaye Weldemariam v. Ethiopian Cereal Trading Enterprises; File No.60489: Vol.13*)

- **Employees of private [personal] service**

Further exclusion is applied on "contracts of personal service" (Article 3(2)(d). Pursuant to Article 2(16) the Labour Proclamation "Employment of private service" means an employment for a non-profit purpose such as catering, cleaning, guardianship, guarding, gardening, driving and other related services for the employer and his family's consumption. These are domestic services and the employees working in them are "domestic workers".

Ordinarily, the relationship between a domestic worker and their employers squarely fits into the definitional elements of a contract of employment. Nevertheless, this relationship has been excluded from the applicability of the Labour Proclamation.

But it must be noted that it is not all cooking, cleaning, guarding or gardening services which are excluded from the ambit of the Labour Proclamation. If such services are provided to a profit-making employer, such as hotels or restaurants, the relationship will be governed by the Labour Proclamation. Therefore, it is not the nature of the service that matters. It is rather the identity of the employer (whether for profit or for non-profit employer) that is the determining factor in this regard.

Domestic employees are under-paid and over-worked suggesting that protection is warranted. In fact, it has, more often than not, gender dimension in the sense that women have wider visibility in this sector of employment. Thus, it is legitimate to raise a question as to why domestic workers are denied the protection of the Labour Proclamation. Some tend to contend that employer and domestic worker relationship is too private and too personal for regulation. Nevertheless, the fallacy in this contention is that husband and wife relationship is equally private and personal (if not more personal) but a substantial part of the relationship is regulated by family laws. It may, however, be that since this is household issue; and since every household has its own unique feature, labour standardization by law at household level would be unfeasible.

Another possible reason could be private persons who hire domestic workers for personal service purposes will be willing to buy such service as long as its price is within their economic ability to pay. Whenever labour law protection is accorded to domestic workers, obviously the price of their labour would be higher because protection involves cost. Thus, private persons would be compelled (priced-out) to change their consumption pattern (working it by themselves) thereby quit buying this service. This might have an adverse effect of reducing the employability of domestic workers. Hence their coverage by the Labour Proclamation would backfire in the sense that protection by the law would be to their disadvantage and they would be better off if they are excluded from the ambit of protection.

In fact, in some jurisdictions, their labour laws do not apply not only in not-for-profit entities but in employees of the informal economic sector as well. Employees of the informal economy are persons engaged in a business enterprise that is not required to have a license, is not required to keep a book of accounts and employs less than ten workers. However, the Ethiopian labour law does not have that kind of flexibility. The law is rigid in the sense that it is applicable on an employer that even employs a single worker. Employer is defined as "a person or an undertaking that employs one or more natural persons…" (Article 2(1). It is also irrelevant for the purpose of the Ethiopian Labour Law whether the entity has a trade license or not; or whether it has book of accounts or not. These are issues which may be relevant for the ministries of Trade and Revenue respectively and not to the Ministry of Labour and Skills.

Be that as it may, an important point at this level is, though domestic workers are excluded from the ambit of the Labour Proclamation, the Labour Proclamation has stipulated that the Council of Ministers shall issue Regulations governing conditions of work applicable to personal service (Article 3 (3)(c). However, even though this promise has been in place since the adoption of Labour Proclamation of 1993, the Council of Ministers has not acted upon it yet. As a last resort therefore, domestic workers have very minimal protection under the Civil Code of 1960 (Articles 2601-2604) other than their respective contracts of employment.

Problem for discussion:

1. *We have already seen that employees who render domestic service are excluded from the coverage of the Labour Proclamation. But what if the job position of the employee requires him to undertake "mixed service" which combines domestic service and business service? Should he be categorized as domestic worker or employee under the labour law? For instance, let us assume Tessema has a garage in which Eshetu is employed as a driver. In his capacity as a driver, Eshetu's job description includes transporting employees of the garage to and from work place. In addition to this, he is required to transport Tessema's children to their schools and back home. He transports Tessema's wife twice a week for shopping to their household as well. In this scenario Eshetu has been engaged in a mixed service. Now the issue is whether Eshetu is a domestic worker or an employee of the garage. Discuss among yourselves and come up with possible solutions.*

2. *The Ethiopian government did not yet provide adequate regulatory frame work of protection for domestic workers locally, as it had expressly excluded them from the applicability of the Labour Proclamation. On the other hand, the government is trying to regulate the employment relations of domestic workers to be deployed to middle-east countries. What is your view? Did you observe any inconsistency in this approach?*

- **Public servants**

Another employment relation excluded from the Labour Proclamation is "*contracts relating to members of the armed force, members of the police force, employees of state administration, judges of courts of law, prosecutors and others whose employment relationship is governed by special laws*" (Article 3(2)(e). As it is a well-known, the state has three main branches. These are the legislative, the executive and the judiciary. Their appointed officials and employees who are generally called "public servants" are outside of the coverage of the Labour Proclamation.

In fact, ministers and judges are not, strictly speaking, employees because they do not fill their respective posts through employment. They are rather politically appointed. Therefore their tenure, rights and responsibilities are to be determined through the political channel. Even the experts and support staff working thereunder, though technically employees, are not governed by the Labour Proclamation. Their working relationships are rather subject matters of the Federal Civil Service Proclamation. The same is true with respect to armed forces and the Police that have their own special laws.

It is interesting to note, however, that it is not all employees of the state which are excluded from the application of the Labour Proclamation. It is only "employees of state administration" which are excluded from the labour law's application. This will lead us to inquire whether there is a distinction between "employees of state" and "employees of state administration".

"Employee of the state" is a broad concept which comprises of employees of state administration and employees of state-owned enterprises. When the state acts as a public power with regulatory and administrative decision making functions, it is considered to have engaged in state administration. Conversely, when the state owns and runs business, for all practical purposes, it will be treated like any business entity since it has a profit and business purpose in view. In the latter capacity it no longer is a state administration. What are excluded from the applicability of the Labour Proclamation are employees of state administration. Therefore, employees of state-owned enterprises are to be governed by the Labour Proclamation.

Problem for discussion:

How do we distinguish state administration from state owned enterprises? How is the National Bank of Ethiopia different from the Commercial Bank of Ethiopia? Ethiopia Civil Aviation Authority from Ethiopia Airlines? Telecommunication Agency from Telecommunication Corporation?

In this connection there is another issue which deserves a separate treatment. There are employees of the state which may not fall within the two categories indicated above. For instance, employees of public educational facilities and health facilities do not fall in the above categories because the public educational and health facilities are neither state administration nor state owned enterprises. They are not state administration because they do not possess any regulatory and supervisory power. Nor are they state-owned enterprises because they do not operate on a for-profit basis. Strictly speaking therefore, employees of these public social service providers are not excluded from the ambit of the Labour Proclamation. Nevertheless, the Federal Civil Servants Proclamation No. 1064/2017 defines “civil servant” as a person [permanently] employed by a federal government institution (Article 2(1). And “Government institution” means any federal government office established as an autonomous entity by a proclamation or regulations and financed by government budget (Article 2(3).

These public social service providers, for instance, the public universities are established by Council of Ministers regulations and they are financed by the government. Hence, they satisfy the definitional elements of government institution. Therefore, their permanent staff employees are civil servants.

However, the academic staff in Ethiopian universities are employed on a fixed term contract basis to be renewed every two years. Strictly speaking they are not permanent employees. Thus what is the employment of status university instructors? For the purpose of the Civil Servants’ Proclamation “temporary employee" is defined as "a person employed in a government institution for a *job which is not permanent in nature or where circumstances require temporarily assigned to a permanent position…*" (Article 2(2); emphasis added). Clearly, the service of an academic staff in public universities that is teaching, research and community services are permanent in nature as they are the institution's core functions. Therefore, though they are fixed term employees; they are, by virtue of their tasks, permanent employees of the government institutions and hence civil servants. Based on this analysis, the public educational and health facilities are government institutions and employees working thereunder are civil servants. Thus, though they are not employees of state administration, because of the broad formulation of the federal civil servants' law, they are to be governed by the Civil Servants Proclamation. Indeed, the Cassation Division in a case *Dr. Desalegn Temesgen v. Addis Ababa Science and Technology University (File No.132714; Vol: 21)* adopted this line of interpretation.

2.4.2. Conditional exclusion

Another mechanism of exclusion formulated by the Labour Proclamation is conditional exclusion in the sense that the law stipulates conditions the fulfilment of which will result in exclusion. Unless and until the conditions stipulated are satisfied, the contract of employment under consideration shall remain within the coverage of the Labour Proclamation. The relevant provision states as follows:

Article 3(3);

(a) Unless the Council of Ministers by regulation decides, or an international agreement to which Ethiopia is a signatory provides otherwise, employment relations between Ethiopian nationals and foreign diplomatic missions or international organizations operating with in the territory of Ethiopia shall be governed by this Proclamation.

(b) *The Council of Ministers by Regulation determine the inapplicability of the Proclamation to employment relations established by religious or charitable organizations.*

Generally, these are employment relations in non-profit sector. Diplomatic missions, international organizations, religious organizations, and charitable organizations are all non-profits. This is an indication that though the Labour Proclamation is mainly intended to regulate the for profit sector, it can reach out to non-profit enterprises, if not excluded. The modality of excluding the applicability of the law may be undertaken by either international agreement or by regulations. Let us review them one by one:

- **Employees of diplomatic missions and international organizations**

It is well known that many foreign diplomatic missions and international organizations have been operating in Ethiopia. As a seat of the African Union, it is believed that the number of such diplomatic missions and international organizations will be on the rise over-time. These institutions employ Ethiopians as local staff in various job positions. How the local staffs' employment relationship with the diplomatic missions is to be regulated is something to consider.

In this regard, the Labour Proclamation offers two options of exclusion in the absence of which the Labour Proclamation regulates the relationship. The first option is to enter in to an international agreement between the Ethiopian government and the diplomatic missions or international organizations as to how the employees are to be regulated. The second option is for the Council of Ministers to issue regulations on the matter.

The Council of Ministers has not issued any such regulation yet. In practice it is the first option that has been materialized. As gathered from personnel at the Ministry of Foreign Affairs, whenever diplomatic missions or international organizations commence operation in Ethiopia, they sign "Host Country

Agreements" with the Ministry of Foreign Affairs. This instrument stipulates their rights, duties, privileges and immunities while operating in Ethiopia. Nevertheless, based on the agreements, they are duty bound to respect Ethiopian laws. This implies they are required to comply with the stipulations of the Labour Law in their employment relations.

However, whenever a labour dispute arises between the missions and any of their local employees, we are told by the relevant authorities that, efforts for amicable settlements through the assistance of the Protocol Department at the Ministry of Foreign Affairs will be undertaken. Therefore, the immunity accorded to these institutions is not to disregard the provisions of the Labour Proclamation. They are rather given exemption from appearing before Ethiopian labour tribunals. This approach tries to strike the balance between two competing interests. These are respecting the sovereign power of the representatives of the foreign countries from being dragged into domestic institutions such as courts on the one hand; and protecting the fundamental rights of host country citizens on the other.

- **Employees of religious and charitable organizations**

The other category under the so called "conditional exclusion" is the situation of employees of religious and charitable organizations. For this category too, as we indicated above, the Council of Ministers has been delegated to issue Regulations which determine the inapplicability of the Labour Proclamation to employment relations in these institutions. This implies in the absence of the anticipated Regulations their employment relations shall be governed by the Labour Proclamation.

Although this authorization was given to the Council of Ministers through the Labour Proclamation of 1993, it did not act upon it until recently. However, in 2015 a Council of Ministers regulation was issued to this effect. This is a "Council of Ministers Regulation on Employment Relations established by Religious and Charitable Organizations No. 342/2015." According to the Regulation, it is stated that "*the Labour Proclamation shall not be applicable with respect to a person* *who gives spiritual service in a religious organization"* (Article 3(1). It is further stated that *"the labour proclamation shall not be applicable with respect to a person who performs spiritual and administrative or spiritual and charitable activities simultaneously, in a religious organization"* (Article 3(2).

In fact, prior to the adoption of this Regulation, the Federal Supreme Court Cassation Division had already held that employees of religious institutions who offer spiritual service are not subjects of the Labour Proclamation, they are rather to be governed by the religious code of the respective institutions (*Hamerework Kidist Mariam Church v. Diacon Mihret Birhan et al.;* File No.18419: Vol.8); (*Hohetesemay Saint Mary Church v. Diacon Ayalew Addisu*; File No.47806: Vol.9). Based on the holdings of the Cassation Division, if the labour law is made to apply on such employment relations, it will be tantamount to interference by the government in religious affairs which is constitutionally prohibited (Article 11(3) of the Constitution). Thus, the Regulation is predominantly an endorsement of the holding of the Cassation Division.

In another note, *the Labour Proclamation is applicable with respect to workers engaged in performing administrative, charity or income generating activities undertaken by religious organizations* (Article 3(3) of the Regulation). Nevertheless, workers engaged in performing administrative or charity activities in religious organizations are not entitled to collective bargaining. Therefore, in order to determine the full applicability of the Labour Proclamation with respect to employees of religious institutions, it depends on whether the particular job position of the employee is an income generating or not because it for workers engaged in income generating activities in religious institutions that the Labour Proclamation in its full force applies.

With respect to employees of charitable organizations as well, the Regulation stipulated that "*the Labour Proclamation is applicable with respect to workers engaged in performing income generating, administrative or charity activities in a charitable organization*" (Article 4). It is only with respect to collective bargaining that the applicability of the Labour Proclamation has been avoided in connection with employees engaged in administrative and charity activities within the charitable organizations.

The relevant part of the Regulation prescribes as follows: *Religious and charitable organizations shall not be obliged to engage in collective bargaining on increment of wages, benefits, incentives and other similar matters with workers engaged in performing administrative or charity activities*" (Article 5(1). The implicit message of this provision is that employees of religious or charitable organizations tasked with income generating activities still can engage in collective bargaining.

2.5. Employment under the Civil Service Sector

Unlike the private sector employment regime where we have federally legislated single labour code applicable across the whole Ethiopia, the civil service employment regime is within concurrent jurisdiction. That means both the federal and the regional states have the competence to issue the law. The federal legislature issues a law that governs the employment relations of federal civil servants while the respective regions adopt laws applicable to their respective civil servants. It is noteworthy, however, that the basic principles are the same for the federal and the regions. In this regard, the Federal Constitution states that though *Regional States are empowered to enact and enforce laws on State civil service and their condition of work; in the implementation of this responsibility, it [they] shall ensure that educational, training and experience requirements for any job, title or position approximate national standards* (Article 52(2)(f). In this textbook, we will rely on the relevant provisions of the Federal Civil Servants' Proclamation (Proc. No.1064/2017).

The Federal Civil Servants Proclamation No. 1064/2017 defines "civil servant" as a person [permanently] employed by a federal government institution (Article 2(1). And "government institution" means any federal government office established as an autonomous entity by a proclamation or regulations and financed by government budget (Article 2(3).

Based on the Proclamation, employees of civil service are categorized into three; permanent civil servant employees, temporary employees and daily labourers. It is only on permanent employees that the federal civil service law applies. Article 2(1) of the Proclamation states that *[permanent] civil servant means a person [permanently] employed by a government institution, provided however, that it may not include the following;*

a) Government officials with rank of state minister, deputy director general and their equivalent or above;

b) Members of House of People's Representatives and the House of Federation;

c) Federal judges and Prosecutors;

d) Members of the armed forces and the Federal Police including other employees governed by the regulations of the armed Forces and the Federal Police;

e) Employees excluded from the coverage of this Proclamation by other appropriate laws.

Although the word "permanent" is not included in the English version of the Proclamation, the Amharic version carries that important word. It is to be noted that in the Ethiopian legal parlance, the Amharic version is the governing version in case of inconsistency between the Amharic and the English versions.

Be that as it may, the exclusions provided thereunder were unnecessary because they are not, strictly speaking, employees. Officials with a rank of state minister, deputy director general and their equivalent or above such Ministers and Director Generals are political appointees rather than employees. Since they did not satisfy the definitional elements of the concept civil servant, placing them under exclusion was not appropriate. Exclusion makes sense when a category fulfils the elements of the definition and it is desirable to exclude them for whatever reason. Similarly federal judges and prosecutors fill their respective posts through appointment instead of employment. Technically therefore they are also not employees.

When it comes to parliamentarians and members of the House of federation, they assume their seats through election and not through employment. Hence the exclusion was unnecessary. Members of the Armed Force and the Federal Police have their own separate regulatory framework which governs their rights and duties. On the principle that the special prevails over the general, it is their special governing legislation which applies on them. Thus, the exclusion was unnecessary to their cases, too.

The other phrase defined by this proclamation is "temporary employees". Pursuant to Article 2(2) of the Proclamation, "*temporary employee" means a person employed in a government institution for a job which is not permanent in nature or where circumstances so require temporarily assigned to a permanent position provided however, that it shall not include the following:*

a) Persons employed as daily labourers and paid on daily basis;

b) Persons assigned in a government institution for apprenticeship or internship;

c) Persons who enter into contract with a government institution to work for consideration and on the basis of their own business or professional responsibility;

d) Persons who enter into contract with a government institution to work for consideration on part-time basis due to their special knowledge and skill;

As regards to the scope of application of the Proclamation, Article 4 of the same provides that it shall be applicable to all offices and employees falling under definitions of "government institutions" and "Civil Servants." Therefore, temporary employees, daily labourers, independent contractors and part-timers are outside of the coverage of this Proclamation because they are not permanent employees. The Civil Service Agency is empowered to issue directives as regards to them.

As to the recruitment and deployment procedure of civil servants, it is more competitive and open compared to the Labour Proclamation recruitment procedure. The Civil Servants' Proclamation dictates that *any government institution shall advertise every vacant position to invite candidates to apply for the positions* (Article 16(1). Moreover, it further states that *any type of recruitment of a civil servant shall be effected only on the result of examination conducted on the basis of nationally set criteria or on the basis of any other type of objective certification of professional or occupational competence* (Article 13(1).

2.6. Duration of Employment Contracts

Generally, a contract of employment may be concluded for specific work, for specified period (fixed term) or unspecified period (contract for indefinite period).

2.6.1. Contract for specific work

A contract of employment may be entered in to accomplish a certain task by the employee. Article 10 of the Labour Proclamation has listed them out as laid down hereunder:

1. *A contract of employment may be concluded for a definite period or for piece work in the case of:*
   a) *The performance of specified piece work for which the employee is employed;*
   b) *The replacement of a worker who is temporarily absent due to leave or sickness or other causes;*
   c) *The performance of work in the event of abnormal pressure of work;*
   d) *The performance of urgent work to prevent damage or disaster to life or property, to repair defects or breakdowns in works, materials, buildings or plants of an undertaking;*
   e) *An irregular work which relates to permanent part of the work of an employer but performed on irregular intervals;*

f) Seasonal works which relate to the permanent part of the works of an employer but performed only for a specified period of the year but which are regularly repeated in the course of the years;

g) An occasional work which does not form part of the permanent activity of the employer but which is done intermittently;

h) The temporary placement of a worker who has suddenly and permanently vacated from a post having a contract of an indefinite period;

i) The temporary placement of a worker to fill a vacant position in the period between the preparation of an organizational structure and its implementation.

In such cases, the parties shall remain engaged until such time the task is completed or the fact that initiated the engagement has come to an end after which the parties will be separated without any further procedure. The length of the engagement will depend on the magnitude of the task. For instance, if a certain labourer is employed to harvest crops in a particular season of the year, as soon as the harvesting is completed, the contract of employment may validly be terminated without any complicated process. Project work has such attributes. The construction sector is very much associated with this kind peculiar arrangement. In a certain case submitted to the Cassation Division *Ethiopian Telecommunication Corporation v. Gebissa Yemane* (File No. 20885; Vol.4), an employee was hired to prepare meal for trainees, it was held that his termination is valid as soon as the trainees completed their training.

Problem for discussion:

Please come up with your own examples that can fall under any of the sub-Articles above. To have a better understanding of this issue, you are advised to read the Cassation Division decision on Ethiopian Telecommunication Corporation v. Tiegist Worku (File No.11924; Vol.3)

2.6.2. Contract for specified period (fixed term employment)

A contract of employment could also be concluded for a definite duration. For example, the parties may state that their contract of employment shall remain valid for six months, one year, two years etc. Conventionally, it may be said that after the expiry of the specific duration, the contract of employment shall come to an end. However, it is not as simple as that. In fact, this is one of the controversial areas under Ethiopian Labour Proclamation because the Law has exhaustively listed certain situations where fixed term employment may be formulated (Article 10). In all other cases "the presumption of indefiniteness" of a contract of employment applies (Article 9). This means unless the nature of the contract falls under any of the circumstances stipulated under Article 10, even if the contract fixes a duration, the contract is presumed to have been concluded for indefinite duration.

This is one of the areas of labour contract which deviates from the general principle of contract that states terms of contract agreed by the parties are binding as though they are law. Although the parties agreed to a fixed term engagement, the law overrides their terms and extends it to an indefinite duration. It seems that it is with the view to providing employment stability to the weaker party (the employee) that this presumption has been put in place. Therefore, even if the contract is for a definite period, if the job is of a continuous nature, the employer may be compelled to renew the contract. The Cassation Division rendered a similar interpretation under *Ethiopian Telecommunication Corporation v. Tiegist Worku* (File No.11924; Vol: 3).

In connection with fixed term employees, it is important to note that they are entitled to all benefits and protections under the Labour Proclamation because the law prohibits discrimination among employees based on status unless the law has created its own distinction. In a certain case, *Yotek Contruction Plc v. Gebre Belayneh et al (File No. 87338; Vol.15*), the Cassation Division handed down a decision that substantiates this line of argument. On the other hand, where the source of the benefit is an instrument other than the law such as a collective agreement, the Cassation Division held that benefits available to indefinite period employees may not be available to fixed term employees (*Ethiopian Electric Power Corporation v. Seyum Gebretsadik et al; File No.47469; Vol:9*)

In practice, however, there are instances where employers deny annual leave, maternity leave or other similar entitlements alleging that fixed term employees or contract employees are not eligible for such entitlements. Similarly, many trade unions deny union membership to fixed term employees based on a similar contention. As far as the law is concerned, however, such discriminatory measures are legally invalid. Therefore, all employees, regardless of whether they are permanent or temporary are equally entitled to all benefits and protections under the law. Of course, there are some instances where differential treatment is allowed by law. For instance, probationary employees are not entitled to sick leave or severance payment because the law states that in order to be eligible for these entitlements, completion of probation period is a pre-requisite (*please refer Articles 39(1), 85(1*).

2.6.3. Contract for indefinite period

A contract for definite period, as indicated above, is mainly associated with project works which have limited period of existence. Where enterprises are established for indefinite duration, their modality of employment is mainly for indefinite period as well. Nevertheless, this does not mean that the employee is employed forever or for life. An employment contract, unlike marriage, is not a lifelong commitment. Moreover, the labour law does not provide an absolute guarantee of employment. It thus does not mean permanent employment; it rather only means the employee concerned is protected from arbitrary dismissal.

In this connection, in the world of practice, there are two misconceptions both from the employers' and employees' side. From the employer's side, some employers tend to conclude fixed term arrangements while the job position is of permanent nature. The reason for so doing is they hold the view that in a fixed term arrangement they have wider latitude for hiring and firing such employees including offering reduced labour standards.

From the employees' side too, whenever they conclude fixed term contract even for jobs of permanent position, they feel insecure in their employment in that they are of the view that the employer may terminate them at will upon the expiry of the stipulated period. At times, they resort to court with a view to obtaining a declaration of permanency in their employment status since their position is of permanent nature.

Both positions are legally invalid. With regard to the positions of the employers, though it is within the principle of contractual freedom to enter into fixed term contracts if the parties wish, it will be unlawful to terminate a contract of employment by the mere fact that the duration expires. The presumption of indefiniteness (Article 9) prohibits such a measure. Of course, the Cassation Division in *Lalibela Mar Museum v. Marie Beza case (File No.138054; Vol.21)* held that a contract for definite period can validly be terminated upon the expiry of the stipulated period. However, the Cassation Division's holding in this regard is open to challenge on the face of Article 24 (1) of the Labour Proclamation and the spirit of the labour law in general.

The new labour proclamation tried to clarify the confusion by amending the phrasing of Article 24(1). (Please, *compare the formulation of Article 24(1) under Proclamation No.377/2003; and the same sub-Article under Proclamation No.1156/2019 and decide for yourself*). Thus, the employer should look for other valid grounds of termination such as incompetence or serious improper conduct if the job is of a continuos nature. Moreover, the employer can in no way reduce the benefits to be accorded to the employee by law due to his contractual status. Therefore, fixed term employment does not offer employers a wider employers' prerogative.

With respect to the employees' concerns, courts are not there to declare what the law has already stated. Courts are mainly there to resolve disputes and render judgments. Thus, if the employees can show that they were denied entitlements by the employer alleging that they are fixed term employees, they can seek remedy before court of law. But if their application is simply for amendment of their contract from definite into indefinite one by court order, courts are not there to draft the contracts on behalf of the parties.

In this connection, the Federal Supreme Court Cassation Division, under *Ethiopian Telecommunication Corporation v. Genta Gemea;* File No.16273: Vol.2 held that "if an employee's sole request is to determine his contractual status or to amend definite contract of employment into indefinite one, he will not have a cause of action that requires court determination because this has already been determined by the law; and it does not need court blessing. Hence, such request shall not be entertained by courts or other labour tribunals." Moreover, if they can show that their job position is of continuous nature, the employer cannot terminate them by the mere fact that the fixed term period expires.

2.7. Rights and Duties of the Parties

2.7.1. Obligations of the employer

In the process of concluding a contract of employment, the parties are expected to spell out their respective rights and obligations under the contract exhaustively. However, the law provides mandatory provisions from which the parties may not deviate unless the law expressly allow them to contract out. Thus, what has been provided by the law shall be implied terms of the contract. In this regard, Articles 12-14 of the Labour Proclamation are the pertinent ones. Article 12 stipulates the positive obligations of the employer, while Article 13 stipulates that of the employee. Article 14 provides negative obligations both for the employer and the employee. While Article 14(1) prescribes what prohibited acts are for the employer; sub-Article (2) of the same provision provides unlawful acts from the side of the employee.

It may be advisable to elucidate some of these prescriptions. Pursuant to Article 12 of the labour proclamation, the employer *shall provide work to the worker in accordance with the contract of employment* (Article 12(1)(a)). It has been further obligated to pay the worker wages and other benefits in accordance with this proclamation or the collective agreement (Article 12(2).

At this juncture, it may be legitimate to ask the question as to why should the law obligate the employer to provide work so long as it pays him the wage. Wouldn't the duty to pay wage be sufficient? Why should the law bother itself in prescribing the duty to provide work on the employer?

Some reasons could be submitted. First, in cases where wage is assessed in the form of piece rate, failure to provide work may result in denial of wage because if the employee is not given job, she will not produce anything. In fact, under the Civil Code there has been a provision to this effect. Article 2529(1) provides *"the employee who is paid at piece rates may require the employer who engages him to give him an adequate amount of work for the duration of the contract".* The fact that the employee is entitled "to require adequate amount of work" implies the employer has the duty to provide work in such cases. Therefore, for piece rate based wages, providing adequate work should be an essential duty of the employer.

The other reason is based on human rights concerns. It is believed that work is a source of pleasure and very much associated with respect to human dignity. Work has essential psychological functions such as personal fulfilment and self-expression, opportunities for social interaction, sense of status and prestige. As a result, denying someone work is tantamount to dispossessing one's career development. Thus, with the introduction of a human rights based approach to labour, provision of work to the employees, regardless of the modality of the pay structure, has been included as a primary duty of the employer.

The work that is expected to be provided is "in accordance with the contract of employment." This formulation restricts the power of the employer towards assigning the employee in reference to the agreed job position. In fact, under labour proclamation No.64/1975, it was provided that "*a worker shall not be forced to perform a job which is not stipulated in the contract of employment*" (Article 10(1). This "to the letters of the contract" approach restricted employers from organizing and re-organizing production process and assigning and re-assigning tasks to their employees as they saw it fit.

Of course, under certain very restricted conditions (for example if the employee is suspected of grave misconduct, the employee may be suspended from duty pending investigation) the employer can unilaterally declare suspension and thereby is exempted from the duty to provide work (Article 27(4). Indeed, the Cassation Division held that it is within an employer's prerogative to assign its employee in any tasks so long as the employee's job grade and other benefits are not reduced (*Muger Cement Enterprise v. Hailu Mengistu; File No.40938; Vol:8* and *Menbere Patriarch Supreme Office v. Yibeltal Atnafu; File No.44033; Vol.8*).

The other employer's duty which is payment of wages and other benefits is a fairly obvious one because the employee is rendering service in the expectation of and in return for such entitlements. Payments other than wages may be such as allowances, over-time payment and bonus. The legal basis for such entitlements could be contracts of employment, work rules, collective agreement because Ethiopian law does not yet fix statutory minimum wage for the private sector. Nevertheless, if the amount of wage is not fixed in the contract, and is not based on collective agreement, the wages which is usually paid for certain work in a certain branch or region is due (Civil Code; Article 2535).

To respect the human dignity of the employee is another duty imposed on the employer (Article 12(4). We have discussed on the historical development of employment relationships that individuals have passed through the status of slavery, serfdom and tenancy which were undignified treatment in many respects. With the transformation of social relations from status to contract and decommodification of labour, however, the concern for human dignity received prominence.

The Ethiopian Constitution prohibits inhuman treatment of any sort in any area of social life. Specifically, it provided that "*no one shall be held in slavery or servitude*"; and "*no one shall be required to perform forced or compulsory labour*" (Article 18(2) and (3). Thus, respect for human dignity has received constitutional protection as well. Moreover, the Labour Proclamation has made it unlawful for an employer "*to compel any worker to execute any task which is hazardous to his life" (Article 14(1) (e); and "to coerce a worker in any manner to work or discharge an obligation"* (Article 14(1) (j) both of which are contrary to human dignity.

2.7.2. Obligations of the employee

The employee has corresponding obligations as well. She is expected to render the agreed service in person (Article 13(1). She is not, as of right, entitled to delegate someone on her behalf to offer the service. As the employee is expected to render the service under the authority of the employer, the duty to obey the instructions of the employer is another aspect of the engagement (Article 13(2). However, the employee is never obliged to carry out work if this would violate the law. This means the employee has the duty to obey lawful orders. The duty of care and diligence in handling all equipment and tools entrusted to her (Article 13(3); and reporting for duty in fit mental and physical condition are other essential duties of the employee (Article 13(4).

Nevertheless, other than spelling out these mandatory obligations, the law did not expressly attach any sanctions in case of failure to comply with these dictates. A legitimate question therefore is, what the consequences would be. One possible line of argument would be since grounds of termination without notice have been exhaustively listed under Article 27(1), and since these are not mentioned thereunder, they cannot be grounds of dismissal. They could entail any disciplinary measure short of dismissal.

The other possible argument would be, since these are mandatory provisions, failure to abide by them amounts to striking at the root of the contract thereby resulting in frustrating the terms of the very contract. This latter position has been reinforced since the Cassation Division has handed down similar line of interpretation in many instances (*Fitsum Astatike v. Integrated Family Service Enterprise; File No.90570; Vol: 16; Selam Bole Consumers' Association*

Cooperative Society v. Eshetu Adefris; File No.108933; Vol: 18; Century General Trading Plc v. Geset Nigussie; File No.108789; Vol: 18)

As an aspect of the duty to obey the instruction of the employer, an employee is required to comply with the provisions of work rules issued by the employer so long as the rules are consistent with the law (Article 13(7). In this connection, there are times when employees have objected to comply with work rules alleging that such rules violated their privacy or presumption of innocence. For instance, where employers establish search at the gate during employees' checking in and out of the work premises, certain employees have objected to this practice on the contention that such measures would violate their constitutional right to privacy.

Notes:

As far as literature is concerned, however, it is argued that "for a search to violate the constitutional right to privacy, the employee who has been searched must have a subjective expectation of privacy which could be considered reasonable by society. Rules relating to the doctrine of expectation of privacy do not operate within a vacuum. Reasonable expectation of reasonable people, factors including location, nature of objects or data and many other factors must be considered."

Similarly, in the *Stedman v. UK* case which was submitted before the European Commission on Human Rights, the applicant was asked by her employer to accept a contractual variation which would require her to work on Sundays. She refused to accept the variation because it interfered with her religious obligations. The European Commission on Human Rights rejected her case as manifestly inadmissible.

The Commission refused to acknowledge any connection between her refusal to work on Sundays and her religious beliefs, holding that she had been dismissed for failing to agree to work certain hours rather than for her religious belief as such. Moreover, the Commission emphasised she was free to resign and seek alternative employment which did not involve Sunday working.

Problem for discussion:

1. *Does search at the gate of working premises violate constitutional right to privacy?*
2. *What about dress codes in which employers prescribe wearing of uniforms or other dressing formalities? Particularly, imagine the uniform is prepared in a manner that appears to contradict with one's religious ways of dressing, does it violate freedom of religion?*
3. *What legitimate business purpose do search and dress code serve, if any? Discuss.*

Another mode of stipulating duties of the parties has been formulated by prescribing negative obligations. Article 14(1) prescribes the negative duties for the employer, while 14(2) is the negative duties of the employee. Discrimination in general and gender and anti-union discrimination in particular along with taking retaliatory measures against an employee are prohibited acts for the employer.

In this regard, it shall be unlawful for an employer to:

a) *Restrain the worker in any manner from exercising his rights or take any retaliatory action against him because he exercises his rights;*
b) *Discriminate against female workers in matters of remuneration, on grounds of their sex;*

c) *Coerce any worker by force or in any other manner to join or not to join; or cease to be a member of a trade union; or to vote for or against any given candidate in elections for trade union offices;*

d) *Discriminate between [among] workers on the basis of nationality, sex, religion, political outlook or any other conditions.*

An employer who commits any of the above-mentioned unlawful acts shall be liable to sanctions, which are prescribed under Article 185 pursuant to Article 185(2)(c) of the Labour Proclamation.

Historically, in labour literature, employers have been criticized for taking retaliatory measures against employees by the mere fact that the latter attempted to exercise their rights such as instituting court action against the employer. Moreover, discriminatory payment among employees based on sex had been widely practised. In fact, discriminating against employees based on race, sex, religion or political opinion had been common. By taking these factual situations into account, the ILO wanted to combat such practices at international level.

Termination of Employment Convention No.158; Freedom of Association and the Right to Organize Convention No.87; The Right to Organize and Collective Bargaining Convention No.98; Equal Remuneration Convention No.100; and Discrimination (Employment and Occupation) Convention,1958 (No.111) are the most important ILO conventions. Ethiopia is a signatory to those conventions. It was noted earlier in this text that any international agreement ratified by Ethiopia is an integral part of the law of the land. It is rather to give more focus and emphasis that the Labour Proclamation has reproduced many of the provisions of the conventions almost verbatim. One of them is discrimination. In Ethiopian labour history, protection against discrimination was first introduced through Labour Relations Proclamation of 1963. However, its protection was not comprehensive in the sense it focused only on anti-union discrimination (Article 30).

Article 1(a) of Convention No. 111 defines discrimination as "*any distinction, exclusion or preference [based on certain grounds] which has the effect of nullifying or impairing equality of opportunities or treatment in employment or occupation*". This purely descriptive definition contains three elements:

- *a factual element* (the existence of a distinction, exclusion or preference originating in an act or omission) *which constitutes a difference in treatment*;
- *a ground on which the difference in treatment is based*; and
- *the objective result of this difference in treatment* (the nullification or impairment of equality of opportunity or treatment).

Through this broad definition, the instrument covers all the situations which may affect the equality of opportunity and treatment that they are to promote. Most national legislations contain essentially these same elements, using the same terms as the Convention. Prohibited distinctions are enumerated along with the fields in which the prohibition applies. The legislation specifies that any difference in treatment based on prohibited grounds and applying to one of the fields enumerated, *a priori* constitutes discrimination.

Any discrimination - in law or in practice, direct or indirect - falls within the scope of the instrument. General standards that establish distinctions based on prohibited grounds constitute discrimination in law. The specific attitude of a public authority or a private individual that treats unequally persons or members of a group on a prohibited ground constitutes discrimination in practice.

Indirect discrimination refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of the characteristics such as race, sex religion or political outlook and is not closely related to the inherent requirements of the job. It is now universally recognized that discrimination based on such grounds is contrary to the concept of fairness and human dignity.

Equality in Employment and Occupation: International Labour Conference 83rd Session (1996)

It is important to note that not all distinctions, exclusions or preferences in employment and occupation are deemed to be discrimination. Convention No.111 set aside three categories of measures which "shall not be deemed to be discrimination: those based on the inherent requirements of a particular job; those warranted by the protection of the security of state; and those measures of protection and assistance."

Under Article 1(2) of Convention No.111, "*any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."* This exception must be interpreted restrictively. When qualifications are required for a particular job, it may not be simple to distinguish between what does and what does not constitute discrimination. It is often difficult to draw the line between bona fide requirements for a job and the use of certain criteria to exclude certain categories of workers. In order to determine the real scope of this exception, the following two points should be examined: first, the concept of "a particular job" and second, the definition of "inherent requirements" of a particular job.

It appears that from the preparatory work of the Convention that the concept of a "particular job" refers to a specific and definable job, function or task. The necessary qualifications may be defined as those required by the characteristics of the particular job, in proportion to its inherent requirements. A qualification may be brought to bear as an inherent requirement without coming into conflict with the principle of equality. In no circumstances, however, may the same qualification be required for an entire sector of activity. Likewise, the general exclusion of certain jobs or occupations, such as work in agriculture, or public service from the scope of measures designed to promote the principle of equality of opportunity and treatment is obviously contrary to the Convention.

As regards to men and women, distinctions on the basis of sex may be required for certain jobs, such as those in performing arts or which are perceived as involving particular physical intimacy; such a distinction may also be linked to special protection measures. These distinctions should be determined on an objective basis and should take account of individual capacities. However, the continuing exclusion of women from certain posts of authority merely because they are women encounter negative prejudices is one of the measures to be eliminated by methods appropriate to national conditions and practice.

With regard to religion, national provisions can be found restricting jobs associated with a particular religion to persons of that religion. Provisions of this kind are generally deemed not to be discriminatory; however, this exclusion does not apply to all work performed for a religious organization (such as building maintenance, etc.). In order to fall within the scope of the exception provided for in Article 1(2) these criteria must correspond in a concrete and objective way to the inherent requirements of a given job or occupation.

From the employee's perspective as well, there are prohibited acts. Article 14(2) of the Labour Proclamation has spelt out some of them. It reads as follows:

It shall be unlawful for a worker to:

a) *Intentionally commit in the workplace any act which endangers life or property;*
b) *Take away property from the workplace without the express authorization of the employer;*
c) *Make use of falsified document or an attempt thereof;*
d) *Use drugs prohibited by law or use alcoholic beverages and have impaired physical and mental status at the workplace;*
e) *Except for HIV/AIDS test, refuse to submit himself for medical examination when required by law or by the employer for good cause;*

f) Refuse to observe safety and accident prevention rules and to take the necessary safety precautions;

g) Conduct meeting during working hours in disregard to the time assigned by collective agreement or without obtaining the permission of the employer;

h) Commit sexual harassment or sexual violence at workplace;

i) Physically abuse anyone in a workplace;

Committing any or many of these acts may result in adverse consequences for the employee. As per Article 27(1)(i) commission of any of the prohibited acts under Article 14(2) may subject the employee to dismissal without notice. We will discuss these issues at length later on while elaborating termination without notice (Chapter III).

2.8. Triangular Employment Relationship

In a standard employment relationship, the relationship is bilateral. If at all third parties were involved, they were confined to "services for matching offers." Through passage of time, however, disputes concerning the legal nature of a relationship for a provision of labour are increasingly frequent because the employment relationship may be objectively ambiguous or disguised. Both situations create uncertainty as to the scope of the law and can nullify its protection. One source of such complication is the emergence and proliferation of the so called "triangular employment relationship." Under this arrangement, workers are employed by an enterprise (the "service provider") that perform work for a third party (the "user enterprise") to whom their employer provides services. The fact that they are employees might not be in doubt but they frequently face difficulties in establishing who their employer is, what their rights are and who is responsible for them.

In most cases, the triangular arrangement was justified on efficiency grounds in the sense that enterprises consider that they would be more efficient if they were to focus on their core business and outsource their support service to be handled by other service providers. At times, it was put in use by service users in order to avoid employers' legal obligations associated with employment relationships. Whatever the motive, it has been widely practised even in Ethiopia. Particularly, many of the private security service and cleaning services have been contracted out (out-sourced) to independent service providers instead of offering them in-house. However, this arrangement has been unpopular within the labour community.

For one thing, it has the effect of displacing labour force as employees who were performing the outsourced task will be liable to reduction. Secondly, employees of the service providers felt that the service providers are taking undue advantage at their expense in such an arrangement. They are unclear as to who their employer is; and unsure against whom they should bring an action to enforce their rights under the law. Ethiopia ratified the Private Employment Agencies Convention, 1997 (No.181) in 1999. The Convention obligated its signatories to make sure that rights of employees of the private employment agencies have been respected. Moreover, it has been expressly stipulated that "*private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers"* (Article 7(1).

Herein below is an extract from: "The Impact of Triangular Relationship on Workers' Right in Ethiopia" LL.M thesis by Nigatu Abera (AAU-College of Law and Governance-2019): Footnotes omitted.

Although there is no consensus on what exactly constitutes a standard employment relation, in most labour law regimes, it is characterized by a full time, permanent employment contract, of an employee working for a single employer at a time, on the latter's premises and expected to continue doing so for undetermined period of time. In other words, an employment relationship is considered to be standard (typical) when there is an exchange of labour in return for wages on a full time basis according to a known schedule; the employee works continuously for one employer with one contract instead of series of contracts;

and work at a place provided, according to a schedule determined and direction given by the employer.

A triangular employment relationship is a relationship in which employees find themselves interacting with two (or more) persons, each of whom assumes certain functions of an employer in standard employment relation. Under standard employment relationship, the employee enters into a contract with a certain person and provides the labour service for the same person (who is the employer and the user of the labour service at the same time). In a triangular labour relationship however, this is not the case. The worker enters into an employment contract with a certain person assuming the place of employer (the employment agency) while the actual service is rendered to another person who is not part of the contract (the user enterprise).

The relationship between the employment agency, the client and the worker is the most common form of what is known as "triangular" or "tripartite" employment relationship. A basic problem raised in such relationships is who should be considered the legal "employer" of the worker in question. In these situations, there is no contract directly signed between the user enterprise and the worker. However, there is reason to place some employer responsibilities with the user, since the characteristics of employment that put workers in need of protection can be found, to some extent, in both of the worker's relationships (i.e. worker-agency and worker-user relationships). So, responsibility of an employer is shared between the two parties (i.e. the user enterprise and the employment agency).

This arrangement which is the result of an attempt to externalize employment relationships by user enterprises may take place in the forms of outsourcing, subcontracting or use of temporary employment agency service. Outsourcing as a modality of externalizing work, is an arrangement whereby an activity or service performed by employees within an employer's business (usually a "non-core" or ancillary service) is contracted out to be performed by an outside party. The outsourcer will take over the complete function of a particular department, rather than the user enterprise employing full time personnel. Outsourcing in relation to labour may take place in different forms. An enterprise may outsource the task of recruitment and placement of workers who are engaged in activities which do not constitute the core business. In such cases the entity to which this task is outsourced will perform the work without having any further relation with the workers recruited and placed at the outsourcing enterprise. There is nothing that looks triangular here.

A survey by Susan N. Houseman has revealed some of the reasons invoked by employers for using non-standard labour relations. The most common reasons related to specific staffing or scheduling the employers raised in the Survey include:

- to fill a vacancy until regular employee is hired;
- to fill in for absent regular employee who is sick, on vacation, or on family medical leave;
- seasonal needs; due to seasonal nature of some of their work;
- to provide needed assistance during peak-time hours of the day or week;
- to provide needed assistance at times of unexpected increases in business;
- when they are engaged in special projects which last in a certain period for which they do not have regular workers;
- to provide needed assistance during hours not covered by full time shifts;
- to do away with the procedure and complexities in screening job candidates for regular jobs;
- to save on wage and/or benefit costs;
- to provide needed assistance during company restructuring or merger;
- to fill positions with temporary agency workers less than one year;
- to save training costs;
- special expertise possessed by this type of worker;
- accommodate employees' wishes for part-time hours;
- when unable to find a qualified full-time worker.

Others argue that employers prefer such work arrangement to bypass statutory obligations and justify differential treatment of atypical employees since it gives them more flexibility. As discussed elsewhere in this paper, the reasons on employees' side for engaging in the atypical labour relationships are of two types. Some employees prefer this arrangement due to their particular situation (like family and other responsibilities) which do not allow them work in the standard arrangement. Others join work under these arrangements because they do not have other alternatives.

Generally, despite the change in the world of work which is witnessing a proliferation of atypical employment relation at a higher rate, the focus of labour laws in most countries is the standard labour relation. This is attributable to the very inception of labour laws which mainly consider the full time, permanent work arrangements and did not sufficiently cover atypical work arrangements. The relatively younger age of some of the atypical workers have also partly contributed to this. However, due the unique features involved in the relationships, workers in the non-standard employment relation might be subjected to abuse unless this work is regulated properly.

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Article 2(13) of the labour law defines "*Private employment agency" as any legally licensed person, to provide one or two of the following local employment services without charging directly or indirectly any fee from the worker:*

a) Local employment exchange service without being a party to an employment relation; or

b) Deploying of employees under its authority to the service of a service user enterprise, by entering into contract of employments with such employees; or combines both services.

It is in the case of (b) that the issue of triangular employment relationship will come into the picture. In the former case, the private employment agency is merely serving as an intermediary rather than assuming the role of an employer.

But under scenario (b) the agency is deploying the employees under its authority thereby making it an employer. It is on the latter case that the service recipient would be exonerated from employer's liability as the service provider is at the time an employer.

Incidentally, it is worth noting that Employment Exchange Service Proclamation No.632/2009 had an important provision that would have been helpful in allocating responsibility between the service provider and the user enterprise with respect to the employees. It provided as follows:

> *The private employment agency and the third party [user enterprise] shall jointly and severally liable for violation of the contract of employment concluded with a worker to provide the service mentioned in sub-Article 1(b) of Article 2 of this Proclamation* (emphasis added) Article 22).

What is mentioned under sub-Article 1(b) of Article 2 of the Proclamation relates to offering of services by making workers available to a third party by concluding a contract of employment with such workers. However, since Proclamation No.632/2009 is repealed by Proclamation No.1156/2019, the concept of joint and several liability has been withdrawn. Now that the latter proclamation has empowered the Minister to issue directive on conditions for private employment agency to participate in local employment service (Article 171(1)(k), it is hoped that the Ministry would re-introduce the joint and several responsibility principle that may be of some help to alleviate the concerns of the labour community.

2.9. Suspension of a Contract of Employment

Suspension of a contract of employment is a situation where the obligations of the parties to the contract may be temporarily withheld. This is a grey area that combines the attributes of termination and contracting. On the one hand it resembles termination since the employee will not be required to render service and the employer will not be obligated to pay wage during this period. However, since the parties will be reinstated to their previous engagement once the circumstance that warranted suspension elapses, the "bare contract" exists during this period.

Industrial relations may require this kind of arrangement for various reasons. Some of the reasons could generally be:

- voluntary arrangement of the parties;
- reasons dictated by societal interest;
- due to reasons beyond the control of the parties.

In the Ethiopian context, Article 18 of the Labour Proclamation lists down these grounds.

Article 18: Grounds of Suspension

The following shall be valid grounds for the suspension in accordance with Article 17 of this proclamation:

1) *Leave without pay granted by the employer upon request by the worker;*
2) *Leave of absence for the purpose of holding office in trade unions or other social services;*
3) *Detention for a period not exceeding 30 days provided, however, that the employer is notified within 10 days or is supposed to know of the detention;*
4) *National call;*
5) *Full or partial suspension, due to force majeure, of activities of the employer for a period of not less than 10 consecutive days;*
6) *Financial problems, not attributed to the fault of the employer, that requires the suspension of the employer for not less than 10 consecutive days;*

Although there is also what is called "disciplinary suspension" where an employee may be suspended from duty and wage pending investigation on alleged serious misbehaviour, we believe that this is not its proper place to discuss the issue. We will come to it in due course when we discuss dismissal on disciplinary grounds (Article 27).

- ***Voluntary arrangement (Article 18(1)***

The employer and the employee may agree to suspend their contractual relation for some time. For instance, the employee may obtain an offer for better pay for six months. In such a case, he may request his employer to grant him leave without pay for six months. If the employer accepts the request, this is a typical case of suspension. Within the agreed six months, the employer will not pay wages and other benefits to the employee. Conversely, the employee will not be required to render service for the employer. At the expiry of the six-month period, however, the parties will be reinstated to their previous employment relation.

This kind of arrangement is beneficial to both contracting parties. On the one hand, it enables the employee to obtain modest increases in payment for some time without losing his employment security. From the employer's perspective, such an arrangement helps it retain skilled and productive employees by providing employment flexibility that addresses its employees' concerns and interests.

- ***Suspension for socially beneficial tasks (Article 18(2) and (4)***

It is possible that employees may assume trade union leadership offices which may demand much of their working time. Usually, trade union leadership at an enterprise level is a part-time job in the sense that the employee renders such service mainly out of working hours. But where the employee assumes higher level trade union leadership, such as at the level of federation or confederation, these roles demand fulltime engagement. The other possibility is an employee may hold office at Woreda or Kebele administrations or may be elected as parliamentarian which may require full time commitment. It is also possible that the employee may be called upon to respond for a national call, be it military or other national agenda. Many of these roles are directly or indirectly related to socially beneficial services. However, their service is for a limited duration because many of them are positions to be assumed through periodical election.

In such cases what will be the fate of the employee's contract of employment? Should it be terminated? Should the worker be still considered as an employee and collect wages from the employer even if the worker is not rendering service to it? It seems unfair to terminate the contract of employment of an employee who is rendering service which is important to the society at large. Workers should not lose their jobs for rendering national service. Individuals should be encouraged to serve society. This can be achieved by ensuring employment security to such individuals.

Should the employer then be required to pay the worker wages while the employee is not rendering service to it? This is again unfair and uneconomical to the employer because as the service is being rendered to society at large, it should be society which should incur such costs and not the employer individually.

On the one hand, employees would like to make sure that they will get their employment back after discharging their social responsibility. Otherwise, they may not be willing to commit themselves to such services. From the employer's perspective as well, it would like to make sure that it will not be obligated to pay wages to the employee while the latter was not rendering service to it. Thus, suspending the contract of employment would be the feasible option in the sense that during the period of suspension the employer would not be obligated to pay wage to the employee but the employee will be reinstated to the previous employment position once the societal service is accomplished.

- Suspension due to reasons beyond the control of the parties

Reason beyond the control of the employee (Article 18(3)

Pursuant to Article 27(1)(b), if an employee is absent from duty for a total of five days in a six-month period while being warned in writing of such a problem, and where the absence cannot be classified in any of the leaves under the

Proclamation, she may be terminated without notice. An employee may be detained by government authorities for some time. If the detention lasts more than five days, the fate of the worker's contract of employment should be an issue of concern. Of course, the detention cannot be classified in any of the leaves, such as sick leave, maternity leave, mourning leave etc. The Proclamation does not recognize "detention leave." Strictly speaking therefore the employee will be exposed to dismissal due to unjustified absence from duty.

However, it must be noted that detention is within police power and hence it is beyond the control of the employee. Detention *per se* does not erode the presumption of innocence. It is when a conviction attaches that presumption of innocence would be removed. Conviction is judicial determination while detention is not. It thus appears that Article 18(3) is an exception to Article 27(1)(b). It states as follows:

Detention for a period not exceeding 30 days provided, however, that the employer is notified within 10 days or is supposed to know of the detention results in suspension of contract of employment.

In order for an employee to benefit under this provision, the following conditions must be met:

- the incident should be detention (police measure) as opposed to imprisonment (judicial measure); and
- the detention should not exceed 30 days; and
- the employer must have been notified of the incident within 10 days of its occurrence; or
- the employer is supposed to know of the detention (for instance, if the employee was detained from workplace, the employer is supposed to know).

In fact, the Federal Supreme Court Cassation Division held that even when the detention exceeds the 30 days limit, the employer cannot terminate the contract of employment by contending that the 30 days have elapsed unless it is shown that there was a court sentence passed against the employee as per Article 27(1)(j) (*Ethiopian Road Construction Corporation v. Asmare Fetene*; File No.114669: Vol.19). The fact of the case was the employee remained in police custody for forty days on remand after which the public prosecutor decided to send him free.

It is interesting to note that in the case above, neither the applicant nor the Cassation Division relied on Article 18(3). *What would be your view on the case on the face of Article 18(3)? Do you still agree with the holding of the Cassation Division?*

Reasons beyond the control of the employer (Article 18(5) and (6)

In an industrial relation setting, situations which may have the result of cessation of activities of the undertaking may occur. If the cessation of the activities of the undertaking is permanent in nature, the contract of employment will come to an end (Article 24(4). But, if the situation results in temporary cessation of activities, it will be an issue of suspension of a contract of employment. Although how long is temporary or how long is permanent may be issues open to debate, it appears that the intention of the legislature seems cessation of operation up to ninety days is temporary; while cessation of operation longer than that is considered to be permanent. This can be deduced by looking at Articles 18(5) and (6) cum 21(1) of the Proclamation. Therefore, any temporary cessation of operation for less than 10 days should be tolerated and incurred by the employer (non-actionable); while cessation of operation above 10 days and up to 90 days shall fall within suspension. And any cessation of operation beyond ninety days may warrant termination of a contract of employment.

Be that as it may, most of the grounds of suspension under these provisions are situations associated mainly with economic reasons or other reasons beyond the control of the parties. For example, the Metehara Sugar Factory may be compelled to temporary suspend its operations fully or partially, for more than ten days, due to the over flow of the Awash River out of its river banks. This may be one incident where suspension may be associated with non-economic reasons beyond the control of the employer. An enterprise's financial problems or shortage of raw materials may also be a ground for temporary cessation of operations. For instance, there have been multiple times in Ethiopia when construction enterprises had to temporarily cease operation, for more than ten days, due to shortage of cement or iron bars. These have been typical cases of suspension.

Suspension under these two grounds is not within the sole discretion of the employer. It is subject to review by the MOLSA or Regional Labour and Social Bureaus. In order for the appropriate government office to determine whether the stated reason is adequate to suspend operation temporarily or not, the employer should notify in writing the appropriate office within three working days of the occurrence of the alleged ground of suspension (Article 19). The reason for such an arrangement seems if the measure is left to the discretion of the employer, it is feared that it may give room for misuse of the provisions for not well-founded reasons. It is the responsibility of the Regional Labor Offices to handle the request.

The appropriate government office is expected to determine whether or not there is sufficient ground for suspension within three working days after the receipt of the notification. In fact, failure to respond by the appropriate organ within the prescribed period shall be considered as acceptance of the suspension measure (Article 20(1)). Where the appropriate office determines there is sufficient ground for suspension, it will approve it and fix the duration for it. But the duration shall not exceed ninety days (Article 21(1)). Where the appropriate organ is convinced that the employer cannot resume operation within the maximum period of ninety days, the contract of employment shall be put to an end and the workers shall be entitled to benefits specified under Articles 39 and 44 of the Proclamation (Article 21(2).

Conversely, if the appropriate organ determines that there is no adequate reason to suspend operation, it will order the resumption of the activities and payment of wage for the days for which the employees were suspended (Article 20(2)).

The decision of the administration is not final in the sense that any of the parties who is aggrieved by the decision of the administration can appeal within five working days against this decision to the appellate court where the employer runs its business (Article 20(3) cum 140(1)(e).

At this juncture, it is important to note that *Article 39(1)(a) entitles an employee to severance payment where his contract of employment is terminated because of permanent cessation of operation of the undertaking due to bankruptcy or for any other cause; provided that he has completed his probation period and is not eligible for pension [payment].* In the present case, since it is held that the enterprise cannot resume operation (for full suspension cases) within ninety days, it will then be considered as a case of permanent cessation of operation thereby entitling the terminated employee obtain severance payment on the condition that worker has completed probation period and not yet eligible for pension pay. Moreover, Article 40(4) is an additional source of entitlement in such cases.

However, if the suspension was only partial and the enterprise failed to resume operation within the prescribed period, the situation will be entertained under Article 28(3)(b). In this case, severance payment shall be due as per Article 39(1)(c) and payment in lieu of notice under Article 44. In this case too, Article 40(4) is relevant as the reduction of labour force is to be effected based on Article 29; and Article 29 cross refers to Article 40(4).

2.10. Consequences of Expiry of Period of Suspension

Normally as soon as the situation that gave rise to the suspension expires, the parties will be re-engaged without any procedure. It is important to note that the employee will not be re-employed or employed afresh. The employee will not be subjected to a probation period and the employee's prior job experience and seniority will be retained in this arrangement. This is why we contend that during suspension the bare contract exists. Accordingly, *the worker shall report for duty on the working day following the date of the expiry of suspension and the employer shall reinstate the worker, who so reports for work, in the relevant* *position to his profession without adversely affecting his job position and wage* (Article 22). In fact, at the time of the revision of the Labour Proclamation, trade union representatives were contending that wage increments or adjustments undertaken within the enterprise while the employee was on suspension should benefit the suspended employee as well. However, their view was not accepted during the formulation of the law on the ground that it would be unfair to require an employer to increase wages while the employee was not rendering service to it.

Problem for discussion:

Let us assume an employee had assumed trade union leadership at the level of a federation. It was a full-time job and she stayed for five years in that position. However, she was not re-elected for a second term and hence she had to report for duty at her previous employment. In fact, she did report. The employer received her and assigned her to her previous position with the same amount of wages and benefits. The employee noted that her workmates who have been working in the enterprise managed to obtain two levels of wage increases in the last five years.

The employee petitioned her employer requesting that her wage be adjusted at par with her workmates and that her job experience at the Federation of Trade Unions be considered as years of service in the enterprise. How should the employee's petition be determined? Is it legally valid to bring such request or not? Why? Why not?

Chapter III
Termination of Contract of Employment

3.1. Lawful Termination

As stated earlier, a contract of employment is not a life-long commitment. There may be circumstances that may bring about its end. Accordingly, termination of a contract of employment and its effects have been extensively regulated by the labour proclamation. In a sense, any termination which does not fall under either of the grounds mentioned by law will be unlawful. Unlawful termination will have consequences which will be discussed later in due course.

Broadly, lawful grounds of termination of contract of employment are the following:

- termination by the operation of law;
- termination by the agreement of the parties;
- termination at the initiation of the employer;
- termination at the initiation of the employee;

Let us examine them in closer detail hereunder:

3.1.1. Termination by the operation of the law

Under this provision, the occurrence of a certain factual or legal situation will put to an end the parties' contractual relationship without any additional procedure or process. For instance, if a contract of employment was concluded for the performance a specific work, the completion of the agreed work will bring an end to the parties' engagement (Article 24(1). Prior notice or any other measure is not required from either party in such cases.

This is not the case if the contract was made for a definite period. If a contract of employment was made for a definite period, the expiry of the stipulated period does not necessarily bring the contractual relation to an end because Article 9 places what we call a “presumption of indefiniteness” of a contract of employment. It means if the job to which the employee has been assigned is of a continuous nature, unless the employee was employed for replacement purposes, even if the contract was for a definite period and the period has expired, renewal shall be required unless there existed other ground of termination such as incompetence or serious misbehaviour.

Death of an employee is another ground for termination of a contract of employment by the operation of law (Article 24(2). This is a natural consequence of a contract of employment because the employee is required to render the agreed service personally. If the employee dies, personal service is no longer available. The right to employment is personal and cannot be inherited by third parties. It is true that under the general principles of contract, the heirs of a person shall be substituted for him in contracts to which he was a party, unless the contrary was stipulated or flows from the nature of the contract (underline added: Article 1986; Civil Code). In employment contract cases, since the nature of the contract requires personal service that service provision is not transferable to heirs.

An employee’s attainment of the age of retirement as per the relevant law could also be another ground of termination under this section. There is an inter-generational equity policy consideration that would note that older workers should vacate job positions to the youth. There was no retirement age for the private sector in Ethiopia until 2011. During the Imperial era retirement age for the public sector was attainment of sixty years of age for men and fifty-five years for women. At the time of the military rule, attainment of fifty-five years for men and women was the pensionable age. The post-military regime increased the retirement age to sixty for men and women. All the same, the labour proclamation does not prescribe retirement age in any of its provisions.

It is with the coming into effect of Proclamation No.715/2011(as amended by Proclamation No.1267/2014) (i.e. Private Organizations Employees’ Pension Proclamation) that the private sector has been introduced into pension schemes.

According to the Pension Proclamation, attainment of sixty years of age for both sexes is the retirement age. However, it must be noted that in a country like Ethiopia where registration at birth is not yet implemented, verifying actual age is difficult, if not impossible.

Problem for discussion:

1) *Is attainment of sixty years of age too early or too late for retirement in the Ethiopian context?*
2) *With respect to the Ethiopian pension laws on retirement age of the three successive regimes in Ethiopia, what is your view? What policy considerations, if any, should be put in place while fixing retirement age?*
3) *Where registration at birth is not yet implemented, on what mechanisms should implementing agencies rely on to effectively put pension at in place?*

The other situation which may result in termination by the operation of the law is, where the enterprise ceases operation permanently due to bankruptcy or for any other cause (Article 24(4). This may be considered as the "death of the enterprise." Admittedly, bankruptcy in business, though not desired, is a possibility. Enterprises may be driven out of the market by other more efficient peers. Technically, bankruptcy could be analogized to the death of the enterprise and it has equivalent effect to the death of the employee. However, it is not the employer who determines bankruptcy; it is rather a court of law that declares such a status. It must be noted that mere reduction of profitability does not amount to bankruptcy. Reduction of profitability is something that will handled under Article 28(3).

Indeed, it is not only bankruptcy which is covered under this sub-Article. Any other cause, for instance, if an operating license of an enterprise is revoked (where the revocation is permanent) by pertinent authorities, may be a valid ground for termination. It should be recalled that where the cessation of operation is temporary, it is valid a ground for suspension. However, where the cessation of operation is a permanent one it will be an issue of termination of employment relationship. How to determine permanency has been proposed in the previous chapter. As noted there, the maximum duration for suspension due to force majeure or financial reasons is ninety days. Therefore, it is reasonable to consider suspension of operation beyond ninety days as permanent cessation of operation.

In this connection, the Cassation Division in *Wudmetas Nuro import-export enterprise v. Hunegnaw Setie and et al;* (File No.42985; Vol: 9) held that employees terminated due to permanent cessation of operation of the enterprise are entitled to payment in lieu of notice period. The court relied on the provisions of Article 28(3). It seems to me that Article 28(3) is relevant in cases of reduction of labour force. In reduction of labour force situations, there will be two groups of employees; those who will be retained and those who will be terminated. Those to be reduced would be eligible for notice period as per Article 35(1) (d).

In the case before the Cassation Division, however, as the enterprise ceased operation permanently, the whole labour force was terminated. Thus it is my view that Article 24(4) would have been more appropriate than the provision cited by the Cassation Division. Since Article 24(4) is placed under termination by the operation of the law, and hence employees terminated thereunder are not entitled to notice. Thus, payment in lieu of notice period was unwarranted in the circumstances.

Finally, another ground of termination by virtue of the law is *when the worker is unable to work due to partial or total permanent incapacity* (Article 24(5). This is more or less similar with our discussion in death cases. Since personal service of the employee is required, if the employee is proved unable to render service due to permanent incapacity, there seems no need to require the parties remain engaged. Hence, the contract of employment will be terminated automatically. However, the subjective appreciation of the employer that the employee is unable to work due to permanent incapacity is not sufficient. Whether the employee is within permanent incapacity must be verified by medical experts. This rigorous third party verification requirement may be noted from the Amharic version of the law (ሲረጋገጥ) though it is not clearly spelt out in the English version. Legally, it is noted that the Amharic version is the prevailing version. In fact, Article 39(1) (g) seems to cross-refer to this sub-Article; and the requirement of verification by medical board has been expressly stated therein.

3.1.2. Termination by agreement of the parties

It was stated at the beginning of the previous chapter that the basis for a contract of employment is the agreement of the parties. It logically flows that the agreement of the parties could put an end to their contractual relationship as well. Nevertheless, the Labour Proclamation places a rigorous procedure during termination compared to the time of contracting. Recall that at the time of entering into employment relationship, the law, in principle, does not require any formality. The parties may enter into their commitment in writing or orally. But at the time of termination by agreement, the agreement to terminate must be made in writing and signed by the parties (Article 25(2).

In fact, even though the Labour Proclamation does not require the signature of two witnesses, the Civil Code has such a requirement for written contracts (Article 1719; Civil Code). A contract of employment being a special contract, it has to comply with the requirements of the general law of contract principles unless expressly excluded. If these formalities are not complied with, the employee can challenge the agreement as invalid at a later stage.

Such rigorous procedure of consensual termination seems to be dictated by the need to ensure the employment stability of the employee. The assumption of the law seems that if the employee affixes signature to the written instrument of termination, it is a well-considered decision from the worker's side. More often than not, written instruments tend to show due consideration and seriousness of commitment. In *Kaliti Metal Production Enterprise v. Birhanu Lidet Wolde* (File No.37575; Vol.8), the Cassation Division ruled that an agreement to terminate a contract of employment that is not made in writing is invalid and hence unlawful termination.

3.1.3. Termination at the initiation of the employer (dismissal)

The traditional rules governing the contract of employment which developed in various countries during the nineteenth century were characterized by a formal symmetry of the rights of either party to terminate the contract of employment, by giving notice, without even having to justify its decision. However, the consequences of this equivalence of rights differed widely for the parties: termination of the contract by the worker-exercising his fundamental right to protect his freedom of work is in most cases merely an inconvenience for the employer, while the termination of the contract of employment by the employer could result in insecurity and poverty for the worker and his family, particularly during periods of massive unemployment. The disparity of the consequences of each exercising its discretionary power to terminate the employment relationship led in many countries to a movement towards workers' protection. The development resulted in an extension of the period of notice; the payment of severance allowance; efforts to restrict the employer's discretionary power to terminate the employment relationship for any reason or without reason by applying the concept of the abusive exercise of a right and abusive termination of the employment relationship; and more recently, the adoption of provisions requiring justification for the termination of the contract of employment by the employer as the employment situation became more difficult. These provisions were supplemented by measures to be applied in the event of workforce reductions for economic, technological, structural or similar reasons.

In a resolution adopted in 1950, the International Labour Conference noted the absence of international standards on the termination of contract of employment and requested a report on national law and practice on the matter for consideration by the Conference. Following a number of studies carried out on the subject, in 1963 the Conference adopted the Termination of Employment Recommendation (No.119), the first international labour instrument dealing specifically with this issue. This instrument recommended certain fundamental standards with regard to justification for termination, notice, right to appeal, compensation and income protection, and included provisions concerning reduction of workforce. It marked the recognition at the international level of the idea that workers should be protected against arbitrary and unjustified termination of their employment relationship and against the economic and social hardship inherent in their loss of employment.

In 1974, the Committee on the Application of Conventions and Recommendations of the International Labour Conference, when considering the General Survey by the Committee of Experts on the Application of Conventions and Recommendations of reports on the application of Recommendation No.119, acknowledged that this Recommendation had played an important role since its adoption in 1963 in encouraging protection against unjustified termination of employment, and thereby favouring the promotion of employment security which is an essential aspect of the right to work. The Committee concluded that the issue should be put before the Conference in order to draw up another suitable instrument taking into consideration new developments since the adoption of the Recommendation No.119. At its 211th Session (November 1979), the Governing Body of the ILO decided to place on the agenda of the 67th Session, 1981, of the International

Labour Conference an item on termination of employment at the initiative of the employer. Discussions at the Conference led to the adoption in 1982 of the Termination of Employment Convention (No.158) which replaced the Termination of Employment Recommendation, 1963 (No.119). Ethiopia is a party to this convention since 1991.

ILO (1995) Protection against Unjustified Dismissal, International Labour Office (Geneva)

The Labour Proclamation empowers the employer to terminate a contract of employment with notice or without notice depending on the particular ground of termination available to it. In this regard, the employer has broadly three valid grounds. These are:

- Termination without notice (summary dismissal)-Article 27
- Termination with notice (ordinary dismissal)-Article 28
- Group termination (reduction of labour force)-Articles 28 and 29.

Let us examine them one by one.

- ***Termination without notice (summary dismissal)***

Traditionally, a worker's improper behaviour is treated as misconduct and can result in termination of employment if it is considered to be sufficiently serious. Reasons for termination of employment connected with the conduct of the worker can be constituted either by professional misconduct or improper behaviour which may lead to disciplinary action and termination of employment, The types of conduct for which a worker may be dismissed are frequently referred to in legislation in general terms such as misconduct or breach of discipline, but more precise definitions can also be found. Misconduct, when defined, can belong to one of two categories: the first usually involves inadequate performance despite having the potential of the duties the worker was contracted to carry out; the second encompasses various types of improper behaviour. The first category may include such forms of misconduct as neglect of duty, violation of work rules (particular mention is sometimes made of rules related to safety and health), disobedience of legitimate orders and absence or lateness without good cause.

The second category includes in particular disorderly conduct, violence, assault, using insulting language, disrupting the peace and order of the workplace, turning up for work in a state of intoxication or under the influence of narcotic drugs, or the consumption of alcohol or drugs at the workplace, various acts displaying a lack of honesty and trustworthiness, such as fraud, deceit, breach of trust, theft and various disloyal activities(such as divulging trade secrets or undertaking activities in competition with the employer) or causing material damage to the property of the undertaking. Certain forms of misconduct, such as absence or lateness without good cause or turning up for work in a state of intoxication, often have to be habitual or repeated if they are to warrant dismissal.

From this perspective, the Labour Proclamation provides the following misdeeds to be serious misbehaviour warranting termination without notice:

- *unless the reason for being late is justified by the collective agreement, work rule or contract of employment, being late for duty eight times in six months period while being warned in writing of such a problem;*
- *absence from duty for a total of five days in six months period while being warned in writing of such a problem; and where the absence cannot be classified in any of the leaves provided under the Proclamation.*
- *deceitful or fraudulent conduct in carrying out his duties;*
- *misappropriation of the property or fund of the employer with intent to procure for himself or to a third person unlawful enrichment;*
- *performance result of a worker, despite his potential, is persistently below the qualities and quantities stipulated in the collective agreement or determined by the agreement of the parties;*

- *being responsible for brawls or quarrels at work, having regard to the gravity of the case;*
- *conviction for an offence where such conviction renders him incompatible for the post which he holds;*
- *being responsible for causing damage intentionally or through gross negligence to any property of the employer or to another property which is directly connected with the work of the undertaking;*
- *commission of any of the prohibited acts under Article 14(2) of this Proclamation;*
- *absence from work due to a court sentence passed against the worker for more than thirty days;*
- *commission of other violations stipulated in a collective agreement as grounds for terminating contract of employment without notice;*

As can be gathered from this long list of misdeeds that warrant termination without notice, in employment relations, skill and productivity, though necessary are not sufficient to ensure employment security. On the contrary, behaviour of the employee is equally important in retaining employment security. No matter how skilled and productive an employee may be, if the employee happens to have committed any or many of the listed serious misconducts, that employee may be subjected to termination even without being accorded the benefit of notice.

Nevertheless, given that termination of employment without notice is the most serious disciplinary measure that an employee can suffer at the hands of an employer, for reasons attributable to the worker's own behaviour, the misconduct under consideration must be serious enough deserving the measure and its commission must be sufficiently verified.

Generally, seriousness of misconduct may be assessed from two angles. Firstly, a single misdeed may be considered serious enough to justify summary dismissal (quality of the misdeed). Second, minor failings which may not warrant termination individually may be added up thereby cumulatively warranting such a response (quantity of misdeed). In order to verify the commission of these misdeeds through a transparent procedure, it has been provided that the employment of a worker shall not be terminated for reasons related to the worker's conduct before he is provided an opportunity to defend himself against the allegations made, unless the employee cannot reasonably be expected to provide this opportunity (Article 7 of the Convention No.158/1982).

Even though the labour proclamation does not have express provisions on the procedure of the right to be heard, as the ILO Convention is ratified by Ethiopia, the procedural safeguard of the ILO Convention should be read into the Proclamation. The essential purpose of this procedure is to ensure that the employee has an opportunity to express their view of the facts. The establishment of a disciplinary committee with a view to investigating the misdeed may serve the purpose.

However, the right to defend is not available in all cases and at all times. In cases where the employer cannot be reasonably expected to provide the right to be heard, the right can be withheld. This implies that if, for instance, the employee is found red-handed (at the spot) while committing the serious misdeed, the right to defend may not be available as it is manifestly visible act which makes further investigation unnecessary.

Termination without notice is one of the most litigated issues before labour divisions of regular courts in Ethiopia. There are cases that reached to the level of the Cassation Division in which this issue was addressed. In order to properly understand the law in action, consider the following cases:

1. *"Absence from duty for a total of five days in six months period while being warned in writing of such a problem; and where the absence cannot be classified in any of the leaves provided under the Proclamation"* (Article 27(1)(b). In *Water Action v. Yilma Assefa* case (File No.29415; Vol.6), Yilma, an employee of Water Action was transferred to another job position by the employer. He failed to report for duty at his new

assignment. Five days elapsed. Water Action terminated the contract of employment alleging that the employee absented himself from duty for five days without good cause. The case was litigated up to the Cassation Division. The Cassation Division held that the employer's measure was lawful. In fact, the Cassation Division, in *G7 Trade and Industry Fiber Products Factory v. Mekonnen Abera* case (File No.32822; Vol:6), ruled that what is expected for the employer is to merely show that the employee absented himself from duty for five days. It is up to the employee to challenge the contention by proving it had good cause to be absent.

2. "D*eceitful or fraudulent conduct in carrying out his duties*" (Article 27(1)(c). In *Filwuha Enterprise v. Bereket Teklemariam case* (File No.39543; Vol: 8), the Cassation Division entertained an alleged serious misbehaviour of an employee. The facts of the case were: Bereket was employed by Filwuha Enterprise (an enterprise engaged in the hospitality industry) to prepare ice-cream intended for marketing to customers. He managed to hold this position by producing falsified documents stating that he had an experience in preparing ice-cream from his previous employer. But the quality of his ice-cream was too weak that he did not seem to have any clue as to how ice-cream is to be prepared.

   Filwuha Enterprise began to be suspicious of the accuracy of the document stating the employee's previous job experience. The management of the Filwuha Enterprise sent a team to the previous employer of Bereket to verify the accuracy of the letter of service issued to Bereket. To the team's surprise, however, such letter was not issued to him by the previous employer. In fact, the original employer affirmed that it did never prepare and serve ice-cream to customers.

   Based on this finding, Filwuha Enterprise terminated Bereket, alleging that the employee committed deceitful and fraudulent practice in carrying out his duties. But the employee objected the termination; and took his case to court to reverse the termination and award reinstatement in his favour. The trial court held the termination unlawful, contending that the fraudulent practice was committed not during carrying out of duties but earlier on during entry to employment. Although the case was taken on appeal, the appellate court affirmed the decision of the lower court.

However, the Cassation Division of the Federal Supreme Court reversed the lower courts' decision reasoning that the fraudulent practice of Bereket was not limited to the time of employment but continued up to the time of termination. Fully aware that he did not have ice-cream preparation experience, he still pretended to have that qualification and this conduct should be understood as a fraudulent practice in the process of carrying out duties. Thus the Cassation Division held that the employer's measure of termination in this regard is lawful. *Do you agree?*

Incidentally, it is important to note that the above case was disposed based on Proclamation No.377/2003. The recently adopted Labour Proclamation No.1156/2019 introduced a new provision that seems to have been designed to fill this gap. It reads as follows. "*It shall be unlawful for a worker to make use of falsified document or an attempt thereof*" (Article 14(2)(c). The consequence as well has been determined as per Article 27(1)(i), which is termination without notice.

3. In another case, in the *Addis Ababa Hilton Hotel v. Yonas Tilahun case* (File No.50009; Vol.: 9), a driver and an employee of the Addis Ababa Hilton Hotel invited a guest for lunch in a subsidized cafeteria which was exclusively reserved for the employees of the Hotel. The Hotel held that the employee's act was fraudulent practice and as a result a dismissal was proper. The employee took his case to court contending that the termination was unlawful.

   The lower courts held that though the act may be considered fraudulent, it was not grave enough to warrant dismissal. As a result, the Court annulled the decision of the employer. Although the Hotel took the case up to the Cassation Division, the latter upheld the lower courts' decision, noting that the employee's job position was driving and the alleged misdeed was not directly related to his job. Moreover, the misdeed was not serious enough to subject the employee for dismissal because the cafeteria's management should have placed its own control mechanism to prevent abuse of the subsidized meal benefit.

4. *"Being responsible for* *brawls or quarrels* *at work, having regard to the gravity of the case"* (emphasis added) (Article 27(1)(f). The issue of what amounts to "…being responsible to quarrels…" was litigated before the Cassation Division as well. In a case between *Ghion Travel Plc and Daniel Asfaw* (File No. 49958; Vol.9), Daniel, the employee, was summarily dismissed for being responsible for quarrels at workplace. The facts of the case were that, Daniel was an employee of the Plc and a driver. His job position was a tour guide for guests, taking them to various tourist location in Ethiopia. He had travelled and submitted receipt of his fuel consumption for reimbursement. His supervisor informed him that his expense reports and receipt were in exaggerated amounts and were not acceptable. Daniel intimidated his boss by stating that "*if this receipt is not reimbursed either I or you will die".* As a result, he was issued a letter of termination citing the fact that he was responsible for quarrels at work.

Daniel took his case to court with a view to reversing the employer's decision. The trial court reasoned that the act of the employee is mere insult or intimidation and does not amount to quarrels. Thus, it held the dismissal unlawful and ordered the reinstatement of the employee with five months wage in the form of back pay. Although Ghion Travel lodged an appeal before the appellate court, the appellate court affirmed the decision of the lower court.

Finally, the case had to be examined by the Cassation Division. In reversing the lower courts' decision, the Cassation Division reasoned that within the framework of employment relations, when asked by his supervisor an employee should answer satisfactorily and respectfully. In the present case, however, the employee resorted to intimidation and aggressive behaviour while lawfully asked to explain issues by his superior. This act, according to the Cassation Division, amounts to being responsible for quarrels as per the meaning and intent of the law. Thus, it held that the measure taken by the employer was lawful.

5. In *World Vision Ethiopia v. Mezemir Mekbib case* (File No. 79105; Vol.13), Mezemir was accused of committing sexual harassment and sexual violence against his workmate at night, in a residence camp established by the employer. The employer held that Mezemir was responsible for quarrels <u>at work</u>. As a result, he was dismissed pursuant to Article 27(1)(f).

   Mezemir challenged the dismissal and requested the court to nullify the employer's measure, alleging that the misdeed was not committed at work as per the stipulation of the law. The court with original jurisdiction held that since the act was committed at a residence established by the employer for its employees, it should be considered as a workplace and hence the decision of the employer to terminate the employee was lawful.

   The case was presented on appeal by the employee in order to have the decision of the lower court reversed. The appellate court, for its part, decided that since the alleged act was committed at a residence and during the night, it could not be considered as though it was committed at work because the residence camp was not a workplace, and the night was not working time. Thus, it held that the termination was unlawful.

   At the level of the Cassation Division the case was handled differently. The Cassation Division argued that "a workplace is any area where an employee is found while carrying out his employer's order, even away from the work place or outside his normal hours of work" (Article 97(1). Accordingly, the victim employee was situated in the residence camp in order to carry out her employer's instructions. Hence there was no reason why this place (residence camp) and time (outside of working hours-at night) should not be treated as part of the workplace. Therefore, the Cassation Division reversed the appellate court's decision and affirmed the decision of the trial court that held dismissal was lawful in this case.

6. *"Being responsible for causing damage intentionally or <u>through gross negligence</u> to any property of the employer or to another property which is directly connected with the work of the undertaking"* (emphasis added) (Article 27(1) (h). In a certain court case, how "…gross negligence" was to be assessed was the main issue. In *Midroc Construction Plc. V. Ato Moges Shiferaw* case (File No.41115; Vol.8), Ato Moges, a big truck operator of Midroc, left the key of the vehicle in the truck and left the vehicle. His assistant driver, though unauthorized, moved the truck and caused damage to property. Midroc was of the view that the act of Ato Moges was gross negligence and due to his actions, damage to property has been incurred. As a result he was dismissed.

Ato Moges objected to the measure and contended that the termination was unlawful. He requested reinstatement with back pay. The lower court accepted Mogese's claim and awarded him reinstatement with four months' wage back pay. The Appellate court confirmed the lower court's holding.

The Cassation Division discussed at length as to whether Ato Moges's act in the present case amounted to gross negligence. According to the Cassation Division's reasoning, in principle a truck driver has strict professional responsibility as to how to handle the truck's key. But in the present case the truck was within the compound of the employer's premises; and an assistant driver was within the vicinity of the truck. Given these two important facts, it is difficult to consider that the act was gross negligence. It seems that had it been in public space and in the absence of the assistant driver, the case might have been decided differently.

The other issue of contention in connection with termination due to serious behavioural problem of the employee is its relation with criminal sanction or acquittal. This issue becomes relevant since one single act may be a source of disciplinary and criminal proceeding. For instance, let us assume an employee was alleged to have committed theft at workplace and was subjected to disciplinary investigation. Let us further assume that the same incident was reported to the police and a police investigation was being undertaken simultaneously. On the disciplinary track, the Disciplinary Committee determined that the alleged wrongdoing was indeed committed and hence the Committee recommends that the employee be dismissed without notice. The General Manager acted as per the recommendation of the Committee.

The criminal justice track, on the other hand, would take longer to finalize the investigation. After the police submit their investigation report to the prosecution office, the prosecution office could then file charges against the suspected employee before a criminal bench. However, the court, after examining the law and the evidence submitted to it might arrive at the conclusion that there was no sufficient evidence to convict the suspect, thereby acquitting him. Now the issue is what impact, if any, will the acquittal have on the dismissal from employment? Should the employee be reinstated now that she has been exonerated from criminal liability? This will take us towards resolving the issue as to what effect does criminal liability or non-liability have on the disciplinary measure.

The Federal Supreme Court Cassation Division was confronted with a very similar issue in *Ethiopian Electric and Power Authority (EELPA) v. Dereje Woldekidan* case (File No.34585; Vol.6). Dereje, an employee of EELPA, was caught red-handed while taking out, without due authorization, eight cans (160 litres of transformer lubricant oil) that belonged to the employer. Due to this, he was terminated automatically as per Article 27(1)(d) of the labour proclamation.

Dereje challenged the employer's measure, contending that it was unlawful termination because he was exonerated from criminal prosecution. The first instance court to which the case was originally submitted, held that the act was mere "attempt" and since the Criminal Bench found there was no sufficient evidence to convict him, the termination was unlawful and hence Dereje should be reinstated. Although EELPA appealed against the decision of the first instance court, the appellate court affirmed the lower court's holding.

It was after this litigation that the case was brought to the attention of the Cassation Division. The Cassation Division viewed the case differently from the way the lower courts did. According to the Cassation Division, employer disciplinary measures and criminal justice have distinct objectives. Disciplinary measures are an in-house and administrative measure while criminal prosecution is punishing the offender's dangerous disposition towards society at large. Thus, evidence required to convict the accused in criminal proceeding is of higher threshold (i.e. beyond reasonable doubt standard). Conversely, the evidence demanded for disciplinary sanction is less rigorous (i.e. balance of probabilities standard). Hence, someone who may be acquitted based on the higher standard of proof in a criminal proceeding may still be liable of violating work rules in the light of the lower standard of proof. Therefore, criminal acquittal may not provide immunity from disciplinary sanction. Consequently, the Cassation Division reversed the decision of the lower courts and affirmed the employer's measure. Similar lines of interpretation were handed down by the Cassation Division in *Addis Ababa Cultural Restruant v. Yewubdar Tilahun* (File No. 37256; Vol.8); *Ethiopian Electric and Power Authority v. Kebede Abunetie* (File No.42292; Vol.8) and in a case between *Ethiopian Seed Enterprise v. Hailemariam Sharew* (File No.59906; Vol.11)

Another issue deserving consideration as regards termination without notice is the time within which the measure should be taken. The reason why the law allows the employer to terminate the employee instantly under this provision is the misdeed committed by the employee is so intolerable that the employer would not be expected to remain engaged with the employee until the notice period expires. Hence the right is to be exercised within short span of time of having knowledge of the occurrence of the ground for termination.

Accordingly, Article 27(3) stipulates that the right of an employer to terminate a contract of employment without notice shall lapse after thirty working days from the date the employer know the existence of a ground of termination. If the employer allows the expiry of this period of time without reacting, it may be assumed that the misconduct was not sufficiently serious to justify termination of employment or the employer has waived its right to take action. In fact ILO Recommendation No. 119 provides that "*an employer should have deemed to have waived his right to dismiss for serious misconduct if, such action has not been taken within a reasonable time after he has become aware of the serious misconduct.*" Therefore, this right is not open to the employer indefinitely.

However, where the alleged misdeed makes the investigation of the circumstances of the conduct necessary, the time required for such an investigation would not be included within the thirty working days limit because knowledge as to the existence of a ground of termination will be obtained once the investigation is completed. The Cassation Division adopted this line of interpretation in *Ethiopian Postal Service v. Tilahun Kumma* case (File No.53358; Vol.9). Similar ruling was taken in *Addis Ababa Water and Sewerage Authority v. Admasu Demsachew* (File No.41767; Vol.9). Interestingly, however, the Cassation Division seemed to have adopted different view in *Guder Agro-industry v. Belete Chala* case (File No.45746: Vol.9). (*Please compare the cases and determine for yourself which position of the Cassation Division makes sense for you*).

Finally, under this section, suspending an employee from the job as well as suspending the worker from receiving wages is available to the employer while the investigation is pending. For this purpose, the labour proclamation provides; *the grounds for suspension of a worker from duty before terminating the contract of employment of the worker in accordance with this Article may be determined by collective agreement; provided, however, that the duration of suspension shall not exceed thirty working days* (Article 27(4).

Although the maximum duration of suspension is capped by law to be thirty working days, the actual date is to be determined by a collective agreement. Collective agreement implies bilateral determination between an employer and the trade union concerned. But the Cassation Division is of the view that even in the absence of collective agreement, the employer in its prerogative as an employer can unilaterally suspend an employee without deviating from the legal maximum (*Dashen Bank v. Zenebe Dinkesssa*: File No. 53985; Vol.11). *Do you agree with the ruling of the Cassation Division? Why? Why not?*

Incidentally, it is interesting to note that the employer's measure of termination without notice is not final and conclusive. It is rather open to revision before a labour tribunal if the employee decides to pursue the matter further. For this purpose, the labour proclamation has prescribed that any claim by a worker to be reinstated shall be barred after three months from the date of termination of the contract of employment (Article 163(2) or if the requested remedy is for payment of compensation associated with unlawful termination, it is six months (Article 163(4); and the organ that is empowered to entertain such claims is the First Instance Court Labour Division (Article 139(1)(a).

- ***Termination with notice (ordinary dismissal)***

Termination of the employment relation, with reason or no reason, by providing notice to the other party was a lawful and ordinary action during the earlier times in labour history. As a result it was considered as "ordinary termination." With passage of time, however, it is no longer taken as ordinary since many national laws require valid reasons even for termination with notice. Advance notice enables an employee to undertake the material and psychological preparation which are associated with job loss. Moreover, the advance notice is helpful so that the worker may look for substitute employment within the notice period. It seems that Ethiopian labour law is formulated in line with this purpose in view. The law divides this section in to two broad parts; those grounds of termination attributed to the workers inability or incompetence; and those grounds associated with the enterprise's organizational and operational requirement. The first part reads as follows:

Article 28: Termination of a contract of employment with notice

1. *The following grounds relating to loss of capacity of, and situations affecting the worker shall constitute good cause for terminating a contract of employment with prior notice where;*
   a) *the worker's manifest loss of capacity to perform the work to which he has been assigned; and his lack of skill to continue his work as a result of his refusal or inability to make use of an opportunity of training arranged by the employer to upgrade his skill or after having been trained, his inability to acquire the necessary skill;*
   b) *the worker is, for reasons of health or disability, permanently unable to carry out his obligation under the contract of employment;*
   c) *the worker's unwillingness to move to a locality where the undertaking relocates;*
   d) *the post of the worker is cancelled for good cause and the worker cannot be transferred to another job position.*

We will consider them one by one herein below:

- *the worker's manifest loss of capacity to perform the work to which he has been assigned (Article 28(1)(b);*

A lack of capacity, or aptitude, on the part of a worker can take two forms. It can result from lack of the skills or qualities necessary to perform certain tasks, leading to unsatisfactory performance. Lack of capacity is therefore distinct from bad conduct, for which it is necessary to demonstrate certain degree of "guilt" on the part of the worker. Where the poor performance is associated with intentional conduct to that effect, it will be an issue of summary dismissal as it is a behavioural problem.

Poor performance not caused by intentional conduct, as well as various degrees of incapacity to perform work as a result of illness or injury, are covered by the concept of the capacity of the worker. The worker can thus be offered some safeguards with regard to termination of employment for reasons connected with capacity, such as careful assessment of his work, warning him about the possible consequences if the quality of his work does not improve, and allowing him to demonstrate his skills and to improve his work performance by arranging capacity building programmes. It is after all these efforts that termination will be considered as a last resort. Even in that case, unlike the employee with serious behavioural problem who is denied of notice (Article 27), the employee should be given advance notice prior to termination.

In the world of practice, how to measure an employee's lack of capacity has been a very controversial issue. The employer would often tend to argue that the employee has had reduced capacity in performing work duties that would justify termination with notice. The employee would likely challenge the employer's measure alleging that a lack of capacity was not convincingly proved. Courts have had difficulties in deciding one way or the other, as the issue could be subjective. The current labour proclamation tried to minimize the subjectivity aspect of this issue by prescribing the following. Pursuant to Article 28(2) it is stated that "*any loss of capacity of work referred to in sub-Article (1)(a) of this Article shall, unless otherwise provided by a collective agreement, be verified by a periodical job performance evaluation*".

Other than how to evaluate, what is to be evaluated needs clarification as well. In a certain Cassation Division case (*Holy Angels v. Melkamu Alemayehu*: File No. 82335; Vol.14), an employee, an Amharic language teacher, was employed in a private school to teach Amharic. As his teaching load was low in the Amharic language section, he was assigned to teach the English language, too. Fee-paying students were seriously unhappy regarding the teacher's performance in teaching English. As a result, the School terminated the teacher, alleging that he had poor job performance in the English language.

The teacher objected to the employer's measure of termination and brought his case to court. The case reached to the level of the Federal Supreme Court Cassation Division. The Cassation Division ultimately held that "whenever an employee's performance is to be assessed, it must be in light of the job position he was employed to perform. Consequently, the Cassation Division held that the teacher's performance should have been established in light of his performance on Amharic language teaching." Thus the termination was held unlawful.

- *the worker is, for reasons of health or disability, permanently unable to carry out his obligation under the contract of employment (Article 28(1)(b);*

The other ground of termination under this section, is permanent disablement of the employee for reasons of health or disability. Since the worker is required to render the agreed service in person, if she no longer is unable to provide the service, it would be unfair and uneconomical for the employer to remain engaged. In fact, this ground of termination seems to be similar with what has been provided under Article 24(5).

Problem for discussion:

Termination under Article 24 is termination by the operation of the law and hence the employee is not eligible to notice; whereas termination under Article 28 entitles an employee for notice. Article 24(5) and Article 28(1)(b) seem to be similarly phrased. How is an employee who is to be terminated under 24(5) different from an employee who is to be terminated under Article 28(1)(b)? Would Article 39(1)(g) be of some help in clarifying the ambiguity?

- *The worker's unwillingness to move to a locality where the undertaking relocates (Article 28(1)(c);*

Enterprises from time to time may make many economically rational decisions in order to remain competitive and profitable. One of the possible decisions is relocating the enterprise from one locality to another for purposes of becoming nearer to input products, to market or any economically justifiable reason. In such cases what will be the fate of the employees who were employed for the original location is an issue. Should they be compelled to relocate? Should relocation depend upon their willingness to move or not?

This provision is an attempt to resolve this issue. According to the provision, mobility should depend on the willingness of the employee in the sense that if the employee is unwilling to relocate this should not be considered as a disciplinary problem. Rather the employee should be separated with a benefit of notice because the employee should not be compelled to modify the terms of the contract out of her consent.

However, this issue should not be confused with assigning an employee to a branch office. Transferring an employee from one work place to another; or from one job position to another is within an employer's prerogative. Failure to comply with such an instruction would result in dismissal without notice. Nevertheless, it must be noted that this employer's power may be restricted by a contract of employment or collective agreement.

- *the post of the worker is cancelled for good cause and the worker cannot be transferred to another job position (Article 28(1)(d).*

Employers are at liberty to structure and re-structure their work methods. Regulatory organs may also hand down instructions that may affect the operational and organizational set up of the enterprises. These internally or externally driven measures may bring about cancellation of certain job positions exposing employees to termination. In such cases, employees whose job positions are cancelled may be subjected to termination with notice if it is not possible to transfer them to another job position. In *Dandiboru University College v. Teklu Urge et al* (File No. 40804; Vol.8) case, the Ministry of Education issued a directive to the effect it would not accredit trainees who studied teachers' training courses in private colleges. Dandiboru, a private college, had to terminate the contracts of employment of Teklu and others who were offering courses to teacher trainers contending that their job positions were cancelled for good cause.

Although Teklu and others challenged, before court of law, the decision of the college claiming that the termination was unlawful, the Cassation Division ruled that the termination was lawful. The Cassation Division did not even inquire whether there was a possibility to transfer Teklu and others to another job position or not. In fact, in *Selam Tesfaye v. Alkan Plc* (File No.69125; Vol.13) case, the Cassation Division ruled that if the job position's cancellation was due to a legal instrument by the relevant government organ, not only that the termination is lawful but also that the terminated employee is not entitled to payment in lieu of notice and severance payment. *Do you agree*?

In *Rehobot Holy Savour Plc v. Amare Admassu* (File No.38811; Vol.8) case, Amare was terminated from employment on the ground that his job position was cancelled for good cause. Amare took his case to court, the lower court held that even if the employee's position was cancelled for good cause, the employer did not show that transferring the employee to another job position was not possible. Thus it ruled that the termination was unlawful. While reversing the lower court's decision, the Cassation Division argued that once the employer proves that the job position of the employee is cancelled for good cause, it is up to the terminated employee to show that it would have been possible to assign her to another job position. In the present case, Amare did not submit such contention and hence the termination is lawful.

Termination with notice is not only attributed to lack of capacity of the employee or other elements mentioned under Article 28(1) above. There are other grounds associated with organizational or operational requirements of the undertaking, which may warrant termination with notice as well. For this purpose, referring Article 28(3) would be appropriate. It states as follows:

> *Article 28(3) the following grounds attributable to the organizational or operational requirements of an undertaking shall constitute good causes for the termination of a contract of employment with prior notice:*

a) *Any event which entails direct and permanent cessation of the worker's activities in part or in whole resulting in the necessity of terminating a contract of employment;*

b) *Without prejudice to the provisions of Article 18(5) and (6) demand fall for the products or services of the employer resulting in the reduction of the volume of the work or profit of the undertaking and thereby requiring termination of a contract of employment;*

c) *A decision to alter work methods or introduce new technology with a view to raise productivity resulting in termination of a contract of employment;*

Unlike the provisions of Article 28(1) which are mainly attributable to the employee, the grounds stipulated for termination under Article 28(3) are operational or organizational conditions associated with the enterprise. In fact, these grounds may have the effect of displacing labour in appreciable quantity (reduction of labour force) rather than individual terminations. This area of the labour law is where the need for business continuity and competitiveness on the one hand; and employment security for the employees on the other hand are to be balanced and maintained. It is believed that the state has a key role to play in creating an enabling institutional framework to balance the need for flexibility for enterprise and employment security for the workers in meeting the changing demands of a global economy.

"Operational requirements" generally include reasons of an economic, technological, structural or similar nature. Dismissals resulting from these reasons may be individual or collective and may involve reduction of the workforce or closure of the undertaking. In some countries, rationalization or modernization of undertakings, establishments or services, a fall in production, changed market or economic conditions may require the dismissal of one or more workers. Reasons related to the operational requirements of the undertaking, establishment or service could also be defined in negative terms as those necessitated by economic, technological, structural or similar requirements which are not connected with the capacity or conduct of the worker. At a time when state-owned enterprises were privatized in the 1990s in Ethiopia since state owned enterprises where over-staffed labour shedding was the primary measure the new owners undertook.

The other element under this provision is "organizational requirement". Of course, operational and organizational requirements may at times be difficult to distinguish because they are closely interconnected. Be that as it may, alteration of work methods may bring about a change in organizational structure of an undertaking. A typical example of this arrangement is "outsourcing" of services. In order to promote specialization and efficiency, undertakings may decide to focus their activities within the framework of their "core" businesses, leaving the 'peripheral activities' to be rendered by other service providers based on commercial contracts. This may have an impact on the organizational structure of the undertaking in the sense that services which were formerly provided by employees are now to be offered by contractors. This is what we called as "triangular employment relationship" in the previous chapter.

Outsourcing brought a paradigm shift to employment relation in the sense that the bilateral (employee-employer) engagement has been transformed into triangular (tripartite) relation. In this arrangement, the employment relationship may be objectively ambiguous or disguised. The problems faced by workers involved in "triangular" employment relationships pose different legal questions. These are workers employed by an enterprise (the "service provider") who perform work for a third party (the "user") to whom their employer provides labour or services. Legally, they have contracts of employment with the "service provider;" whereas in real terms they render service to the "user." These employees frequently face difficulties in establishing who their employer is, what their rights are; and who is responsible for them.

In this regard, changes in the legal status of workers, whether real or apparent, seem to be a sign of the times and are commonly observed not only in traditional sectors such as transport (truck drivers, taxi drivers), construction and clothing, but in new areas as well, such as sales stuff in department stores, or certain jobs in wholesale distribution or in private security agencies, though there are considerable differences from one country to another and from region to region.

One of the grounds for termination of a contract of employment with notice, therefore, is alteration of working methods one of which is outsourcing of services to a commercial service provider rather than performing it by own (in-house) employees. Due to this new work method, employees who were tasked to the outsourced activity will be redundant and exposed to termination with notice. On this topic, the Federal Supreme Court Cassation Division, in many instances, has held that outsourcing of service provision is a lawful way of operating a business and any termination as a result of this change is a lawful ground for termination (*Commercial Bank of Ethiopia v. Haile G/Silassie*: File No.22275; Vol. 6) and *SOS Children's Village v. Kebede Kumsa et al*: File No.38435; Vol.8). Introduction of new technologies has an equivalent effect as well. New technology (capital intensiveness) has the effect of labour displacement as tasks which were formerly undertaken by labour will be performed by technology. As a result, employees may be exposed to termination due to redundancy.

Other grounds of termination under this heading, as indicated above, are attributed to operational reasons. An enterprise may be driven out of the market by rival companies and its market share may shrink; or demand for its products may be reduced or its profit may fall. If such economic situation is left unchecked, it may ultimately lead to bankruptcy and Article 24(4) may become relevant. Thus, in order to prevent the occurrence of total collapse (bankruptcy), the law has put a safety valve under Article 28(3) in the sense that saving the enterprise by sacrificing the job security of some employees was found appropriate.

Indeed, organizational and operational requirements of an undertaking may have an adverse effect of displacing appreciable number of employees. Whenever the social impact of the termination becomes significant by embarking upon group termination, it is not an exclusive matter for the employer to merely giving notice and terminate. Pursuant to Article 29(1) whenever at least 10% of the labour force is to be affected by the termination, it is no longer an issue to be left to the discretion of the employer. In such cases, the law prescribes a rigorous procedure of layoffs under which the employer will be obligated to consult with representatives of the employees concerned. It must be noted, however, that the obligation of the employer in this regard is a mere consultation not the obligation to reach at an agreement with employees' representatives. In a sense, it is a 'soft obligation' in that the employees' representatives will be given an opportunity to express their views and concerns to which the employer may take them into account while making and taking decisions. Hence, there is no duty to reach at an agreement in this regard. Furthermore, the law has spelt out list of priority for termination where its implementation is to be observed by the parties to the consultation (Article 29(3). It reads as follows:

Whenever a reduction of workforce takes place in accordance with Article 28(3) of this proclamation the employer shall conduct consultation with a trade union or workers' representatives in order to retain workers having skills and higher rate of productivity in their posts. In case of comparable skill and rate of productivity, the workers to be affected first by the reduction shall be in the following order:

- *a) Those having the shortest length of service in the undertaking; [Last in First out: LIFO]*
- *b) Those having fewer dependents;*
- *c) The reduction shall affect first workers except those that are listed under (d) up to [and] (e) of this sub-Article;*
- *d) Those employees with disability;*
- *e) Those who sustained employment injury in the undertaking;*
- *f) Workers representatives; and*
- *g) Expectant mothers and mothers within four months post-natal.*

There are policy rationales behind this list of priority of termination. First, the law prescribes that employees having skills and higher rate of productivity shall be retained. It thus encourages acquisition of skill and being productive. Second, seniority will be taken in to account in that those who have the shortest length of service are to be terminated first. This again encourages low labour turnover. Third, a "social selection" mechanism has been introduced in the sense that those who may be affected most by the termination should be terminated at a later stage of the termination process. It is believed that employees with appreciable number of dependents; employees with disability and mothers would be affected most in case of job losses. This is one area where the social concern of the law is manifested. Incidentally, it is worth mentioning that MOLSA, pursuant to the power given to it under Article 171(1)(h) of the Labour Proclamation, has already issued a directive that stipulates the procedures for reduction of labour force.

Although the law seems to prescribe consultation with workers' representatives or trade unions and comply with the priority list stipulated under Article 29(3) in cases where the reduction of the labour force affects at least 10% of the work force, as per Article 29(1), the Cassation Division tends to hold different view. In *Aschalew Getahun et al v. Alpha University College* (File No. 74230; Vol.13) case, though the number of those reduced was proved to be below 10% of the labour force, the Cassation Division ruled that the employer cannot simply terminate at will; it should rather comply with the priority list under Article 29(3). *Do you agree with the ruling of the Cassation Division? Why? Why not?*

Problem for discussion:

The legislation of many countries establishes the principle of priority of rehiring. Under this principle, workers whose employment have been terminated for reasons of an economic, technological, structural or similar nature should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, *within a given period from the time of their leaving, expressed a desire to be rehired.*

Ethiopian law does not offer this kind of entitlement. Do you think introducing this principle in to Ethiopian legal system is worth considering? Discuss.

- ***Duration and form of notice***:

A follow up and a legitimate question may be raised in this regard. How long is the notice period? How should it be communicated to the concerned employee? What form should notice take? This takes us towards consulting Articles 34 and 35 of the Labour Proclamation. Article 34 stipulates the form and content of notice; while Article 35 fixes the length of notice period. Let us reproduce them hereunder.

Article 34: Procedure for giving notice

1. *Notice of termination required under the provision of this Proclamation shall be in writing. The notice shall specify the reasons for the termination of the contract and the date on which the termination shall take effect.*
2. *Notice of termination by the employer shall be delivered to the worker in person. Where it is not possible to find the worker or he refuses to receive the notice, it shall be affixed on the notice board in the work place of the worker for ten consecutive days.*

Article 35: Period of notice

1. *The period of notice given by the employer shall be as follows:*
    a) *One month, in case of a worker who has completed his probation period and has a period of service not exceeding one year;*

b) *Two months, in the case of a worker who has a period of service above one year and not exceeding nine years;*

c) *Three months, in the case of a worker who has a period of service more than nine years;*

d) *Two months, in case of a worker who has completed his probation and whose contract of employment is to be terminated due to reduction of work force.*

Based on these provisions, in terms of form, the notice of termination should be made in writing and delivered to the employee personally. If for whatever reason personal delivery is not possible, such notice shall be posted for at least ten consecutive days in a notice board where the employee works. From the perspective of content, the notice should specify the reason for termination and the date when the termination will be effected. However, the fact that notice of termination was not issued or reason of termination was not mentioned does not make the termination unlawful (*Alhabesh Sugar mills Plc v. Tegenie Gebrehawariya*; File No.49797:Vol.9). As regards to the length of the period of notice, it depends on the length of service the employee has had in the enterprise. The general formulation of the law is that the longer the length of service, the longer the period of notice. The length of notice extends from one to three months.

3.1.4. Termination at the initiation of the employee (resignation)

Resignation with notice (ordinary resignation)

Resignation is less controversial in terms of putting an end to the employment relation of the parties, because it is the employee herself who decides to separate. But in countries like Ethiopia, where unemployment rate are typically high, not many employees decide to leave their employment voluntarily. This does not mean that resignation is non-existent altogether, but as it is less common, the employee can resign with reason or without reason at any time. The only limitation according to Article 31 of the labour proclamation is, "*any worker who has completed his probation period may, by giving thirty days' notice to the employer, terminate his contract of employment.*" Notice of termination by the worker shall be in writing and handed over to the employer or its representative or delivered to its registry office (Article 34(1) and (3). In fact, a worker who does not complete his probation period does not have a duty to provide prior notice (Article 11(6).

In a similar fashion to the reverse situation, advance notice to the employer enables it to look for an alternative employee within the notice period so that no operational gap will be created due to a vacant post. The length of the notice period prescribed by the law is a flat rate in the sense that it does not take into account the length of service of the employee. The notice period is thirty days for all, regardless of seniority. Actually, under Labour Proclamation No.42/1993, the notice period was only fifteen days.

Private sector employers had concerns in the sense that some job positions could not be filled within thirty days. As a result, they had proposed a longer notice period of resignation for skilled labourers during the revision of the law. However, their proposal was not accepted for the reasons set out below.

First, according to the government representatives who spelt out their positions, at the time of considering the law revision, obligating the employee to remain in his employment without his will for more than thirty days amounted to forced labour and hence was unconstitutional. Article 18 of the Ethiopian Federal Constitution prohibits forced labour. Second, it is even unproductive to retain an employee for so long where that worker has lost interest in the position, which might be detrimental to the employer's economic interest as well. Third, if the employee is truly indispensable to the employer, it is advisable to retain that worker by offering an attractive benefit package rather than through legal prohibition (use carrot rather than stick). Indeed, strategically, the best way to counteract such a problem is to avoid heavy reliance on an individual by establishing a well-considered succession plan ahead of time in the sense that every employee should have back-ups. After all, even if that worker does not decide to resign, the worker could die or fall sick; that makes heavy reliance on individuals inappropriate.

In *Shewit Hailu v. Defence Construction Enterprise* (File No.104465; Vol.18) case, the employee tendered a letter of resignation but the employer did not respond to the letter. The employee continued working and the parties remained engaged for another seven months after which the employer wrote a letter that it has accepted the resignation. The employee contended that this is unlawful termination. The lower courts held that the contract was terminated due to resignation of the employee. While reversing the lower courts' ruling, the Cassation Division reasoned that the parties resumed their contractual engagement for seven months after the submission of the letter of resignation indicates that the plan to separate was nullified by their conduct. Thus, resignation cannot be the ground of termination under the circumstances. Hence, it held the termination unlawful.

Problem for discussion:

Let us assume that an employee submitted a written notice of resignation on 13 July 2021 stating that she will quit her job on the 12 August 2021. This letter was delivered to the enterprise's register on the 13th of July. The Manager issued an acceptance of resignation effective 14th July 2021. The employee had no plan to quit job on the 14th of July. Rather her plan was to quit job on the 12th of August 2021 and she was surprised and worried to receive that letter. What, if any, would you advise her?

In this connection, what meaning would you give to Article 35(4)?

Incidentally, under the civil service employment regime, it is stated that "any civil servant may by giving one month prior notice, resign at any time, provided however that <u>the government institution may release him prior to the end of the notice period</u> if it can easily replace him" *(underline added) (Article 83(1)-Federal Civil Servants' Proclamation No.1064/2017).*

Under the civil service employment regime, *where the service of the Civil Servant is indispensable and he could not be replaced easily, his release may, in agreement with his future employer, be delayed for a period not exceeding three months counted from the date of application (*Article 83(3). This provision seems to anticipate that the civil servant after resigning would be employed elsewhere; and consultation between the original employer and the prospective employer shall be undertaken. However, what happens if the employee is not planning to be re-employed elsewhere after resignation remains unanswered.

Problem for discussion:

What justification, if any, could be offered for this differential type of treatment in which private sector has only one month advance notice, while the civil service sector can prolong the notice period up to three months? Would public interest concerns be relevant?

What happens if the employee fails to provide prior notice of resignation is a legitimate question, which should be addressed. The labour and the civil service instruments stipulate varied solutions. As per the Labour Proclamation, "*a worker who terminates his contract of employment in disregards of the notice requirement shall be liable to pay compensation to the employer. However, the compensation payable shall not exceed 30 days' wages of the worker and be payable from the remaining payment due to the worker"* (Article 45). Pursuant to the civil service regulatory framework, however, it is stipulated that "*any civil servant, who has terminated his service without giving one month notice shall* *have civil and criminal liability for any damage cause by such failure"* (Article 83(2). However, the Cassation Division in *Addis Gas and Plastic Factory v. Solomon Hailu*; File No.119448: Vol.21) ruled that the employer cannot by its own deduct the one month's wage of the employee. It must be verified and determined by the appropriate tribunal or the employee must have consented to the deduction. *Do you agree with the holding of the Cassation Division? Is that really the legislative intent?*

- ***Resignation without notice (extra-ordinary resignation)***

This is a situation where the employee may lawfully resign without offering the benefit of notice to the employer. Earlier, within the framework of termination by the employer without notice (summary dismissal), we have seen that the employee's serious misbehaviour entitled the employer to terminate the worker without even giving the benefit of notice. Similarly, under resignation without notice, it is the employer's serious misbehaviour against the employee that compels the latter to resign without giving the benefit of advance notice to the employer. The relevant provision which is Article 32 of the Labour Proclamation reads as follows:

Termination of contract of employment without prior notice

1. *The following shall be good causes [for the employee] to terminate a contract of employment without prior notice:*
    a) *Where the employer has committed any act contrary to human dignity and morals or other acts punishable under the Criminal Law against the worker;*
    b) *Where the worker has been a victim of sexual harassment or sexual violence by the employer or a managerial employee;*
    c) *In the case of imminent danger threatening the worker's safety or health, where the employer, having been made aware of such danger, failed to act within the time limit in accordance with the early*

warning given by the competent authority or appropriate trade union or the worker himself to avert the danger;

d) *Where the employer has repeatedly failed to fulfil his basic obligations towards the worker as prescribed under this Proclamation, collective agreement, work rules or other relevant laws.*

As can be noted from the listing above, it is the misdeed of the employer or its representatives that provoked the employee to terminate. At times it is termed as "constructive dismissal" to mean that the employer is indirectly dismissing the employee in such cases. It is interesting to note that Article 32(1)(b) was not included under the previous labour law. Women employees who were victims of sexual harassment and sexual violence at work were inclined to rely on the provision which states *where the employer has committed any act contrary to human dignity and morals or other acts punishable under the Criminal Law against the worker* (Article 32(1)(a)) because sexual harassment and sexual violence were considered to be acts contrary to human dignity and morals. In fact, they are punishable under the Criminal Law as well. Nevertheless, the new labour law expressly includes these grounds for resignation.

With the establishment and development of industrial parks, the labour profile in these locations has been predominantly female, poor, young and illiterate coming from rural areas devoid of parental supervision. The production process in these locations has been characterized by working together in large numbers; in close proximity with each other in shifts including late night shifts. These factors increased the vulnerability of women and girls to sexual offences. In this regard, reports of abuse have been pervasive. Therefore, the need arises for expressly stating these issues in the regulatory framework together with multiple sanctions which will be discussed later on in this text.

Similar to what we elaborated under summary dismissal, invoking summary resignation is limited in time. Article 33 of the Labour Proclamation stated that "a *worker's right to terminate his contract of employment with Article 32 (1) above of this proclamation shall expire after fifteen working days from the date* *on which the act occurred or ceased to exist*." The assumption of the law is that if the employee did not resign promptly as soon as the grave mistreatment occurred or ceased to occur, it will be considered as though the worker has tolerated it. It does not, however, mean that the worker cannot resign. Even after the expiry of the fifteen working days period, the worker can still resign based on ordinary dismissal (i.e. Article 31).

3.2. Consequences Associated with Lawful Termination

All grounds of termination discussed above are lawful grounds. Therefore, under this topic, we will examine the entitlements available (*exit/separation package*) to the separated employee at the time of termination. Under the Civil Code, it was only when the employee was terminated on unlawful grounds that payment in the form of "compensation" was due with a maximum of three months wage. Four years later, by virtue of Regulation No. 302/1964 the compensation associated with unlawful termination was increased to a maximum of six months wage in the name of "severance pay". For lawful terminations, however, payment of wages and other benefits for services render until the time of termination were the only entitlements under the Civil Code.

It was with the coming in to force of Labour Proclamation No. 64/1975 that even employees who were terminated on lawful grounds were entitled to certain payments. The concept of "compensation for service" was introduced by that proclamation. Based on the concept, *an employee whose contract of employment was terminated pursuant to the provisions of the proclamation was eligible to payment of compensation for service (*Article 17*)*. The amount of the compensation was one month's wage for the first year of service; and one-third of that amount for every additional year of service. The maximum payment was twelve months wages of the employee (Article 17(2). This means it was a generally available benefit in the sense that all terminated employees regardless of the ground of termination were eligible to this benefit. It was rather severance payment which was available only for two grounds of termination and the amount was two months wage (Article 16).

The compensation for service entitlement was carried-over to Labour Proclamation No.42/993. However, with the coming in to effect of Labour Proclamation No.377/2003, the concept of "compensation for service" was avoided altogether and "severance payment" has been introduced with different meaning and content which we shall see it below.

Pursuant to Proclamation No.377/2003 and the current labour law, entitlements associated with lawful termination are varied in nature. Broadly, such entitlements could be categorized as: generally available entitlements and ground based entitlements. They may also be monetary entitlements or non-monetary entitlements.

Generally available entitlements

Generally available entitlements are both monetary and non-monetary benefits accorded to the terminated employee regardless of the grounds for termination. It means these benefits are available to all terminated employees. Ground based entitlements, for their part, are monetary benefits available to an ex-employee depending upon the particular grounds on which termination is based.

Let us begin our elaboration with the generally available entitlements. Article 77(4) *provides that a worker whose contract of employment is terminated pursuant to this Proclamation shall be entitled to his pay for the leave he has not taken [utilized].* This benefit is available to all employees whose contract of employment was terminated pursuant to all grounds stipulated by the Labour Proclamation. In principle, it is prohibited to convert annual leave into cash. Rather it should be utilized in kind. Therefore, Article 77(4) is an exception to the general principle enshrined under Article 76(2). The entitlement is a monetary benefit because the unutilized annual leave is to be converted into cash and paid to the separated employee. However, it is important to note that it is not all unutilized annual leave that will be converted into cash because annual leave cannot be accumulated for more than two years (Article 79(4).

Moreover, Article 12(8) of the Labour Proclamation obligates the employer *to issue a certificate of service in favour of the terminated employee which specifies the type of work he performed, the length of service and the wage he was earning, free of charge, upon termination of a contract of employment*. Technically this is a non-monetary benefit. But, still, it is a benefit because the certificate would typically assist the terminated employee in an effort to look for an alternative employment elsewhere. This certificate is available to all terminated employees as well irrespective of the ground of termination (except may be an employee whose employment was terminated upon death).

In fact, even an employee who was terminated due to serious misbehaviour is entitled to a "clean" certificate of service because it is provided that nothing unfavourable to the employee shall be inserted in such a certificate (Article 2588(2) Civil Code). ILO Recommendation No.119 in its Article 8(2) has a similar stipulation. It provides "nothing unfavourable to the worker should be inserted in such certificate." The rationale seems, since disciplinary measure is an internal in-house measure, its effect should remain in-house as well. It is feared that unfavourable terms inserted in certificate of service may adversely affect the future employability of the ex-employee. The employer should not be allowed to possess the full power to destroy the future career of its employees. To sum up, conversion of unutilized annual leave into cash and issuance of "clean" certificate of service are the generally available entitlements upon separation.

Ground of termination based entitlements

These are monetary benefits of different kinds and amounts, which are available only to employees terminated on particular grounds. One of these benefits is severance pay. Article 39(1) of the Labour Proclamation determines who is eligible for severance pay. It is reproduced hereunder:

Article 39: General

1) *A worker who has completed his probation period and who is not eligible for pension shall have the right to receive severance pay from the employer where;*
    a) *His contract of employment is terminated because of permanent cessation of operation of the undertaking due to bankruptcy or for any other cause;*
    b) *His contract of employment is terminated by the initiation of the employer in violation of the law;*
    c) *He is reduced as per the conditions prescribed under this Proclamation;*
    d) *Where the worker resigned due to sexual harassment or sexual violence by the employer or managerial employee; or where such act was committed by a co-worker and the incident was reported to the employer but the latter failed to take appropriate measure in due time;*
    e) *He has terminated his contract of employment because of the employer's maltreatment affecting his human dignity or morale or constituting a criminal offence under the Criminal Code;*
    f) *He has resigned due to failure of the employer to take measures despite being informed of a threat to his safety or health;*
    g) *His contract of employment is terminated because of his partial or total disability as certified by medical board;*
    h) *Where he has given service to the employer for a minimum of five years' service and his contract of employment is terminated because of sickness or death; or his contract of employment is terminated on his own initiative provided that he has no contractual obligation relating to training to render service to the employer;*
    i) *His contract of employment is terminated on his own initiative because of HIV/AIDS.*

To begin with, based on the above provision, eligibility for severance pay is dependent upon completion of probation period and being non-eligible for pension payment. This means an employee whose contract of employment is terminated prior to completion of his probation period is not eligible for severance pay. Probation period, as indicated earlier, is a trial period available to the employer to enable it determine the suitability of the employee to the job position the employee is anticipated to assume (Article 11 (1). For this purpose, the law has allocated a maximum sixty working days counting from the first date of employment (Article11 (3). However, it does not mean that the first sixty working days are as of right and virtue of the law probation period. Rather probation period must be agreed by the parties and must be made in writing (Article 11 (3). This means if the written contract of employment or the letter of employment is silent about probation period, the law assumes that the employee has been employed for no probation period. Therefore, the requirement of completion of probation period may be satisfied either by working a maximum sixty working days since the start of employment or lower than that duration.

Furthermore, an employee who is eligible for a pension payment as soon as his contract of employment is terminated is not eligible for severance pay. In a sense, the legislative intent is that severance pay and pension payment are not simultaneously available. For instance, an employee who attains the age of retirement may be terminated (Article 24(3) and hence will be eligible for pension pay provided that the worker had ten years of minimum service; the retiree would thereby denied receiving severance pay. However, it must be noted that if the employer shows willingness to pay both, the law does not have any objection (*Boset Children and Family Charity Organization v. Alem Shimeles*; File No.151474: Vol.23).

This issue will take us towards analysing when and how eligibility for pension payment is to be determined. In order to dispose this issue, since the Labour Proclamation does not provide a solution for this, there is a need to consult "The Private Organization Employees' Pension Proclamation (Proc. No.1267/2014 as amended)." Based on this Pension Proclamation, for someone to be eligible for pension payment:

- *pension contribution must have been made under his name on monthly basis (i.e.,11% of the employee's wage to be contributed by the employer and 7% of the employee's wage to be deducted from the employee's wage and delivered to the "Pension Fund" every month); and*
- *minimum of ten years employment service ; and*
- *attainment of sixty years of age; or*
- *attainment of fifty-five years of age with 25 five years of service and separated from service by his own initiative; or*
- *Completion of at least 10 year of service and separates from service due to health problems preventing him from engaging in any remunerated work shall receive invalidity pension for life.*

As per the Pension Proclamation, these are the requirements that need to be met in order to be eligible for a pension payment. An employee who satisfies the above requirements will be eligible for a pension payment immediately at the time of separation, thereby being denied the collection of severance payment on top of the pension payment.

At this juncture, there is a need to pin point the distinction between "eligibility for pension payment" and "eligibility for pension". Eligibility for pension payment means the pension right has already matured and the pensioner is entitled to pension payment immediately at the time of termination.

However, eligibility for pension means the candidate has a pension right, but the right has not yet matured. For instance, an employee who has completed at least twenty years of service and separates from the service by voluntary resignation is entitled to a pension. But that worker's pension will be payable not immediately but upon attaining sixty years of age. This means if the employee resigns after twenty years' service at the age of fifty-five, the employee has to wait for five years before the pension payment matures. Therefore, the one who is eligible for pension payment is not a beneficiary of a severance payment whereas the one who is eligible for pension actually is entitled to severance payment.

If the terminated employee has completed their probation period and is not eligible for a pension payment, the next step will be to identify whether the worker's termination is associated with one of the grounds of termination mentioned above (Article 39 (1)(a-i). If not, entitlement for severance pay does not exist. Assuming that eligibility for severance pay is affirmatively determined, the next step would be calculating its amount. The relevance of Article 39(1) is limited to determining whether the right to severance pay exists or not. In determining the extent (amount) of severance pay, however, Article 40 of the labour proclamation is the pertinent provision.

***Problem for discussion*:**

The grounds of termination provided under Article 39(1) are drawn from Articles 24-32 of the Labour Proclamation. But all grounds of termination in those articles are not found under Article 39(1). This means some grounds of termination are not eligible for severance payment. Please identify those excluded grounds; and think of the possible reasons for their exclusion.

Article 40: Amount of Severance Payment

1. *The amount of severance pay referred to in Article 39 of this Proclamation shall:*
   a) *Be thirty times the average daily wages of the last week of service for the first year of service; and for the service of less than one year, be calculated in proportion to the period of service.*
   b) *In the case of a worker who has served for more than a year, payment shall be increased by one-third of the amount referred to in sub-Article (1) of*

this Article for every additional year of service; provided, however, that the total amount shall not exceed twelve months' wage of the worker.

To put it in the form of an equation:

Severance pay= x+1/3x(y-1) less or equal to 12x;

Where: X= is the monthly wage; and

Y= is the number of years of service.

For instance if the employee had a monthly wage of Birr 3000 and served for nine years after which they resigned, how much would their severance pay be?

Severance pay = 3000+1/3(3000)(9-1)
= 3000+1/3(3000)(8)
=3000+1000(8)
=3000+8000
=11000

Severance pay under the Civil Service employment regime appears to be more generous in amount. The relevant provisions of the Civil Servant Proclamation No.1064/2017 provide as follows:

Article 87(1) any civil servant shall be retrenched where:

a) *His position is abolished;*
b) *The governmental institution [he was working in] is closed; or*
c) *Redundancy of man power is created; and where it is not possible to reassign him to another government institution or where he is reluctant to accept a position of a lower grade.*

Article 92(1) any civil servant who has been retrenched and he is not entitled to pension allowance on the date of the termination of his service shall be paid:

a) *His three month's salary for the first year of his service; and*
b) *One-third of his monthly salary for each additional year of his service; provided, however, that such payment shall not exceed his 12 months' salary.*

As can be seen from the above provisions, though the maximum ceiling of severance pay both under the labour and civil service regimes is the same, the pay for the first year of service is more generous for the civil service (i.e. three months' salary) than the labour employment regime (i.e. one month wage).

Problem for discussion:

The main purpose of granting severance pay in both the labour and civil service employment cases is mainly to minimize the adverse impact of job losses to the employees who may not have a pension benefit at the time of termination. If so, why did the legislature decide to adopt a different standard in this regard; paying one month's wage for the first year of service in the private labour market whereas paying three month's wages for the first year of service in the civil service regime of employment? Even if such a different standard is justified, why should it be limited then to the first year of service only?

The other entitlement available to lawfully terminated employees on some grounds is payment in the form of an additional compensation. This entitlement emanates from two grounds of termination. One of them is the additional severance pay available to employees whose contracts of employment come to an end by virtue of Articles 24(4) or 29. This is stipulated under Article 40(4) of the Labour Proclamation. Termination based on Article 24(4) is a termination that occurs when the enterprise ceases operation permanently due to bankruptcy or for any other cause; while termination pursuant to Article 29 is a termination associated with reduction of labour force. It can be said that both grounds are situations attributable to the enterprise; and this seems why the employee is entitled to additional pay. The amount payable under this heading is an amount equal to the worker's average daily wage of the last week of service multiplied by 60. Technically, the payable amount under this part is two months' wage.

There is another modality of compensation available for employees who resigned from employment because of the fact that the employee has been a victim of sexual harassment or sexual violence by the employer or a managerial employee (Article 32(1)(b). The amount of compensation under this heading is the employee's daily wage multiplied by ninety (Article 41(2).

Finally the other form of compensation is one month's wage compensation which is available to an employee who terminates their contract of employment because of the fact that the employer has committed any act contrary to human dignity and morals or other acts punishable under the Criminal Law (Article 32(1)(a); or where the termination was initiated on safety grounds where imminent danger threatening the worker's safety or health occurs and where the employer, having been made aware of such danger, failed to act within the time limit in accordance with the early warning given by the competent authority or appropriate trade union or the worker himself to avert the danger(Article 32(1)(c); or where the employer has repeatedly failed to fulfil his basic obligations towards the worker as prescribed under the Labour Proclamation, collective agreement, work rules or other relevant laws and the worker was initiated to resign as a result of this (Article 32(1)(d). It is important to note also that the compensation under this Article is payable to a worker who is even eligible for pension payment, because this has a type of punitive and deterrent effect.

In *Red Fox Ethio Plc v. Jalene Getachew* (File No.11757; Vol.19) case, the employee resigned alleging that she was compelled to work in a dangerous situation to her life and health. Thereafter she instituted an action against the employer claiming severance payment and compensation associated with resignation without notice. The defendant argued that since she resigned on her own initiative, she is not entitled to any compensation whatsoever. The Cassation Division, however, ruled that she is entitled to the payment though she resigned on her own volition.

- ***Time limit within which the payments should be effected or claimed***

The fact that monetary entitlements are available to the terminated employee is not beneficial unless those entitlements are payable as soon as possible. The economic gaps associated with job loss need to be filled soon. With this purpose in view, the labour proclamation stipulated that *where a contract of employment is terminated, wages and other payments connected with the termination due to the worker shall be paid within seven working days from the date of termination* (Article 36). In our view, payments connected with the termination due to the worker is intended to mean payments such as unpaid wages, bonuses, severance pay, compensation and unutilized annual leave converted into cash.

If there is a dispute as to the amount payable to the employee in this regard, the law remedies that by stating that the employer shall pay the worker the admitted amount within the prescribed period (Article 37) while the amount in dispute will be resolved at a later stage in time by a dispute resolving organ. This means the fact that the worker received, without objection, the admitted amount of compensation does not dispossess him of his right to claim the remaining amount owed later, if any.

To reinforce this policy of prompt payment, the law has prescribed a penalty in stating that *where an employer fails to pay the sum due to the worker within the time limit, the labour division of a competent court may order a penalty payment of up to three months' the worker's wage except where the delay is due to causes beyond the control of the employer* (Article 38). One of the reasons for delay in payment beyond the control of the employer may be failure of the worker to complete her clearance process by giving back tools and other property entrusted to her for the job he was assigned (*Ethio-telecom v. Tigist Mulualem et al*; File No.74636; Vol:13). In such cases, payment could be justifiably delayed.

In this connection, the next issue would be the question of what to do if the employer failed to settle payment within the prescribed payment period. The available remedy will be resorting to court. It is the First Instance Court Labour Division that would have the jurisdiction to entertain such cases (Article 139(1). The time limit within which such claims should be submitted is within six months from the time of termination (Article 163(4). In addition to the outstanding payments, the court can award up to three month's wages of the employee, if it is claimed by the employee; and if the court is of the view that payment has been unjustifiably delayed (Article 38).

3.3. Unlawful Termination and Its Effects

Up to now, we have discussed issues associated with lawful termination and its effects. Herein below we will examine unlawful terminations together with their effects. Broadly, unlawful terminations could be of two types: unlawful due non-observance of procedure (procedural unlawfulness) and unlawful in substance (substantive unlawfulness). Procedural unlawfulness denotes a situation where the employer or the employee has a valid reason for termination but failed to follow the legally prescribed procedure of termination. For instance, the employer may have a valid reason to terminate by giving notice but it failed to give notice and terminated the employee immediately. Similarly, the employee is authorized by law to terminate a contractual engagement by giving one-month prior notice, but then that employee later decides to leave the job without giving advance notice to the employer. As far as the law is concerned, these all are unlawful measures due to non-compliance with procedure.

Conversely, substantive unlawfulness relates to the situation where the employer terminates the contract of employment without having a valid reason. For example, an employer terminates an employee without notice, alleging that the latter has committed a serious misdeed at the workplace, but the employer has no convincing evidence to substantiate the alleged misdeed. Or the employer has reduced its labour force without having sufficient ground for a lay off. These are all substantively unlawful measures.

Although both of the above are unlawful measures, the law has treated them differently in terms of effect. Procedural unlawfulness is accorded less seriousness in the sense that it is procedural and can be remedied through compensation. For instance, if the employee was not given due notice at the time of termination, *non-compliance by the employer with the notice requirements shall only result in the payment by the employer, wages in lieu of the notice period* (Article 44).

It is to be recalled that length of notice period available to each employee is to be determined pursuant to Article 35 and hence the compensation is to be assessed in that light. Therefore, the employee terminated in such circumstances cannot claim reinstatement or other compensatory claims. From the employee's perspective as well, *if the employee failed to provide advance notice upon resigning, he shall be liable to pay compensation to the employer. However, the compensation payable by the worker shall not exceed 30 days' wages of the worker and be payable from the remaining payment due to the worker* (Article 45).

When it comes to substantive unlawfulness, however, the situation is different. Basically, substantive unlawfulness may be divided into two categories: the first is the so-called termination on "invalid (prohibited) grounds"; while the second could be termed as other substantive grounds. The law creates a distinction in giving effect between the two. While Article 26(1) of the Labour Proclamation sets forth the principle that the employment of a worker may only be terminated on the grounds mentioned thereunder, Sub-Article (2) of the same provision provides certain reasons which do not constitute valid reasons for termination. Let us examine these.

Article 26: General

1) *A contract of employment may only be terminated where there are grounds attributed to the worker's conduct or with objective circumstances arising from his ability to do his work or the organizational or operational requirements of the undertaking.*
2) *The following shall not be deemed to constitute legitimate grounds for the termination of a contract of employment:*
    a) *Membership of the worker in a trade union or his participation in its lawful activities;*
    b) *Seeking of holding office as a workers' representative;*

c) *Submission of grievance by the worker against the employer or his participation in judicial or other proceedings;*

d) *The workers' nationality, sex, religion, political outlook, marital status, race, colour, family responsibility, pregnancy, disablement or social status.*

Similar prohibition and protection have been enshrined under ILO Convention No.158, Articles 4 and 5 (*Termination of Employment Convention; ratified in 1991 by Ethiopia*). Protection against some of the invalid reasons for termination included reflects the protection laid down in a number of ILO instruments. The ILO Committee has considered the protection provided by these instruments and their application in its recent general surveys on freedom of association workers with family responsibilities and equality in employment and occupation. A considerable number of countries protect workers against termination of employment for one or more of the reasons mentioned generally by means of legislation. This is the case both in countries that require termination of employment to be justified and in those where there is no requirement for justification. These forms of protection are usually included in more far-reaching policies intended to guarantee, for example, trade union rights, a comprehensive system of workers' representation within enterprise, the right to claim protection under legislation governing work and employment, and equality of treatment. Some of these guarantees were instituted even before protection against unjustified termination of employment was incorporated into the legislation.

Trade union membership and participation in trade union activities constitute one of the most common invalid reasons for termination of employment. The protection afforded to workers and trade union officials against acts of anti-union discrimination constitutes an essential aspect of freedom of association, as acts of this nature may result in practice in a denial of the guarantees laid down in the Freedom of Association and Protection of the Right to Organize Convention, No.87.

Legislation sometimes guarantees protection against acts of anti-union discrimination, including termination of employment relationship. Some legislation grants special protection to certain persons, such as the members of a trade union that has applied for registration or that is in the process of being established, the founders of a trade union, or trade union leaders and officers. Protection against acts of anti-union discrimination, and in particular termination of employment for such activities, is particularly necessary for trade union leaders and representatives, since in order to be able to fulfil their duties freely and independently they must have the guarantee that they will not suffer any prejudice as a result of holding trade union office or taking up trade union activities. One way of ensuring the protection of trade union representatives is to stipulate that their employment may not be terminated either during their term of office or for a certain period of time following its expiry. While some exceptions may be laid down for cases of serious misconduct, the nature and the importance of the duties performed by a trade union representative and the demands of this kind of office should be taken into account when deciding whether an offence has really been committed and when determining how serious it is.

Submission of a grievance by the worker against the employer or his participation in judicial or other proceedings is also an invalid reason for termination of employment. This is an important aspect of employment security as it provides protection for workers against retaliatory measures. In its General Surveys on equal remuneration and on equality in employment and occupation, the Committee emphasized this point with respect to rights in the fields of equal remuneration and equality of opportunity and treatment. Protection of this kind can be established through provisions to protect workers against retaliatory measures when they try to defend their rights. Thus in a growing number of countries there are legal provisions to protect a worker against retaliatory measures should the worker report, for example, working conditions that fail to meet standards set by law, discriminatory practices in employment or non-compliance with occupational safety and health provisions.

In the General Survey on equality in employment and occupation, the Committee emphasized more specifically that the effective protection of the principle of equality presupposes the existence of guarantees providing protection against retaliatory measures for a person who lodges a complaint with the appropriate body, who institutes proceedings to enforce his or her rights, or who is a party to such proceedings as a witness. Such measures, the most severe form of which is termination of employment, taken against a person who has suffered discrimination and who has availed himself of a right which is his in accordance with the national policy of equal opportunity and treatment, are of a particularly serious nature and can have detrimental effects with regard to the practical application of anti-discriminatory provisions, as those who have suffered discrimination often hesitate to have recourse to procedures to redress their grievances for fear of reprisals. The Committee also emphasizes the seriousness of retaliatory measures, in particular in the form of termination of employment, taken against a worker who reports the employer's failure to apply occupational safety and health rules while the workers' physical integrity, health, and even lives may be at risk.

ILO (1995) Protection against Unjustified Dismissal: Geneva

The remedy available for an employee who was terminated based on any of the grounds mentioned under Article 26(2) would be reinstatement to her previous employment position. This is explicitly stated under Article 43(1) of the Labour Proclamation. Thus, the remedy is legislatively determined and the tribunal has not much flexibility in this regard. It is only when the employee does not want to be reinstated that she may be compensated and separated because requiring reinstatement against the will of the employee would be tantamount to forced labour.

In fact, during the Civil Code era where compensation was the sole remedy for unlawful termination, in a certain case where a president of a Labour Union was dismissed because of his membership in the union, a decision by the Labour Relations Board, holding that the dismissal was illegal and ordering reinstatement of said worker, was upheld by the Supreme Imperial Court (*Sera Mikael Brick Factory v. The Association of Demissie Eshete et al*; Journal of Ethiopian Law: Vol.3). Furthermore, Proclamation No.210/1963, had clear provisions prohibiting anti-union discrimination (Article 30). These tended to show that anti-union discrimination was given special attention at the time.

Be that as it may, in addition to reinstatement, if the tribunal found it appropriate, it may award a back pay amounting to a maximum of six months wage of the employee. No matter how long the litigation might have taken, the First Instance Court Labour Division is only empowered to award a maximum of the specified amount (Article 43(5). It seems that the law is of the view that an employer cannot be held accountable for the delay and inefficiency of the justice system because the law has already put a maximum of six months period within which a labour dispute is to be resolved (Article 139).

For other terminations which are held substantively unlawful, the remedy available to the employee is either reinstatement or compensation. The labour tribunals decide these matters on a case-by-case basis. However, it is important to stress that the tribunal is not at full liberty to award either of the remedies. The law has laid down the parameters. Accordingly, it is stipulated that the labour tribunal may affirm the termination of the worker upon payment of compensation even if the worker requests reinstatement *where the tribunal is of the view that the maintenance of the particular worker and employer relations,* *by its nature or due to the controversy of the parties concerned, is likely to give serious difficulties* (Article 43(3).

Therefore, based on this broad framework, the labour tribunal is entrusted with a margin of flexibility in determining, on case-by-case basis, as to whether to award reinstatement or affirm the termination and compensate the employee instead. Judicial records have shown that courts have had difficulties in determining which the appropriate remedy is in a particular case. In a case between *Gosh and Ergib medium level transport service and Tessema Hailu* (File No.49931; Vol.9), though the employer contended that serious difficulties in employer and employee relations would be created if the employee was reinstated, the Cassation Division held that compensation instead of reinstatement would not be awarded just because of the mere fact that the employer objected to the reinstatement. Similarly, in the *Abjata Soda Ash Share Company v. Martha Abebe* case (File No.82336; Vol.14) case, the Cassation Division held that the fact that the employer and the employee were litigating against each other before the Court did not necessarily mean that serious difficulties in their employment relations would be created thereafter.

Conversely in *Selam Technical and Vocation Training Centre v. Kebede Seifu* (File No.37454; Vol.8), the court refused to order reinstatement. There, Ato Kebede was a security guard of the Training Centre, and a labour dispute arose between the two. Ato Kebede asserted that he was unlawfully terminated and requested reinstatement. Although the Cassation Division accepted that the termination was indeed unlawful, it awarded compensation instead of reinstatement. Its reason for such a holding was that the employment relationship between an employer and its security guards is based on utmost trust and confidence; litigation between them may significantly erode such a confidence and hence reinstating security guard post litigation is unwarranted.

In *Ethiopian Electric Corporation v. Getnet Mekonnen* case (File No. 64079; Vol.11) Getnet was an employee, a bill collector, of the Corporation and was dismissed on disciplinary grounds. The employee took his case to court alleging that the disciplinary measure was taken after the expiry of the thirty working days period. The reason for this contention was that Article 27(3) stipulates that *the right of an employer to terminate contract of employment on disciplinary grounds shall lapse after thirty working days from the date the employer knew the existence of a ground for the termination*. The Cassation Division held that the fact that the disciplinary measure was taken after the expiry of the thirty working days from the date the employer knew of the misdeed made the disciplinary measure unlawful. But it opted for compensating the employee rather than reinstating him.

The next issue would be if the employee is to be compensated rather than reinstated, how much is the compensation needs to be determined. This will take us to consulting Article 43(4). Let us reproduce it hereunder.

Article 43(4)

The compensation to be paid to a worker who is not reinstated shall, in addition to the severance pay, be:

a) *In case of a contract of employment for an indefinite period, 180 times the average daily wages and a sum equal to his wage for the appropriate notice period in accordance with Article 44 of this Proclamation;*

b) *In case of a contract of employment for a definite period or for piecework, a sum equal to the wages he would have obtained if the contract of employment has continued up to its date of expiry or completion of the work; provided, however, that such compensation shall not exceed 180 times his average daily wage. The provisions of this sub-Article shall also be applicable to a worker covered by the relevant pension law.*

Generally, the benefits available to an unlawfully terminated employee who may not be reinstated or does not want to be reinstated shall be the following:

- As per Article 43(4)-maximum of six months wage: (180 times(x) average daily wage); and
- As per Article 43(4) and Article 35- compensation in lieu of notice period; and

- As per Article 39(1)(b) and Article 40-severance pay; and
- As per Article 77(4)- unutilized annual leave to be converted into cash, if any.

Problem for discussion:

Let assume that Ato Asfaw was an employee of Zebul Trading Enterprises for the last fifteen years. He was a very diligent employee who has never taken annual leave in his tenure of employment. He received promotions during his time of employment. Since 2016, he has been earning Birr 12,000 per month. His company had no pension scheme arrangement. He received a termination letter from his employer last month for alleged incompetence. Being disappointed on receiving the letter of termination, he instituted an action against Zebul for reinstatement or payments as per the Labour Law.

The labour tribunal after examining the case found that the termination was in fact unlawful. However, it did consider that reinstating Asfaw would create difficulty in the parties' future employer and employee relationship. It thus held that awarding cash entitlements would be preferred than reinstatement. Please calculate the liquidated amount Asfaw would be entitled to.

In addition to payment of compensation, employers who undertook unlawful termination are liable to additional penalties as well. Pursuant to Article 14(1)(c) of the labour proclamation, it is unlawful for an employer "to terminate a contract of employment contrary to the provision of this Proclamation." Moreover, Article 185(2)(c) stipulates that *an employer who violates the provisions of Article 14(1) of the proclamation shall by taking into account its economic and organizational standing and the manner the fault was committed will be fined:*

- from Birr 10,000 up to Birr 20,000 if the violation is committed for the first time;
- from Birr 20,000 up to Birr 40,00 if it is committed for the second time; and
- from Birr 40,000 up to 60,000 if it is committed for the third time.

- *If the act is committed more than three times it may result in closure of the undertaking.*

However, the penalty which is in the form of fine does not go to the pocket of the dismissed employee. Since it is a violation of labour law provision, the action is to be instituted by a labour inspector rather than by the employee (Article 188). The organ that is empowered to entertain such cases would be the Regional First Instance Court Labour Division (Article 139(1)(f). In cases of Addis Ababa and Dire Dawa, it would be the Federal First Instance Court Labour Division that will have jurisdiction. In terms of the time frame, the case by labour inspectors should be brought within a year from the date of violation (Article 163(1). However, the labour inspection service in Ethiopia is too ill-equipped and understaffed to handle such cases.

Finally, it is worth considering the time within which an employee may challenge the unlawful termination. Normally, employees who consider that they are unlawfully terminated would like to claim for reinstatement. Therefore, pursuant to Article 163(2) *any claim by a worker to be reinstated shall be barred after three months from the date of termination of the contract of employment.* If their claim is for compensation instead of reinstatement, the action should be brought within six month. Hence, it is advisable that the employee act as promptly as possible.

In another note, unlike lawful termination where severance payment and pension may not be payable at the same time, for unlawful termination cases, an employee who is unlawfully terminated and who may not be reinstated shall be entitled both to severance payment and pension benefit.

It must be noted, however, that these all payments associated with lawful and unlawful terminations, except the pension benefit, are taxable incomes (*Oromia Road Authority v. Birkessa Ibrahim*; File No.61 549: Vol.13 and *Ayele Mengistu v. Ethiopian Cereal Trading Enterprise;* File No. 101040; Vol.17)

Chapter IV
Special Groups of Employees

4.1. General

In the preceding chapters, we outlined the key points about employment relations: the rights and duties of the parties; and how this relation could be put to an end. Conventionally, employment law is ordinarily designed to be applicable to all categories of employees without any distinction. The rights, benefits and obligations under any relevant legislation will be horizontally and even-handedly applicable to all employees. An application contrary to this will be discriminatory and actionable. However, it is common also to see employment legislations of general application contain separate chapters or sections governing the working condition of special groups of employees. In this chapter we will examine the so called "special groups of employees." For the purpose of this text, these are: probationary employees, young employees, women employees, employees with disabilities, and foreign employees.

Although these employees are regulated by the rights and duties provided to all other employees under the labour law; in some respects, the law treats them differently due to various policy reasons. In a sense they are to be differently treated with respect to some employment conditions. Hence, the purpose of this chapter will be highlighting special conditions of work and treatments accorded to such groups of employees.

The reasons for such differential, mainly preferential, treatment, differ from one group to another. At times, it is because of the status of their employment. Differential treatment for young employees and women employees is dictated by physical and mental tenderness and maternity issues respectively. Young employees, being in possession of tender physical and mental condition, are vulnerable to multiple risks at workplaces. Women employees, as well, are subject to employment discrimination that arises from stereotypes about gender roles and sexual harassment in workplaces. The same logic and reasoning is applicable with respect to employees with disabilities, too.

With respect to employees on probation and foreign employees, their treatment is mostly associated with their status. The status of being in a trial period; and the status of being non-Ethiopian may bring about certain limitations in the exercise of employment rights. This is mainly dictated by policy considerations. Herein below, we will examine the nature and the manner of their treatments one by one.

4.2. Probationary Employees

At the commencement of a contract of employment, the employer is entitled to set a probationary period (i.e. trial period). The main purpose of probation is to test the suitability of the employee to a post to which she is intended to be assigned. Suitability for employment could be assessed in light of different parameters, such as; competence, duty mindedness, human relations, punctuality, discipline and integrity. Within the probation period, the employer is authorized to dismiss the employee without any procedure if the employer is of the view that the employee is unfit for the post. A worker on probation may terminate her contract of employment without notice as well.

It is argued that "whenever a person is dismissed for unfitness, it is sufficient that the employer honestly believes on reasonable grounds that the person is unfit." Hence, this period is a time when an employee has no secured job position. If the employee continues to work after the expiry of the probation period, the employee shall be deemed to have successfully completed their probation period and be tasked in accordance with the contract of employment. As a result, employees would like to have a short probation period while employers would prefer to have a long probation period in order to possess wider flexibility to retain or terminate employees at liberty.

Historically, under the Civil Code employment regime, whether a probationary period would exist and the length thereof was left to the contracting parties

(Article 2598). However, according to the Civil Code, "where the probation period was fixed for a minimum time, the right to terminate the contract was not to be exercised before that minimum time has elapsed" (Article 2600(1). Labour Proclamation No.64/1975, introduced a maximum cap to the duration of probation period. It was stipulated that the probation period of any worker shall not exceed ninety days (Article 9(1). Though the parties may agree to have probation period, they can by no means fix it to exceed ninety days commencing from the date of employment. This law did not require any formality for the incorporation of a probation period in the sense that the first ninety days of employment may be held as probation periods even in the absence of special form.

By virtue of the Labour Proclamation No.42/1993, two changes were introduced. First, the maximum duration of probation period was lowered to forty-five (consecutive) days. Second, if the parties agree to have probation period, they should put it in writing; otherwise, it was considered as though there was no probation period in the contract of employment. In fact, in *Berhe Hagos General Contractors v. Ato Gemechu Adugna (File No.98052: Vol.16)* case, the Cassation Division held that the means to prove the probationary relation is a mutually agreed and signed contract between the parties.

In the above case the parties did not expressly state about probation in their contract of employment. However, the same day a letter of employment prepared by the employer and received by the employee stated that the first forty-five days would be a probation period. But the Court held that this is not by itself sufficient to prove the existence of probationary employment since it was not mutually agreed. A step further, in *Elias Bar and Restaurant v. Mirtnesh Atinafu et al, (File No.126667; Vol.22)* case, the Cassation Division ruled that a legally binding probationary employment contract should be prepared in written form, signed by the parties and attested by two witnesses.

Problem for discussion:

Do you agree with the above line of interpretations by the Cassation Division? Why or why not?

Does it mean that a contract of probation shall be attested by two witnesses in addition to the signature of the parties for its validity?

Other than the rigorous formalities for probation, employers' associations were of the view that forty-five days was too short to determine suitability of an employee for the post. Moreover, in their view, the fact that probation period was formulated in terms of consecutive days rather than working days have compounded the problem. Particularly, with industrialization, the labour profile would be more of skilled than unskilled labour. Skilled labour is more complex than the unskilled and semi-skilled labour. Hence, job complexity demands a longer period to determine an employee's suitability. Industrial parks operators were insisting and pressing for longer probation period. Employers' associations thus proposed the amendment of the Labour Proclamation to the effect that the probation period should be longer than forty-five days; and it should be counted in terms of working days, as the employee may only be assessed during working days. The experience of other countries such as Kenya and the Sudan in this regard showed that probation period could be fixed as long as six months.

The current labour proclamation seemed to have considered the experience of other countries and the concerns of the employers' associations. Currently, the maximum period for probation is sixty working days (Article 11(3); Proc. No.1156/2019). It has been increased from forty-five to a maximum of sixty days and it is counted in terms of working days instead of consecutive days.

With respect to probation period, it is worth noting that the labour law and the Civil Service Proclamation adopt varying positions. Under the Civil Service, a probation period is mandatory in the sense that every new employee should pass through the status of provisional appointment (employment). The length of the probation period for civil service purposes is six months. It can even be extended for another three months in cases where the employee's performance result is below average for the first six months. Thus, the probationary period can extend as long as nine months. As we have seen above, this is not the case under the Labour Proclamation.

> ***Problem for discussion:***
>
> 1. *Under both the Labour Law and the Civil Service employment regime, the probation period serves to determine fitness (suitability) to the anticipated job position. To this effect, the Labour Proclamation stipulates that "a worker may be employed for a probation period for purpose of testing his suitability to a job position in which he is anticipated to hold" (Article 11(1); while the Civil Servants Proclamation prescribes "the purpose of probation shall be to prove the competence of a newly appointed civil servant through follow-up of his performance" (Article 19(1). If so, what explanation could be offered for adopting differing lengths of probation for the civil service and for the labour law one? Should this harmonized?*
>
> 2. *What happens if the contracting parties agree for longer probation period than what has been provided under the Labour Proclamation as a legal maximum? Should the contract of employment be nullified? Or should the term of the contract specifying probation period be nullified? Or should only the terms of the contract of employment on probation period be replaced by the legal maximum? Explain your reasons.*

4.3. Young Workers

Prohibition of abusive child labour employment has been one of the focus areas of ILO since its inception. One of such efforts was the adoption of the first

Convention on age of employment in 1919 (the Minimum Age (Industry) Convention, 1919 (No.5)). Article 2 of the convention states that children under the age of fourteen years shall not be employed. This effort was followed by adoption of a series of binding standards focusing on specialized economic activities and subject matters such as sectors like the non-industrial, sea, agriculture, fishermen, underground work and night work employments. Finally, in 1973 ILO devised a general legal framework, consolidating all of its previous efforts and documents into a single and universally applicable rules on minimum age of employment in any occupation (The Minimum Age Convention, 1973 (No.138)). Behind all such efforts of the ILO and its member states were the effective abolition of child labour and to raise progressively the minimum age for admission to employment (Article 1). The provisions have as one of their goals the enhancement of the children's rights to education.

After recognizing the national policy for countries in exceptional situations, the 1973 convention prescribes that the minimum age to be specified for admission into the employment or work in any occupation shall not be less than the age of completion of compulsory schooling, and in any case, shall not be less than fifteen years (Article 2). The convention also permits a limited exception for developing or underdeveloped countries to initially fix the age at fourteen years. However, for work which by its nature is likely to jeopardize the health, safety or morals of young persons, the minimum age shall not be less than eighteen years (Article 3). The detail types and nature of such occupations are left to be determined by national laws of member states.

Ethiopia has ratified and incorporated into its laws the terms and obligations of Convention No. 138 since 27 May 1999. In addition, the country has also accepted other important conventions in the area, including, the Convention on the Rights of the Child, 1989 (CRC) and Convention on the Worst Forms of Child Labour, 1999 (No.182). The above binding instruments together with other UN and African treaty regimes form the largest packages for protection of the right of children in general and from employment related violations in particular. These all instruments are ratified by Ethiopia and have become integral parts of the law of the country.

Article 32 of the CRC protects children from economic exploitation and from performing work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. Hence what can be inferred from the above international standard setting in the area of children's protection is that premature or early engagement or admission of children into employment or labour market may potentially compromise some of the fundamental rights of children legally protected within other international treaties such as the right to education, the right to development and survival, the right to physical, mental and social development, the right to rest and leisure.

Ethiopia has adopted a series of laws protecting the rights and interests of children and laws regulating admission of young persons into formal employment or labour market in the country. These include: the FDRE Constitution, family codes at federal and regional levels, the Criminal Code, and various types and levels of employment legislations and binding decisions of the Cassation Division. To begin with, the FDRE Constitution clearly protects every child from exploitative practices or works which may be hazardous or harmful to his/her education, health or well-being (Article 36(1)(d)). The FDRE Criminal Code of 2004 on the other hand penalizes those acts of maltreatment of minors which may comprise over-work capable of causing injury to the health, well-being, education or physical or psychological development of the minor (Article 576). Of course, premature engagement of minors in the workplace may potentially bring about one or more of the above-mentioned impacts and hence resulting in criminal accountability of the person in custodial responsibility.

In the Ethiopian context, in principle, persons below the age of 18 are minors; and owing to their status of minority, they are not allowed to enter into juridical acts directly and personally. As we all know, entering into a contract of employment is a juridical act. However, the private sector employment regime allows individuals who attained the age of fifteen to enter into a contract of employment. For purposes of Ethiopian labour law, "young worker" means "*a natural person who has attained the age of fifteen but is below the age of eighteen years*" (Article 89(1). Hence, the minimum age of employability and the age of majority do not coincide. It must thus be noted that the issue of employment of young employees is an exception to the general rule of the law of contract. As the law now stands, employment below the age of fifteen is prohibited; while employment between the age of fifteen and eighteen is rigorously regulated.

Consequently, for the first time in Ethiopian labour history detailed regulation for young workers was introduced in 1966. Pursuant to Labour Standards Proclamation No.232/1966, it is provided that "*no person under fourteen years of age shall be employed in industrial enterprises in which persons other than members of his immediate family are employed*" (Article 13(1). With respect to persons above the age of fourteen, however, it was stipulated that "*no person more than fourteen years of age and less than eighteen years of age shall be employed (*Article 13(2)*:*

a) Without the express written consent of his parent or guardian;

b) In any employment classified as a dangerous trade;

c) At night, which shall mean:

i) in the case of minors under sixteen years of age, the period between the hours of ten o'clock in the evening (10.00p.m.) and six o'clock in the morning (6.00a.m.); and

ii) in the case of minors between the ages of sixteen and eighteen years, a period of more than seven consecutive hours between the hours of ten o'clock in the evening(10.00p.m.) and seven o'clock, in the morning (7.00a.m.);

d) For more than eight hours per day or forty eight hours per week; and

e) On piece work or an assembly line.

Generally, age is considered to be a physical condition for which there are particular needs and in respect of which special protection or assistance is recognized as being necessary. Relevant legislations subsequent to 1966 have not been as detailed as the 1966 instrument. For instance, Labour Proclamation No.64/1975 merely prohibited the employment of persons under fourteen years of age (Article 30(2); whereas it had forbidden employers to require young workers work after 10.00p.m. or to engage them in dangerous trades (Article 30(4). Young worker as defined by the same instrument was to mean "a worker who is above fourteen but less than eighteen years of age" (Article 2(28).

Unlike the 1966 law where it required the written consent of a parent or guardian for a young worker to engage in employment, Proclamation No.64/1975 seemed to have avoided that requirement. It provided that "notwithstanding the provisions of the Civil Code, persons who have attained fourteen years of age and above, may enter into a contract" (Article 6). Since Labour Standards Proclamation No.232/1966 was repealed by Proclamation No.64/1975, it is to be implied that requirement was avoided.

Be this as it may, under the current law, young employees, who are employees within the age range between fifteen and eighteen, owing to their tender age and physical condition are treated differently under the labour law. Their differential and preferential treatment is targeted towards their protection and is manifested in the following terms of employment.

a) ***As regards to length of working hours and its timing:***

- Normal working hours for young employees would be seven hours per day while for adult employees normal working hours is eight hours per day (Article 61 (1) and 90);
- It is prohibited to employ young employees on:
    - Night work (i.e. between 10 p.m.-6 a.m.)
    - Over-time work

- Weekly rest days
- Public holidays; adults do not have such restrictions.

b) *As regards to types of work: Unlike the previous instruments (Proclamations No.232/1966 and Proclamation No.64/1975) which employ the generic phrase "dangerous trades"; it lists out activities that are considered to be "dangerous trades" to young employees;*

- No employment for young workers in the transporting of passengers and goods by road, rail air and internal water;
- No employment for young workers in dock sides and warehouses involving heavy lifting;
- No employment for young workers in electric power generation and transmission lines;
- No employment for young workers in underground works (such as mines and quarries)
- No employment for young workers in sewerage systems and digging tunnels.

Furthermore, the Ministry of Labour and Social Affairs has been empowered to issue directives which incorporate lists of activities prohibited for young workers (Article 89(4). Accordingly, the Ministry issued such a directive in 2013 that detailed the prohibited tasks to young employees, which were broadly formulated by the Labour Proclamation.

The Civil Service Proclamation, in principle, prohibits civil service employment below the age of majority (i.e. eighteen years of age). It, nevertheless, promises to come up with the Federal Civil Service Agency's Directive on how persons below the age of majority will be employed as civil servants (Article 14(2)). However, the anticipated directive is not yet put in place.

***Problem for discussion*:**

It is frequently argued that child labour is mainly associated with poverty. Ideally childhood is to be allocated for primary education. But in impoverished societies like Ethiopia, few and poor educational facilities do not provide access to all children. Thus, for many children in such societies, their fate would be to either join the labour market or to be idle. As a result, many contend that it is preferable to find children in the labour market rather than in the streets. Some even raise the issue that placing such restrictions on youth would not be relevant to the Ethiopian reality where a child needs to produce in order to feed him/herself or starve to death. Are the child labour standards based on a developed world standard (i.e. euro-centric) rather than on the Ethiopian reality? Or are these relevant instruments applicable to Ethiopian society as well?

Problem for consideration:

Ethiopia has already ratified a sufficient number of international instruments on human and child rights in general that concern the age of admission into employment and the eradication of child labour in particular. However, studies indicate that the prevalence of engagement of children in formal labour market is among the highest in Sub-Saharan Africa and there is not much indication that this figure will change soon. One of the challenges in the enforcement of legal age of admission into employment is the overall poverty and underdevelopment of a nation's economy. The other limitation is the absence of effective registration at birth which makes enforcement of the laws challenging. Critically discuss how Ethiopia can tackle such continuing challenges in enforcing its treaty commitments and effectively eliminating child labour in the country.

4.4. Women Workers

According to the ILO, maternity is a condition which requires differential treatment to achieve genuine equality and, in this sense, it is more of a premise of the principle of equality than a dispensation. Special maternity protection measures should be taken to enable women fulfil their maternal role without being marginalized in the labour market.

Distinction based on sex are those which use the biological characteristics and functions that differentiate men from women. Such distinction includes those established explicitly or implicitly, to the disadvantage of one sex or the other. Women are commonly affected, especially in the case of indirect discrimination, by these distinctions, which stem from traditional attitudes that still persist strongly in certain societies such as Ethiopia. Many traditional cultural attitudes in society tend to discriminate against women in many respects. As a manifestation of these discriminatory practices, women workers' share in the formal labour market in many developing countries, such as Ethiopia, has been less visible compared to their number in society.

In order to do away with such inequitable outcome, modern legal systems have already incorporated the principle of "non-discrimination on the basis of sex" in their basic laws and practices. However, a distinction must be made between direct sex discrimination, where the sex or gender of the work is taken as the decisive criterion for unequal treatment, and indirect sex discrimination, where unequal treatment is based on another criterion seemingly neutral to sex, but where the negative implications mainly affect persons of a specific sex.

Equal treatment though necessary is not sufficient to attain equality. The historic legacy of discrimination needs to be addressed and rectified as well. Thus, in order to bring about equality and equity, the principle of non-discrimination must be complimented by another equally relevant principle, which is termed as "*affirmative action.*" Unless and until these two principles are reinforced to each other, past misdeeds and previous marginalization may not be rectified and thereby true equality will not be attained.

The Ethiopian Constitution takes note of this historical legacy of discrimination and has attempted to address it. It provides as follows:

Article 35: Rights of Women

1. *Women shall, in the enjoyment of rights and protections provided for by this Constitution, have equal right with men.*
2. *Women have equal rights with men in marriage as prescribed by this constitution.*
3. *The historical legacy of inequality and discrimination suffered by women in Ethiopia taken into account, women, in order to remedy this legacy, are entitled to affirmative measures. The purpose of such measures shall be to provide special attention to women so as to enable them compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions.*
4. *The state shall enforce rights of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.*
5. *(a) Women have the right to maternity leave with full pay. The duration of maternity leave shall be determined by law taking into account the nature of the work, the health of the mother and the well-being of the child and family.*

   (b) Maternity leave may, in accordance with the provisions of law, include prenatal leave with full pay.
6. *Women have the right to full consultation in the formulation of national development policies, the designing and execution of projects, and particularly in the case of projects affecting interests of women.*
7. *Women have the right to acquire, administer, control, use and transfer, property. In particular, they have equal rights with men with respect to use, transfer, administration and control of land. They shall also enjoy equal treatment in the inheritance of property.*
8. *Women shall have the right to equality in employment, promotion, pay, and the transfer of pension entitlements.*

Historically, it was the Civil Code of 1960, which for the first time introduced maternity leave. By then maternity leave was one month post-natal leave out of which only half of it was a paid (Article 2566). Maternity leave has two underlying components; a wage replacement component covering a specified number of weeks at a specified time; and a job protection aspect during the leave period. By retaining what has been gained by the Civil Code, the Labour Standards Proclamation No.232/1966 further obligated employers "*to provide equal remuneration for work of equal quality regardless of the sex of the employees*" (Article 14).

Further maternity protections have been introduced through the medium of Labour Proclamation No.64/1975. Post-natal maternity leave was increased to forty-five days with full pay (Article 39(2)). Moreover, it was forbidden to have pregnant women after 10.00 p.m. or to require them to work over-time (Article 30(3). Then came Proclamation No. 42/1993 that prolonged maternity leave from forty-five days to ninety days with full pay out of which the first thirty days were pre-natal leave. Therefore, the concept pre-natal leave was brought in by the 1993 Labour Proclamation.

In fact, with the coming into force of the Federal Constitution in 1995, maternity leave and other gender-based protections have obtained constitutional recognition as reproduced herein above. Issues of affirmative action, prohibition of discriminatory payment and promotion have also been indicated by the Constitution. Nevertheless, in practice, in areas such as the construction sector discriminatory payment based on gender has been prevalent in the country.

The current labour law tries to regulate the situation of women employees from two angles. The first type of regulation is providing flat protection available to all women employees by virtue of being women. " *Women shall not be discriminated against as regards employment and payment, on the basis of their sex*" (Article 87 (1). In fact, it is provided that "*priority shall be given to women if they get equal result with men when competing for employment, promotion or any other benefit*" (Article 87(2). However*, it is prohibited to assign women on works that* *may be listed by the Ministry to be particularly dangerous to women or hazardous to their health* (Article 87(3). Based on this, the Ministry has already come up with a directive that incorporates a long list of tasks in which engaging women employees are prohibited due to the risk the tasks may pose to their life, health and reproductive system.

Problem for discussion:

Some tend to hold that laying down a long list of prohibited jobs to women employees would adversely affect their visibility in the labour market. In a society where male supremacy is still intact, such measure could be mis-used to marginalize women from economic empowerment. They thus propose that let women themselves decide whether to engage in such tasks or not.

Others are of the view that this will be a dangerous undertaking because due to poverty, women may take risk that would be detrimental to them. They cannot make a well-informed choice since they may not appreciate the health risks involved in each task. Thus since the government has experts in every field at its disposal to make such determination, government's prescription is desirable and appropriate. Leaving it to private decision is unwarranted. What do you think?

It is worth noting that the current labour proclamation has included issues of sexual harassment and sexual violence expressly. This is a new introduction to the Ethiopian employment regulatory frame work. Until recently, these issues were objects of interest to the criminal justice track. Nevertheless, the present labour proclamation defined what "sexual harassment" and "sexual violence" are (Article 2(11) and 2(12) and attached sanctions on those who commit or attempt to commit these acts at workplaces. The duty to make working condition safe imposed on the employer shall be construed to mean making it safe from sexual harassment and/or sexual violence as well. The sanction imposed by the Labour Proclamation is other than or in addition to what is available under the criminal justice track.

Within the ILO jurisprudence, the term “sexual harassment” includes any insult or inappropriate remark, joke, insinuation and comment on a person’s dress, physique, age, family situation, etc; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or other gesture associated with sexuality, and any unnecessary physical contact such as touching , caresses, pinching or assault. In order to constitute sexual harassment in employment, an act of this type must, in addition, be justly perceived as a condition of employment or precondition for employment, or influenced decisions taken in this field, and/or affect job performance. Sexual harassment may also arise from situations which are generally hostile to one sex or the other.

Sexual harassment undermines equality at the workplace by calling into question individual integrity and the well-being of workers; it damages an enterprise by weakening the bases upon which work relationships are built and impairing productivity. In view of the gravity and serious repercussions of this practice, some countries are now adopting legislation prohibiting it and making it subject to civil and/or criminal penalties. This is similar with what we have in Ethiopia.

The other type of regulation is providing special protections for women under particular circumstances such as pregnancy and maternity. No pregnant woman shall be assigned to night work between 10.00 p.m. to 6.00 a.m. or be assigned on over-time work (Article 87(4). She shall be transferred to another place of work if her job is hazardous to her health or to the foetus as ascertained by a physician (Article 87(5). An employer shall not terminate the contract of employment of women during her pregnancy and until four months after her confinement except on limited grounds of termination (Article 87(6). Prolonged maternity leave which has been increased from three months to four months (one month prenatal and three months post-natal) leave with full pay is another area where change has been introduced (Article 88). The civil service regime has legislated similar protections against discrimination of women in employment, payment and promotion as well as provisions enabling for affirmative action.

Problem for discussion:

Some people tend to hold the view that though pregnancy and maternity protections are necessary for women employees, such protections may substantially reduce their employment opportunity owing to the fact that employer may not be ready to cover the whole expenses associated with paid maternity leaves. Historically, maternity leave under the Civil Code of 1960 was one month and it was only half of it that was paid (Art.2566). Under Proc. No.64/75 such leave was upgraded to forty-five days and all of it was paid leave (Art.39 (2)). With the coming into force of Proc. No.42/93 maternity leave was further increased to three months in duration (in the form of pre and post-natal) with full pay (Art.88) and this has been carried forward to Proc. No.377/2003. In fact, Labour Proclamation No. 1156/2019 prolonged maternity leave to a total of four months (i.e. one month prenatal and three months post-natal). Similar position has been adopted by the Federal Civil Service Proclamation in this respect (Art.41). Indeed, the Civil Servants' Proclamation even allows for aggregation of maternity leave in the sense that what was not utilized as prenatal leave could be transferred to post-natal leave.

It should be known that family reproduction is to the benefit of the family and society at large; if so, shouldn't the family and society (i.e. the household concerned and the state as representative of society) share the cost of maternity leave? Why should employers be compelled to single handily cover such expense? Wouldn't such obligation tend to discourage employers from employing young females who are potentially pregnant?

A study conducted before around fifteen years ago by Ethiopian Women Lawyers Association has the following to say: "The fear that is generally expressed is that, even such legitimate special treatment will eventually harm women's interest if the payment of benefits is primarily borne by the employer. Our sample survey showed that 47% of the employers said that maternity leave is very costly and 36% said that society should bear part of the cost. The prevalence of such view amongst employers and their profit motive makes it likely that they may respond by discriminating women of childbearing age outside of their recruitment range".

Is this really a well-founded fear and concern? If so, what type of alternative(s), which will have least restrictive effect to women employment opportunity, do you propose? The incentive approach instead of the sanction approach?

4.5. Employees with Disabilities

Studies have verified that over 600 million people worldwide have a physical, sensory, intellectual or mental impairment in one form or another. This equals approximately 10% of the world's population. People with disabilities can be found in every country, with over two-thirds of them living in the developing world. Throughout the world there is an undeniable link between disability, poverty and exclusion. The denial of employment opportunities to people with disabilities forms one of the root causes of poverty and exclusion of many members of this group.

There is ample evidence that shows people with disabilities are more likely than non-disabled persons to experience disadvantage, exclusion and discrimination in the labour market and elsewhere. As a result of these experiences, people with disabilities are disproportionately affected by unemployment. When they work, they can often be found outside of the formal labour market, performing uninspiring low-paid and low-skilled jobs, offering little or no opportunities for job promotion or other forms of career progression. Employees with disabilities are often under employed.

The issue of disability is one that deserves serious attention in Ethiopia. The level of poverty in Ethiopia translates into a lack of health care and treatment for the disabled. For example, a lack of adequate health facilities and vaccination during pregnancy or childhood are major causes for disability at birth or childhood. Harmful traditional practices will also have their own significant share in this respect. Absence of tolerance and mutual respect, which resulted in prolonged civil war; and which has been responsible for tribal and at times religious conflicts, are also relevant in the equation.

Against this background, recent Ethiopian legal instruments have incorporated relevant provisions with a view to widening the employment opportunities of persons with disabilities. The FDRE Constitution stipulates, "*The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled,* the aged, and to children who are left without parents or guardian" (Article 41 (5) emphasis added). Of course it must be admitted that the way the constitutional provision has been formulated tends subscribe to the social welfare model in the sense that disabled persons are to be objects of rehabilitation rather than subjects of employment and production.

However, Proclamation No. 568/2008 has brought important provisions for employment of persons with disabilities. The principle of "reasonable accommodation" for persons with disabilities has been incorporated in this Proclamation (Article 6 of the Proclamation). The UN Disability Convention is ratified by Ethiopia as well. The principle of non-discrimination on grounds of disability has also been expressly inserted under the Federal Civil Servants' Proclamation (Article 13 (1)) and the Labour Proclamation (Article 14 (1) (f)).

However, these protections only apply to those disabled individuals who are qualified and meet the requirements of the job. For example, *a taxi company requiring job applicants to have a driving license excludes visually impaired people as well as people who, due to a medical condition, no longer have a driving* *license. Such a license requirement on the part of the taxi company is legitimate and proportionate and therefore constitutes a genuine or justifiable occupational requirement.*

Prohibition of discrimination against disabled persons though necessary is not sufficient for their full admission into the labour market. Affirmative action in favour of disabled persons may need to be introduced with a view to making the protection comprehensive and complete. For instance, in Germany, employers both in the private and public sector who employ more than 16 employees are obliged to employ at least 6% handicapped persons. When this obligation is not fulfilled the employer has to pay a fine. This sum of money has to be spent exclusively on supporting the situation of handicapped persons.

Would the German experience be relevant to our case? Why/why not?

Herein below is an extract from "*Achieving Equal Employment Opportunities for People with Disabilities through Legislation" (ILO, Guideline: 2007)*

Disability as a human rights issue

For a long time, disability was treated primarily as a social welfare issue. This reflected the widely held belief that people with disabilities needed care and assistance, being unable and incapable of living their own lives. As a corollary, people with disabilities were seen as objects of social welfare and not as subjects in their own right, let alone entitled to the full enjoyment of the right to work. Due to their marginalized status in society and resulting invisibility, as well as widespread prejudice, people with disabilities did not fully enjoy their human rights, including the right to decent work.

The human rights charters and conventions adopted from the mid-1940s to the late 1960s – such as the United Nations Universal Declaration on Human Rights, 1948, the UN Covenant on Economic, Social and Cultural Rights, 1966, and the

UN Covenant on Civil and Political Rights, 1966 - do not specifically mention people with disabilities. It is only since the 1970s that the disadvantages faced by disabled persons, their social exclusion and discrimination against them were increasingly perceived to constitute a human rights issue. The shift from a social welfare approach to one based on human rights is reflected in explicit reference to persons with disabilities in human rights charters, conventions and initiatives adopted since the 1980s and in an increasing number of special – and usually non-binding – instruments adopted by such organizations as the UN and the Council of Europe. These instruments include the Council of Europe Coherent Policy for the Rehabilitation of Persons with Disabilities, 1992, and the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993.

On 19 December 2001, the UN General Assembly adopted Resolution 56/168 establishing an "Ad Hoc Committee, open to the participation of all Member States and observers of the United Nations, to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disability, based on the holistic approach in the field of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development." On the recommendation of the Ad Hoc Committee (AHC) at its Second Meeting in June 2003, a decision was taken to proceed with the development of such a convention. Following three years of negotiation involving governments, with active participation of UN agencies, organizations of persons with disabilities, national human rights institutions and other civil society representatives, the draft text of the Convention including an optional protocol, was approved at the Eighth Session of the AHC in August 2006. The UN General Assembly formally adopted the Convention in a vote by consensus on 13 December 2006.

Similar shifts from a social welfare to a human rights law approach are taking place on a regional and national level, with an increasing number of existing human rights instruments being amended, to include the rights of people with disabilities, and new instruments being adopted, both comprehensive and disability specific.

The concept of disability

When legislation is being formulated to eliminate the disadvantages faced by disabled persons, to dismantle the exclusionary mechanisms they face in society, and to enhance equal employment opportunities for them, the question arises of how to define the beneficiaries of the legislation. In other words: what constitutes a disability?

In this discussion, two opposing views can be distinguished. On the one hand, there are those who situate the problems of disability in the person concerned, while paying little or no attention to his or her physical or social environment. This is referred to as the individual or medical model of disability. On the other hand, there are those who perceive disability as a social construct: disabilities result from the failure of the physical and social environment to take into account the needs of particular individuals and groups. According to this social model of disability, society creates disabilities by accepting an idealized norm of the physically and mentally perfect person and by organizing society on the basis of this norm.

Examples:

According to the individual model of disability, a person with a mobility impairment is disabled as a result of an individual impairment. He or she can try to overcome the functional limitations which come along with this by undergoing medical or paramedical treatment and/or by using medical or paramedical aids, such as a wheelchair or crutches.

According to the social model of disability, mobility impairment should be seen in the context of the surrounding society and environment. Reducing or overcoming the limitations on activities and restrictions to participation associated with mobility impairment implies taking away societal barriers, and ensuring that the built environment is accessible.

Both the social and individual models of disability have proven to have advantages and constraints, depending on the aim of the legislation. The individual or medical model can be particularly helpful in such fields as rehabilitation medicine and social security law, while the social model can be instrumental in tackling the root causes of exclusion, disadvantage and discrimination. The social model recognizes that the answer to the question of whether a person can be classified as disabled is intrinsically related to such factors as culture, time and environment.

Defining disability in legislation

The definition of disability, which determines who will be recognized as a person with a disability, and hence protected by the relevant legislation, is very much dependent on the goal being pursued by the particular law or policy. Thus, there is no single definition of disability which can be used in all labor and social legislation. The two different approaches to definition are as follows.

- wording aimed at a narrow, identifiable beneficiary group. This should be used if the aim is to craft laws to provide financial or material support to disabled individuals, or employers of disabled people. A limited, impairment-related definition of disability (individual model) thereby ensures that support is targeted at those who are most in need.

- broadly inclusive wording aimed at protection from discrimination on the grounds of disability. This broader definition of the protected group (social model) should be used in anti-discrimination laws because many people, including those with minor disabilities, people associated with people with disabilities and those who are wrongly assumed to have a disability, can be affected by disability-based discrimination.

- Reasonable accommodation

Disability can sometimes affect an individual's ability to carry out a job in the usual or accustomed way. The obligation to make a reasonable or effective accommodation, or the right to be accommodated, is often found in modern disability non-discrimination law. Disability non-discrimination legislation increasingly requires employers and others to take account of an individual's disability and to make efforts to cater for the needs of a disabled worker or job applicant, and to overcome the barriers erected by the physical and social environment. This obligation is known as the requirement to make a reasonable accommodation. The failure to provide a reasonable accommodation to workers and job applicants, who face obstacles in the labor market, is not merely a bad employment practice but is increasingly perceived as an unacceptable form of employment discrimination.

Examples of a reasonable accommodation:

- an adjusted office chair (for a person with a back impairment), adapted working hours (e.g., for a person with a medical condition requiring frequent rest-breaks),
- a computer keyboard with a Braille reader (for a blind person), and
- the assignment of a job coach (e.g., for a person with an intellectual or mental health disability).

The law should define closely what is meant by reasonable accommodation, so that misinterpretation is avoided and employers clearly understand what they must do.

Example:

In the **United States**, the obligation to make a reasonable accommodation is to be found in the Americans with Disabilities Act, 1990. Reasonable accommodation is understood to mean any change in the work environment or in the way a job is performed that enables a person with disability to enjoy equal employment opportunities. There are three categories of "reasonable accommodations": changes to a job application process, changes to the work environment or the way a job is usually done, and changes that enable an employee with a disability to enjoy equal benefits and privileges of employment, such as access to training.

Other countries, including Australia, New Zealand and South Africa have legal provisions stipulating that the failure to provide a reasonable accommodation constitutes a form of discrimination.

The Ethiopian legislation for the Right to Employment for Persons with Disability of 2008 defines "a person with disability" *as an individual whose equal employment opportunity is reduced as a result of his physical, mental or sensory impairments in relation with social, economic and cultural discrimination*.

Shifting the burden of proof

Under some legislation, a person who considers his or herself wronged because of discrimination has to produce evidence to prove that this has occurred. In some cases it may be possible to collect this necessary evidence without difficulty – such as in the case of recruitment, where advertisements for job vacancies and recruitment materials are easily available. In other cases, involving an action which is suspected rather than established, it may prove impossible to gather credible evidence. This is true, for example, when the information and records that might constitute evidence are held by the person against whom the claim is made (for example, by an employer in an equal pay case). This person may be able to win the case by saying nothing and simply challenging the evidence produced. In practice, this requirement has been recognized as one of the greatest obstacles to obtaining a fair and just result.

To deal with this major procedural problem, many countries have shifted the burden of proof away from the person bringing the claim to court. In many jurisdictions it now suffices for such a person to establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination. After this, it is for the person who allegedly discriminated to prove that there has been no discrimination. Such a shift of the burden of proof does justice to the fact that it is usually very difficult, if not impossible, for a person to prove that he or she have been subjected to discrimination. A reversal of the burden of proof makes non-discrimination law effective.

In 2003, all fifteen countries of the European Union (EU) were required to introduce laws or amendments to their laws or other legal instruments to allow for a reversal of the burden of proof in employment discrimination cases involving direct or indirect discrimination. All new Member States will also have to follow suit. This follows from a European Union law (a directive) adopted by the Council of Ministers in the year 2000. The Directive stipulates that disability discrimination cases are subject to a reversal of the burden of proof in favour of the employee or job applicant with a disability from 2003 onwards.

Similarly, Employment of Persons with Disability Act of Ethiopia (2008) has incorporated this principle. It reads as follows:

Article 7(1)

Any person with disability who alleges that discrimination on ground of disability existed with respect to recruitment, promotion, placement, transfer or other conditions of employment may institute a suit to the competent court on the issue without the requirement of the burden of proof.

Article 7(2)

The defendant to a suit instituted pursuant to sub-Article (1) of this article shall be responsible to prove that there was no act of discrimination thereof.

Problem for discussion:

Some tend to argue that disability lies on the society where the disabled persons is a member rather than the on the disabled individual. To substantiate this position examples may be offered. For instance, let us think of two visually impaired individuals residing into two different locations of the globe (Germany and Ethiopia). The one in Germany is more serviceable, mobile and productive than the one in Ethiopia. This implies the German society has *come up with measures which significantly reduced the adverse impact of disability while the Ethiopian society failed in such effort. Do you agree? Why? Why not?*

4.6. Foreign Employees

Traditionally, international trade was characterized by trading raw materials and/or finished products. In a sense it was trade in goods. With the integration of countries into the global economy; and the progressive elimination and reduction of tariff and non-tariff barriers, goods have been crossing national borders at relative ease. Through passage of time, however, not only goods but capital, services and people began to cross national borders based on predetermined procedures. Nevertheless, movement of persons across national borders was not as relaxed as goods. Particularly, when the intention of crossing national border is to look for employment at country of destination, there are multiple restrictions. As a result, labour, which is a provision of service, needs a certain degree of regulation when it avails itself outside of its country of origin.

With respect to trade in goods, the Global South (developing countries) exports mainly raw materials (primary goods) at cheap price to the markets of the Global North (developed countries), while the latter ships capital goods (finished and expensive products) to the markets of the South. The international division of labour with respect to trade in goods seems to have its reflection on trade in services, too. From the perspective of service sector, unskilled, more often than not, illegally imported and cheap labour is being exported from South to North; whereas the North lawfully exports professional/skilled and expensive labour to the labour markets of the South. Informally speaking, labour exported from South to North is assigned in the so called "3d jobs" (i.e., Dangerous, Demanding and Degrading) in which the nationals of the host state are unwilling to engage in. Conversely, labour exported from North into the South will be employed in white collar jobs that the nationals of the host state are not trained to engage in.

It appears that such a reality seems to remain intact for some years to come, if not decades.

Generally, every country has an express or implied policy on how non-nationals are to avail themselves to its domestic labour market. Almost all countries accord priority in employment to its own nationals. It is only through bilateral or multilateral agreements with other sovereign states that such preferential treatment to own nationals may be restricted. A case in point is the European Union arrangement where nationals of members of the Union have equal opportunity for employment within the EU territory. This was made possible by a treaty signed by EU members to that effect. Bilateral treaties could have an equivalent effect as well.

The regulatory framework on how non-Ethiopians are to enter into the Ethiopian labour market has been in place since the 1960s. Pursuant to Article 15(a) of the Order to provide for the establishment of a public employment administration (Order No.26/1962), it was stated that "*no foreign national may be employed within Ethiopia in any private industrial, commercial, agricultural or other employment activity unless he is in a possession of a valid work permit issued by the Public Employment Administration*". Moreover, sub-Article(c) of the same article provided that "*work permits shall be initially issued by the Public Employment Administration for a period not to exceed three years and may thereafter be renewed for an indefinite number of periods not to exceed three years.*"

For the effective implementation of the Order, the Ministry of National Community Development and Social Affairs was entrusted with the power to issue regulations. Consequently, the Minister issued Regulation No. 295/1964 in which "conditions for issuance of work permits generally" and "automatic issuance of work permit" would be undertaken.

Generally, work permits were to be issued only where the Public Employment Administration determined that "the proposed employment would contribute essentially to the promotion and/or strengthening of the Ethiopian economy or to some other important aspect of national development; and that an Ethiopian national with the necessary skills to meet the requirements of the proposed employment was not available therefor" (Article 7 of the Regulation).

In exceptional circumstances, there was a possibility where work permit would be issued automatically upon request (Article 6 of the Regulation). Under this article the Public Employment Administration was obligated to issue a work permit automatically when request was made by any Ministry or Department of the Government with respect to any person to be employed:

- in any private enterprise pursuant to a Government agreement;
- pursuant to any international treaty or convention;
- by any enterprise operated, controlled and administered, whether directly or indirectly, by the Government;
- by any non-profit seeking organization, whether public or private, the main purpose of which is the promotion of culture, education, health, happiness and prosperity, or any similar charitable purpose; or
- on the basis of an investment project approved by the Investment Committee established by Article 4 of the Investment Decree, 1963 (No.51 of 1963).

The application for a work permit was to be submitted to the Public Employment Administration by every employer who sought to employ a foreign national (Article 9). Nevertheless, the Work Permit was to be issued directly to the foreign national in respect of whom the application was made (Article 13(3)). Application for renewal of a work permit was to be submitted by the employer not later than three months prior to the date of expiration thereof (Article 14(1)). The decision by the Public Employment Administration refusing or revoking a work permit was appealable to the Minster within two weeks after such determination has been communicated and the Minister was required to hand down its decision within one month of the date of appeal and the Minister's decision was final (Article 16).

Conversely, the Public Employment Administration was empowered, in appropriate cases, "*to grant work permit on the undertaking by the employer to ensure that special programme would be undertaken to train Ethiopian nationals in the skills required in the enterprise and thus take maximum advantage of the potential represented by the Ethiopian labour supply*" (Article 8).

In a similar vein with that of Proclamation No.232/1996, Proclamation No.64/1975 maintained the possession of a work permit as a pre-condition for a foreign national to be employed in Ethiopia (Article 20(1)). The obligation to arrange a special programme with a view to ensuring the transfer of skill of the foreigner to an Ethiopian within a limited period was imposed as a duty on the undertaking which employed the foreigner (Article 23(1)).

Presently, the Ethiopian legislature set out the conditions on the basis of which foreigners may be employed in Ethiopia (Article 176 Labour Proclamation and Article 15 and 22(2) FCSP). Consistent with the general practice of states worldwide, Ethiopian law seems to give priority of employment to its nationals. However, Ethiopia has had a bilateral agreement with Djibouti to treat each other based on national treatment, in the sense that nationals of both countries shall have equal opportunity in the labour market of both countries. Other than this, it is when a particular type of service is not available in the domestic market that a foreigner may be employed. Moreover, employment of a foreign national is temporary and for a limited duration (three years) until the particular know-how of the foreigner is transferred to an Ethiopian national. In fact, one of the obligations of the foreign national would be to transfer his or her knowledge to an Ethiopian national.

The relevant provision of the Labour Proclamation provides as follows:

Article 176: Employment of foreign nationals

1) *Any foreigner may only be employed in any type of work in Ethiopia where he possesses a work permit given to him by the Ministry.*

2) *A work permit shall be given for an employment in a specific type of work for three years and shall be renewed every year; provided, however, that the Ministry may vary the three years limit as required.*
3) *Where the Ministry ascertains that the foreigner is not required for the work, the work permit may be cancelled.*
4) *The Ministry may, in accordance with the law, charge service fees for the issuance, renewal or replacement of work permit.*

Ethiopian nationals do not need residence permit to reside anywhere in Ethiopia; nor do they need work permit to enter into the Ethiopian labour market. The Federal Constitution states that "*every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory*" (Article 41(1). This is not the case as regards to foreigners. For a foreigner to lawfully reside and be employed in Ethiopia, they need to possess double permits. These permits are: the permit to reside; and the permit to work. The power to issue Residence Permit is vested on the Security, Immigration and Refugee Affairs Authority; while the Work Permit is to be issued by the Ministry of Labour and Social Affairs (Article 171(1)(e) Labour Proclamation). The Minister has already issued a directive to this effect. The Ministry is empowered to issue a work permit. Nevertheless, in order to facilitate investment and to offer "one stop shop" service, an aspect of the work permit issuing power has been delegated to the Investment Commission. Based on the Directive, foreigners of Ethiopian origin are exempted from such requirements when entering into the domestic labour market. Work permit is to be issued for a specific job; and for a maximum of three years subject to renewal. The duty of the employer to assign an Ethiopian substitute; and the foreigner's duty to transfer their knowledge and skill to an Ethiopian is an aspect of the commitment.

Under the Civil Service employment regime, there is an express provision which stipulates that "a person who is not an Ethiopian national may not be eligible to be a civil servant" (Article 15) because civil service is permanent employment position while foreigners can only be employed temporarily. Towards this end, Article 21 stipulates as follows:

2) A government institution may appoint a foreign national on temporary bases, where it is proved that it is impossible to fill a vacant position that requires high level professional by an Ethiopian through promotion, transfer or recruitment.

3) The appointment of temporary employee of an Ethiopian or a foreign national, their rights and obligations as well as the condition of work applicable to them shall be prescribed by regulation to be issued by the Council of Ministers.

Nevertheless, the same instrument seems to provide exceptions to the general rule with respect to foreigners of Ethiopian origin (Article 15 Federal Civil Servants' Proclamation). It is only in employment positions such as defence, security and foreign affairs that foreigners of Ethiopian origin may not engage. In all other employment positions they can compete equally with Ethiopian nationals.

Be that as it may, the next chapter will examine the minimum protections accorded to employees in the workplace. These are entitlements designated as "floor of rights" prohibiting employers from according less favourable treatment to their employees in employment relations. The next chapter is where the human face of employment relations is more visible. In fact, as we indicated under the introductory chapter of this text, the earliest measure of state intervention in employment affairs was limited to these issues.

Chapter V

Legally Stipulated Minimum Working Conditions (Labour Standards)

5.1. General

The preceding chapters have provided insights into the formation and termination of employment relations and it was pointed out then and there that employment relation is basically a contractual relation. Nevertheless, its contractual nature is not the whole truth; it is rather part of the truth. Unlike most contractual engagements where almost all the terms of the contract are to be determined by the contracting parties, employment relations has benchmarks (the so called minimum working conditions) below which the terms of the employment contract may not stipulate. Thus, a contract of employment is expected to "meet or exceed" such stipulations, otherwise the terms of the contract, which fall below the legal threshold shall be replaced by the stipulations of the law.

The rationale behind stipulating minimum working conditions is predominantly attributed to what economists call *market failure*. As employer and employee are not on equal bargaining strength, leaving them alone to define their terms of contract would not bring about an equitable outcome. Obviously the one with strong bargaining power would manage to dictate its own terms. Hence, the structural imbalance needs to be rectified. During the earlier periods of industrial development, since the market (contract) did not work well in this respect, manifestations of failure such as injustice, employment insecurity and instability of industrial peace became problematic. Thus, freedom of contract failed in this regard. State intervention has been warranted in situations of market failure and this seems why many governments have decided to intervene, through law, and regulate minimum working conditions.

Most provisions of minimum labour conditions are related, but not limited, to prescribing minimum wage; employment security (stability); limiting daily/weekly working hours; provision of paid leaves; maintenance of safe and healthy working condition and compensation for employment injury. This is one of the areas where the social (human) dimension of employment law is to be observed. At times labour jurisprudence has termed these minimum standards as "social provisions". Let us identify some of them; and examine how they are addressed in the Ethiopian context.

5.2. Statutory Minimum Wage

Since employment relation is a commitment to render service in return for wages, determination of wage is an important definitional element of the relationship. For the purpose of the law, "wage" means "*the regular payment to which a worker is entitled in return for the performance of the work that he performs under a contract of employment"* (Article 53(1). Labour history has recorded that leaving wage determination to the contracting parties subjected employees to bare minimum pay and harsh exploitation. As a result, this was one of the areas in which state intervention was proposed. However, it was argued that such intervention was unwarranted due to the fact that it would be an interference in economic affairs by the state. Owing to these and other related issues there are arguments in favour and against the introduction of statutory minimum wage in Ethiopia. It is argued that some of the most usual propositions are the following:

Extracted from "Introducing Statutory Minimum Wage into the Ethiopian Private Sector" by Gebre-amlak Yaebiyo *Ethiopian Civil and Commercial Law Series*; Vol. IX (2019) footnote omitted.

a) Arguments in favour of statutory minimum wage

Although the institutional set up may vary from country to country, minimum wages exist in more than 90 percent of the ILO member states. Given the ILO and the international community are increasingly moving for universalization of core labour standards where minimum wages can be one of those standards, Ethiopia cannot be an exception.

First, Ethiopia has been extending incentive schemes to investors. Because of this, the writer believes that workers' rights should not be left for negotiation. In fact, for those who cannot individually assert their rights, they can make use of collective agreements and negotiations of industrial organizations or through strikes. But still, this mechanism is not free of problems. Collective agreements usually apply on a firm basis and hence, they do not cover workers from outside.

Second, though freedom of association is one of the core rights for all workers and opens more room for social dialogue and collective bargaining, a study shows that the role and number of workers' associations are declining over time. The available workers' associations exist primarily in public and recently privatized enterprises, with few in private manufacturing companies. As it is clear to everyone, there are massive unskilled and unutilized skilled labour forces as the youth who graduated from universities, technical and vocational training centres are unable to get jobs. These social problems combined will deprive workers of their capacity to negotiate with the employer if wages were to be determined only by individual contracts.

It should be noted that abundant supply of labour force means easy substitutability of labour as someone will come and fill the vacancy. Then, employment contracts become "take it or leave it" options for the unskilled worker. A personal observation of the wages of labourers on the part of the writer reveals that there exists wage discrimination in the construction sector for daily labourers between men and women. They earn 150 and 70 Birr, respectively for jobs of equal value.

Third, advocates of statutory minimum wage also ignited a debate into promoting macroeconomic productivity by disciplining the pseudo-markets. Such markets are characterized as being disguised and inefficient ones which create large profit margins owing to extreme exploitation. Regulated minimum wage forces these firms either to raise their level of productivity (i.e. High Road Competition) or to exit therefrom, leaving their former share of the market to more efficient firms. Either possibility can increase productivity in formerly inefficient firms or a shift of production to the already more productive firms. The exponents of minimum wages further argue that it helps marginal workers by forcing their inefficient employers either to rationalize or to be driven out of business by more efficient competitors paying higher wages. Given the aforementioned, Mizanie had to say that the Ethiopian labour proclamation has an apparent weakness for its failure to fix the minimum wages as a minimum labour condition. In his view, in a country where urban unemployment is very high, leaving minimum wages to be fixed by the market does not make sense.

Fourth, proponents of minimum wages argue that it has a direct impact on poverty reduction as long as workers in the formal economy earning minimum wages and their families belong to the poorest groups of the population. The point is, in an economy characterized by a chronic tendency to create substandard working conditions, a measure designed to ensure minimum standards remains useful. This argument would be equally relevant to the Ethiopian economy where a good number of the population lives below the poverty line. In practical terms, investors might not be committed to treat and pay fair wages to employees. Despite this, the country has been time and again advertising itself as having industrious and trainable labour force to improve the leverage for attracting foreign Direct Investment (FDI). Hailemariam Desalegn, ex-prime minister of Ethiopia, claimed that Ethiopia outsmarted the rest of Africa in attracting foreign firms by keeping labour costs low. In the course of making his official statements, the ex-Prime Minister undermined the extent of legally recognized minimum wages requisite for raising the economic condition of working people.

Fifth, the Minimum Wage Introduction Benefit Recommendation No.135 provides that minimum wage fixing should constitute one element in a policy designed to overcome poverty and to ensure the satisfaction of the needs of all workers and their families. In that case, the fundamental purpose of minimum wage should be to give wage earners necessary social protection as regards minimum permissible levels of wages. Regrettably, empirical work shows the low nature of wages in Ethiopia. However, investors contend that the main reason for this meagre amount of wages is attributable to the lack of efficiency and productivity of Ethiopian employees.

Sixth, in the light of the GTP II, Ethiopia remains committed to sustaining inclusive and pro-poor development strategy over the coming years to further address the poverty and employment generation challenges facing the country. At the same time, it also states that greater attention will be given to attracting high quality and high impact foreign direct investment in the future. This, in turn, indicates the resilience of the country towards better quality investment. In this regard, Mizanie seems to be interested in introducing minimum wages by criticizing that the Ethiopian government is reluctant to introduce minimum wages for fear that such measure may scare away investors. He offered no alternative arguments detailing his argument, though. Unfortunately, many workers see overtime work as an opportunity as it comes with additional income. The employer may reduce the normal wages of the employee to save money to secure extra hours of work from the latter. Thus, the working poor would be susceptible to exploitative practices.

Thankfully, the Head of Ethiopia's state-run investment body declared the government's desire to settle minimum wage issues among others, to protect the interests of workers. Similarly, the Commissioner of the Ethiopian Investment Commission, while speaking to a private channel, Business Safari TV during the European Union-Ethiopia Business Forum that took place between 14-15 May 2019 in Brussels (Belgium) agreed with this goal. He also stressed the importance of balancing the competitive labour force with a decent standard of living for Ethiopian workers. With this and many other pressing concerns, the labour law has been re-enacted in 2019. This labour proclamation contemplates the establishment of a Wage Board which will be in charge of periodically revising minimum wages based on studies (Article 55(2)).

Now, to be fair, let us pay a modest amount of attention to the arguments against the stipulation of minimum wages as well.

b) Arguments against introduction of minimum wage

First, stipulating minimum wages reduces employment opportunities for less skilled workers. This argument comes from the neoclassical economic theorists. According to this theory, imposing wage floor leads to job destruction and that mandating a price floor above the equilibrium wage would lead to an excess supply of workers. In consequence, more people would be willing to work at the higher rate in a limited and very selective market, but an employer could only employ some people at higher wages and would likely choose the best ones. They argue that there is an inverse relationship between stipulating minimum wages and employment opportunity. The effect of minimum wage policy on employment is mixed, as the results depend on employers' compliance and numerous other factors. Again most critics of neoclassical theory tend to argue that even though employment losses are possible, they are by no means certain.

Many economists agree that raising the minimum wage will lead to at least some increased unemployment among low wage workers. Because they do not believe that the imposition of a minimum wage increases productivity, opponents of the minimum wage foresee layoffs as employers' only option for offsetting higher wage costs. They note that as an anti-poverty measure, the statutory minimum wages are inefficiently over-inclusive and under-inclusive. It may be argued that very high minimum wages would be counterproductive if the worker cannot find any employment at all.

In the Ethiopian public sector, the salary scale applicable to civil servants is determined from time to time by considering the Government's financial capability, the general living conditions of the society, price levels and other relevant factors. The Civil Servants Law also states that all positions of equal value shall have an equal salary. The Federal Civil Service Agency, while revising the salary scale of federal civil servants in 2015, has set a minimum wage the lowest level to Birr 860.00. In this regard, Mehari argues that before setting out a minimum wage for the private sector, we need to revise the public sector's minimum wages as most private employers pay higher than the public service.

Thus, the entire wage system in the civil service system needs to be revamped beforehand. The author argues that failure to do so would obliterate the bargaining margin of professional labourers otherwise.

Second, as minimum wages no longer guarantee a "living wage," increments are necessary in order to restore a full measure of dignity to all minimum wage earners. Opponents respond by offering similarly uncontested evidence, the vast majority of the poor do not earn the minimum wage, while the vast majority of minimum wage workers are not poor, they contend that lack of employment rather than low wages is the primary cause of poverty. As a labour market instrument, a "minimum wage" has an important role to play in improving the living standards of wage earners and their families; it is also an important indicator of economic progress and social justice. Seen from the Ethiopian perspective, there are no clear research findings so far, but the writer argues that the realistic characterization would not have been different from the above.

Third, opponents also tend to argue that low labour cost does not mean profitability. Employers and their associations are mindful that cheap labour is not a guarantee for competitiveness and profitability. A profit-maximizing employer may choose to pay wages above market wages to incentivize good workers to stay at the firm and maximize their productivity levels to yield better profit margins for their employers. This is known as the efficiency wage, and it is almost always above a person's reservation wage, above the statutory minimum wages, and above the competitive wages. In Ethiopia, most workers are paid dramatically low wages for a reason mainly having to do with their inefficiency.

Furthermore, the 1944 Philadelphia Declaration of the ILO enunciates that labour is not a commodity. Treating labour as such would undermine its value, be governed by the economic forces of demand and supply just as any other generic marketable good is. However, treating it as a non-commodity would necessitate government intervention to protect labourer's rights for the work of a labourer ties to his dignity and is an expression of himself.

Thus, one can see a valid reason to conclude that labour should be incentivized at various stages of production and supply chains to avoid the materialization of the saying "*they pretend to pay us; and we pretend to work*". This would be a legitimate means to avoid a disingenuous, hypocritical and patronizing treatment of workers by the employers. In practice, a developing body of literature also shows that in today's world, companies have begun to worry about their goodwill as a result of which they are practically seen to have entered into several voluntary undertakings in the form of corporate codes of conduct and corporate social responsibility.

It must be noted that the present labour law is applicable on all employers in the sense that even on those who employee one employee (Article 2(1)). As the economic capacity of small employers is low, not all private employers would have the financial capability to hire labourers at the prescribed legal minimum. Personal communication with Mehari Redae, a prominent employment law scholar in Ethiopia, reveals that most of the workers in Ethiopia are affiliated with individual employers. The stipulation of minimum wages without fixing the minimum number of workers for an enterprise to be treated as an employer could have a negative impact on those small businesses.

Fourth, many countries that set minimum wages extend economic assistance to those who cannot find employment by using their unemployment schemes. For them, minimum wages are regarded as a policy component of a welfare state. What is more, social protection coverage and benefits continue to expand, as reflected in the ground breaking ILO Recommendation concerning National Floors of Social Protection (No. 202), adopted in 2021. However, countries such as Ethiopia have not been able to set up such unemployment schemes so far. Today, almost all countries in the world have a social security system. There is growing evidence that labour market regulations impose employment costs beyond the minimum wages. Effective enforcement requires expanding the powers of the responsible agencies, which includes allocating resources for labour inspectors to audit employers and impose penalties to enforce the minimum wage law, and in many cases, their powers are outlined in the legislation.

In some countries, the minimum wage policy affects non-wages benefits (social insurance, pensions) which affect a wider group of workers and hurts overall worker welfare. Thus, a minimum wage increase might hurt not only low-skilled and low wage workers but also more highly skilled workers employed on formal contracts. From this, Ethiopia may not at this point in time easily afford to bear these other labour costs. Besides, minimum wage increases may pass on to consumer higher prices, thus resulting in higher inflation and trade-offs. This would be the case in Ethiopia as there is a critical problem of market failure and weak end-user regulation in respect of the private sector.

Finally, international evidence on the impact of minimum wages on poverty is mixed. It indicates that an increase in the minimum wage can help a subset of poor families escape poverty, but it can also push many non-poor families into poverty since some workers in non-poor families may lose their jobs in the wake of a minimum wage increase.

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Problem for discussion:

Herein above, we enumerated the pros and cons for the introduction of statutory minimum wage. Can you identify additional reasons, if any, in favour or against each of the arguments? Which position do you think is more feasible given Ethiopian reality? Regulation or deregulation? Why/ why not?

In 1928, the ILO adopted the Minimum Wage Fixing Machinery Convention No.26, but Ethiopia is not a signatory to this instrument. Many countries have prescribed minimum hourly/monthly wages to employees working within their territory. Others leave this issue to the contracting parties. The Ethiopian employment regime seems to adopt a hybrid of the two approaches. The Ethiopian civil service regime has prescribed a minimum monthly wage for those working in the civil service; while the labour law regime has left the issue to the contracting parties themselves.

The rational for this hybrid approach from the side of the Ethiopian government may be explained by its economic philosophy. It is believed that in a free market economy, the price of goods and services is to be fixed by taking into account the supply and the demand side of the item in a form of bargain. This could be the main reason why the government opted for deregulation with regard to the private sector. As regards to the civil service, however, since the government is the sole employer, it can come up with a rule binding upon itself. This can also serve as an exemplary wage for the private sector while negotiating on wage and other related benefits.

The problem associated with such an approach is the invalidity of considering labour as a commodity whose price is to be determined against supply and demand. The ILO Conference under the annex for its Constitution reaffirms that "labour is not a commodity" (Annex-I (a)). Furthermore, countries like the US who claim to be the most faithful exponents of free market economy see nothing wrong in determining minimum hourly wage by law. In light of these trends and examples, the position of the Ethiopian government seems to deserve reconsideration unless there are other compelling policy reasons.

Problem for discussion:

Assuming that the Ethiopian government is convinced towards prescribing minimum wage, how should it go about it?

a) *Stipulating minimum wage for the lowest possible wage and leave the remaining to market forces or stipulating minimum wage for each possible job classifications?*

b) *Stipulating minimum wage at country level or determining it by taking into account the living standard of the different regions; why?*

c) *Stipulating a minimum wage that would be applied on all sectors of the economy or determining minimum wage for each sector of the economy?*

5.3. Employment Security

Traditionally, in contract of employment, both parties were to remain engaged so long as both of them are willing to remain engaged. If either of the parties did not want to continue with the engagement, either of them was entitled to put an end to it. Compelling the employee to remain employed against his or her will was tantamount to legalising slavery or forced labour. Likewise, it was held that equity would not require the imposition of unwanted service over the employer. This was the period of "employment at will."

However, such a laissez-faire approach to employment relation subjected employees to employment insecurity in which they were unsure whether the employment of today would continue for tomorrow. Hence, with passage of time, the concept of no termination of a contract of employment without "justifying reason" was introduced into many national labour legislations. This minimum working condition was implemented to protect the employee from arbitrary dismissal. It should be noted that employment, for a worker, is not only a source of lively-hood, but also an engagement for career development and an expression of human dignity.

The ILO has adopted "Termination of Employment Convention No.158" which stipulates: *the employment of a worker shall not be terminated unless there is valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service" (Art.4).* Furthermore, it has been stated that the scope of application of the Convention is *"… to all branches of economic activity and to all employed persons" (Art.2 (1)).*

The need to base termination of employment on a valid reason is the cornerstone of the Convention's provisions. The adoption of this principle removes the possibility for the employer to unilaterally end an employment relationship of indeterminate duration by means of a period of notice or compensation in lieu thereof. It should be noted here that the question of termination of employment for a valid reason is distinct from that of a worker's right to a period of notice and a severance allowance. The Convention requires that there be a valid reason for termination of employment, whether it is terminated following a period of notice or not. In other words, giving the worker a period of notice does not exempt the employer from stating its reasons for terminating the employment. National laws and practices that only require a valid reason for termination of employment where there is no period of notice (this is generally in the case of serious misconduct) and that do not require justification for termination of employment when notice has been given are not in accordance with the Convention.

Ethiopia ratified this Convention in 1991 and hence it is an integral part of Ethiopian law. Consequently, current Ethiopian laws, in compliance with the country's ILO commitment, prohibits unjustified dismissal through different modalities. The first step is laying down the lawful grounds of termination exhaustively and categorizing terminations outside of these grounds as unlawful (Articles 24-32). The second step is spelling out a procedural mechanism through which the legality of terminations would be examined by a neutral tribunal (Article 139). The third tool is stipulating a short probation period after the expiry of which presumption of indefiniteness would operate (Article 11). The fourth step is prescribing a presumption in favour of a contract of employment for indefinite period which in effect means employment security is presumed (Article 9). The fifth step would be prescribing that amalgamation, division and transfer of ownership of an enterprise would not have the result of terminating an employment contract (Article 23). The sixth tool towards ensuring employment security goes towards imposition of fine for undertaking unlawful termination (Article 14(1)(c) cum 185(2)(c). The seventh step moves towards empowering a neutral organ to hold the employer liable for reinstatement or compensation due to unlawful terminations (Article 43). Generally, by making cost of firing expensive, the law attempts to maintain employment security.

It must be underlined, however, that the law does not grant employment security to all employees. These protections are only for those employees who are competent, productive and disciplined. A lack of competence, lack of productivity, or serious misbehaviour attributable to the employee, have all been categorized as lawful grounds for termination of employment.

Similar grounds of termination of employment under the civil service have been put in place. Other than these, any termination is unlawful and the civil servant would be entitled to reinstatement by the order of an administrative tribunal.

5.4. Normal Working Hours and Leaves

By normal working hours, we mean those periods in a day or in a week when the employee regularly renders service to the benefit of his/her employer. Historically, all terms of the employment contract including determination of working hour was left to the parties' bargain. Labour history has documented that there were times when an attempt to limit working hours by law was being held an interference of the state into private contracts. For instance, in1905, in *Lochner v. New York* case, the US Supreme Court struck down a New York law limiting work in bakeries to ten hours a day on the ground that it interfered with the freedom of contract between employers and employees. Through passage of time, however, it becomes a general practice to fix maximum hours of work by law and/or by collective agreement. In fact, limitation of maximum working hours became one of the most important concerns of labour laws of various jurisdictions. In 1919, the ILO came up with a convention which embodied eight hours/day as the normal working hours.

In Ethiopia, the Civil Code had left determination of working hours to private ordering. A provision limiting working hours for the first time was introduced, in 1964, through Regulation No.302/1964. It was then stated that normal working hours shall be eight hours in a day and forty-eight hours in a week. Since then subsequent legislations have maintained the eight hours and forty-eight hours in a week limit.

Currently, regular working hours for employees under the civil service and labour have slight differences. Under the civil service, it has been stipulated that "regular working hours of civil servants shall be determined on the basis of the conditions of their work and shall not exceed 39 hours a week" (Article 32). Under the Labour Proclamation, however, "normal hours of work shall not exceed eight hours a day or forty-eight hours a week" (Article 61 (1).

In order to ensure the effective implementation of the limitation of working hours, the Ethiopian regulatory framework has further introduced additional legislative tools. First of all, it declared that overtime work is, in principle, prohibited. It is only in cases where exceptional circumstances expressly stated by law have occurred that overtime work is allowed (Articles 66 and 67 Labour Proclamation; Article 34 Federal Civil Servants' Proclamation). Second, even if conditions for over-time work are met, the rate of payment for overtime work is being made expensive partly to discourage the employer from requiring its employees for over-time work (Article 68 Labour Proclamation). Third, even if the grounds for overtime work are met, there is limit of hours per day or week an employee can work in the form of overtime. These are four hours in a day or twelve hours in a week (Article 67(2); Labour Proclamation). Fourth, an employer who "causes workers to work beyond the maximum working hours set forth by this proclamation or contravenes in any manner the provisions relating to working hours is liable to fine" (Article 184(1)(a) Labour Proclamation).

Moreover, the laws in both employment regimes grant a certain amount of paid leaves in the form of annual leave. It is believed that the purpose of annual leave is to enable an employee to rest without losing wages and to resume work with renewed strength thereafter. When one looks at the historical development of annual leave in Ethiopia, it was first introduced through the Civil Code of 1960. It was then 10 consecutive days per year for a service of more than one year up to five years; 15 days for a service more than five and up to fifteen years; 20 days for a service more than fifteen years (Article 2562). Four years later, Regulation No. 302 of 1964 on minimum labour standards came up with more generous amount of annual leave. It provided as follows:

- 14 consecutive days for a service of at least one year up to three;
- 16 consecutive days for a service more than three years and less than five;

- 20 consecutive days for more than five years and less than ten;
- 25 consecutive days for more than ten years of service. (Art. 5 of the Regulation)

Then came Labour Proclamation No.64/1975, which stipulated 14 working days of annual leave for the first year of service and an additional one working day for every additional year of service. Unlike the two preceding legal instruments, this proclamation employed the phrase "…*working days*" instead of "*consecutive days*". (*Please note that there is a difference between working days and consecutive days*).

Both the Labour Proclamation and the Federal Civil Servants Proclamation which are currently in force have maintained the terminology of the recent instrument (i.e., working days). Actually, the civil service grants 20 working days for one year of service and it will be increased by one additional working day for every additional year of service the maximum ceiling being 30 working days. The current labour proclamation, on its part, provides 16 working days as an initial leave for the first year of service; and one additional working day for two additional years of service with no cap.

Nevertheless, it is important to note that the annual leave under the civil service is the minimum and at the same time the maximum; while that of the labour proclamation is only the minimum as it can be increased through individual contract of employment, work rule or collective agreement. In both cases, annual leave should be utilized annually since it cannot be postponed beyond two budget years (*Ethiopian Insurance Corporation v. Getahun Hailu*; File No.14057: Vol.3 and *Ethiopian Postal Service v. Ali Mohammed*; File No. 27959: Vol.6).

Sick leave, maternity leave and public holidays are items of minimum working conditions as well. Under the Civil Code, "the employee was entitled to one month sick leave which was half paid where the employee had worked one or more years to the employer" (Article 2542). It was with the coming into force of Proc. No.64/75 that employees received prolonged sick leave. Sick leave on the basis of that proclamation was six months in duration out of which the first one month was with full wage; the next two months with half pay and the last three months with no wage payment.

The present labour proclamation reproduced the stipulations of the previous labour proclamation with respect to sick leave (Articles 85 and 86). The civil service regime appears to be more generous in this regard. It grants eight months sick leave out of which the six months are fully paid; the next two months are with half pay. Maternity leave, as elaborated under Chapter-4, has been prolonged over a period of time, and currently both under the civil service and the Labour Proclamation it has been one month prenatal and three months post-natal with full pay. Paternity leave has been recently introduced as well.

The concept of paid public holiday was first introduced by Regulation No. 302 of 1964 into the private sector employment. At the time, it was not all public holidays, which were paid. An employee who was on the service of an employer for at least two months was entitled to six paid holidays out of the fourteen public holidays in a year. The six holidays in question were to be agreed between the employer and the employee individually; or where such existed through a collective agreement (Article 6).

During the time of the Emperor Haileselassie, other than the public holidays of the Victory of Adwa (Commemoration) (March 01) and Victory day (May 05), public holidays were predominantly associated with his birthday, date of his Coronation, and the religious holidays of the Ethiopian Orthodox Church. That was a reflection of the then existing Imperial rule and authority on the one hand; and religious favouritism towards the Orthodox Church on the other. Indeed, it was constitutionally declared that the Ethiopian Orthodox Church was the religion of the State. The relevant provision of the Revised Constitution reads as follows:

> *The Ethiopian Orthodox Church, founded in the fourth century, on the doctrines of St. Mark, is the established church of the Empire and is, as such, supported by the State. The Emperor shall always profess the Ethiopian Orthodox Faith. The name of the Emperor shall be mentioned in all religious services* (Article 126).

With the assumption of political power by the military regime, a paradigm shift in the designation of public holidays was observed. Ever since that period, public holidays have had national, international or religious features. Among the national holidays we find; Victory of Adwa (Commemoration) (March 01) and Victory day (May 05). The international one is May Day (01) (International Labour Day). The religious holidays tried to address the religious interests of the two dominant religions in Ethiopia (i.e. Christianity and Islam) (for the list of public holidays, please *refer Public Holidays Proclamation No.16/1975(as amended).* All of them have been paid leaves. This position has been carried over to the current legal instruments both in the civil service and labour law.

5.5. Safe and Healthy Working Conditions

It is well known that industrial activities are full of risks. Risks could be either to life, health, property, the environment, or to surrounding communities Risk may express itself in the form of accident, occupational disease or environmental pollution. More often than not, employees are the most vulnerable group of society to these risks.

Traditionally, whenever an employee sustained an employment injury, it was left to the individual worker. Some of the justifications for such an approach were that the wage which was being paid by the employer included payment for possible risks; and the principle of "voluntary assumption of risk" in which the employee assumes the risk of being harmed when they decided to work on that circumstance. Both of these rationales served towards justifying "let the damage rest where it falls" and hence the employee was essentially held as his own insurer.

In connection with this idea, a certain American writer stated the following. "Early common law duties of master to provide safe workplace became effectively eviscerated by the mid-nineteenth century by three common law defences available to employers. The three legal doctrines, *contributory negligence*, voluntary *assumption of risk*, and *fellow servant rule*, formed the "unholy trinity" of employer common law defences. First, workers whose own negligence had contributed to their injuries were barred from recovery under the contributory negligence rule. Second, a worker was deemed to have assumed the risk of accidents by accepting employment. By accepting employment without specific reservation of protection against accidents, workers were deemed to have bargained away their rights to hold the employer responsible for risks known to them or normally incident to that kind of employment.

Unlike contributory negligence and assumption of risk, which were general common law defences that also could be applied in the workplace, the third defence, the fellow servant rule, was exclusively a rule of the workplace. Based on this, the assumption goes, by accepting employment, the worker could be deemed to have assumed the risk of negligence of his fellow servants. As a last resort, the injured worker's only remedy was to bring an action against co-workers, who most likely were unable to pay or wholly judgment-proof.

Thus, the nineteenth century common law rules left the burden of injuries on the working people who suffered them, regardless of whether they had the ability to avoid the accident, change the degree of danger, or even object the dangerous condition. The general employer's duty to provide a safe workplace came to be weakened by three ever more broadly interpreted exceptions and by the legal fiction that the working person was deemed to have assumed the risk of his or her bargaining for the job."

With the passage of time, however, this position gave way to the principle of transfer (passing off) of risk. Many jurisdictions adopted a presumption of employer's liability for employment injury cases. The reason for such a paradigm shift has been more of economic rationale and equity. In economic terms, when an employer is held liable to cover the costs of employment injury, it will transfer such cost into society by thinly distributing this expenditure in the price of the product or services, which the employer made available to the market. Hence an employer is in a better position than the employee to spread the cost to the consumers. Furthermore, as the employee sustained injury while at the disposal and service of the employer, it is economically justified and equitable if it is held liable. If the employer benefits from the service of the employee, then the employer should compensate the employee when injury occurs. Finally, under the "deeper pocket" principle, the employer is in an economically better position to cover such cost even if it fails to transfer it off to consumers.

The Ethiopian legal system has had also expressly incorporated the principle of employers' liability ever since the promulgation of the Civil Code in 1960 (Articles 2548-2559). In fact, prior to the Civil Code, Factories Proclamation of 1944 (Proclamation No. 58/1944) had few provisions pertaining to safety measures in factories. The limitations of the Factories Proclamation have been elaborated under Chapter-1 above. Be that as it may, employer's liability since the coming into force of the Civil Code has two levels, namely at the level of prevention, and at the remedial level.

5.5.1. Preventive measures

Generally, it is considered that preventive measures are cheaper, easier and better than curative efforts because even with maximum expense and expertise some injuries may not be able to be reinstated to a pre-damage situation. At the level of prevention, the law requires the employer to take the necessary measures to prevent preventable risks. Accordingly, the Civil Code stipulates that "the *employer shall take such measures as are required by the special circumstances of the work to safeguard the life, physical integrity, health and moral standing of the employee"* (Article 2548).

Labour Standards Proclamation No.232/1966 legislated similar prescriptions that need to be complied by employers (Article 10). Particularly, employers are obligated "*to arrange the buildings and premises wherein employment is carried on in accordance with all legal arrangements relating thereto and provide therein all safety, welfare and health protection measures and devices required to be maintained or normally found in similar enterprises*" (Article 10(1).

Coming to the currently operative regulatory framework, an employer is obligated to take the necessary measure to safe guard adequately the health and safety of workers; take appropriate steps to ensure that workers are properly instructed and notified concerning hazards of their respective occupation; and assign safety officer, and establish an occupational health and safety committee (Article 92(1) and (2). Moreover, an employer is required to provide safety equipment and provide training about how to make use of the equipment (Article 92(3).

Nevertheless, it is worth noting that the employee has also a corresponding duty at the level of prevention. They are expected to make use of the protective tools appropriately and at appropriate time and place (Article 93 (4). Furthermore, they are obligated to obey all health and safety instructions (Article 93(5). Hence, prevention of employment injury demands conscious involvement of both parties in the sense that it requires bilateral care (i.e. *two sides precaution*).

The way the law is formulated in allocating responsibility between the parties appears to be fair. Those preventive measures that require money have been entrusted to the employer, while the measure which demands behavioural adjustment has been imposed on the employee. However, it must be admitted that preventive measure may not be successful at all times. Even with utmost care, it is possible that a risk may be materialized; and as a result employment injury may occur. Thus regulating prevention, though necessary is not sufficient in this regard. With this view in mind, the law comes out with provisions necessary in regulating the remedial stage as well.

5.5.2. Remedial measures

By remedial stage what we mean is, entertaining compensatory measures after the damage has already occurred. This stage, in actual effect, is pin pointing the modalities for loss distribution. Once an industrial accident or occupational disease is sustained, who should cover the loss or how this loss be distributed; and among whom should it be distributed, are all policy considerations.

In this regard, three possible solutions could be proposed:

a) let the damage rest where it falls in a sense that the employee should incur the loss herself;

b) let the damage be passed-off to the other party in this case to the employer; and

c) in principle, let the damage be passed-off to the other party, but in few cases, the damage should rest where it falls.

Ethiopian law seems to adopt the third option in sense that employer's liability is the prevailing standard (Article 96(1) but when victim's intentional fault is shown, the damage will rest where it falls, and thereby the employer is exonerated from liability (Article 96(2). Accordingly, as a consequence of its liability, the employer is expected to cover the cost of medical treatment and medication including the cost for any necessary prosthetic or orthopaedic appliances. Hence, the employer's liability is not limited to the stage of prevention. It rather covers costs associated with the remedial stage also so long as the injury is related to the employment.

The nature of the employer's liability may be either contractual or extra-contractual. On the one hand, if the injured employee does not want to rely on the fault of the employer, they may base their claims on the provisions of the Labour Proclamation before the labour division of the regular court provided that the injury is an "employment injury". On the other hand, if they can show employer's fault and employment injury, they may bring an action before a civil court on the basis of the relevant extra-contractual provisions. But they cannot make use of both tracks simultaneously (*Walia Leather Processing Enterprise v. Dereje Wuletaw*; File No.80343: Vol.15). It is worth recalling that the alternative remedial tracks have been available ever since the Civil Code era (Article 2559). In the world of practice, however, employees who sustained employment injuries have been inclined to rely on the contractual liability track.

Problem for discussion:

Please discuss the pros and cons of bringing an action based on contract of employment and under the Labour Proclamation or extra-contractual liability in order to seek compensation in employment injury cases.

At this level, it may be pertinent to consider as to how employer's fault can be established in such cases. Article 12 of the Labour Proclamation lists out obligations of the employer. Specifically, Article 12(5) prescribes that "*an employer shall take all the necessary occupational safety and health measures and to abide by the standards and directives to be given by the appropriate authorities in respect of these measures.*" This means failure to comply with such mandatory provisions would amount to fault by virtue of Article 2035 of the Civil Code; because pursuant to Article 2035(1) "*a person commits fault where he infringes any specific and explicit provision of a law or administrative regulation*".

Although employer's liability regardless of fault on its part, it must be noted that an employer is not a 24 hours insurer of an employee. Its liability is limited to injuries associated with employment. This will take us towards identifying when an injury is deemed to have been related to employment and is thereby considered as "employment injury."

<u>Extracted from "Simplified Guide to Ethiopian labour law" (By Mehari Redae: ILO-2007)</u>

Employment injuries could be categorized into two kinds. They are either occupational accidents or occupational diseases (Article 95(1) Labour Proclamation).

Pursuant to Article 97(1) "occupational accident" is any organic injury or functional disorder sustained by an employee:

- while carrying out the employer's order during time and place of work; or even away for the work place or outside his normal hours of work ;(*e.g., one below*)
- while at the place of work before or after his work or during tea or lunch breaks *;(e.g., two below)*
- while the employee is proceeding to or from place of work in a transport service provided by the employer *(e.g., three below*).

Elucidating them by way of example may be helpful. Herein below are some hypothetical cases.

<u>E.g., one</u>

Bekele's right arm was seriously injured while he was operating a machine at his place of work.

<u>E.g., two</u>

Sosna sustained injury when fire broke out at a cafeteria within the compound of her workplace during a tea break while she was drinking tea. Although she was not performing work at the time of the injury, she was there for the purpose of the work and hence her injury is categorized as an occupational accident.

<u>E.g., three</u>

Seyoum was going to his place of work when the car he was in collided with a train. He thereby sustained serious bodily injury. The vehicle he was in was a bus assigned by his employer to transport employees to and from place of work.

Another workmate of Seyoum, Shifa, similarly sustained injury on his way to work place using a taxi. Shifa hired the taxi by money he received from his employer in the form of transport allowance.

Seyoum's injury is an employment injury while Shifa's is not. The reason for so holding is Seyoum was going to work through a means of transport chosen and assigned by the employer and hence the employer is responsible for the consequences of its choice. But Shifa was proceeding to work through a means of transport chosen by himself. Thus he was going to work at his own risk and hence no employer liability.

Occupational disease, for its part, is any pathological condition whether caused by physical, chemical or biological agents which arises as a consequence of:

- the type of work performed by the employee or
- the surroundings in which the employee is obliged to work.

Nevertheless, occupational disease does not include endemic or epidemic disease which is prevalent in the area where the work is done. Such disease will only be considered an occupational disease for those employees who are exclusively engaged in combating such diseases by reason of their occupation.

E.g., *four*

Osman was a store keeper at a cotton plantation in Afar Region for five years. While at work, he contracted malaria and died due to it. His family instituted a court action against the cotton plantation for compensation claiming that their breadwinner died due to occupational disease.

The claim of the deceased's family is untenable under the law. Malaria in Afar region is an epidemic disease and hence contracting malaria in Afar is a "*generally available risk*" to the inhabitants of the locality whether employed or not. Thus, it cannot be considered as occupational disease.

Another example, *Seid is a health officer in the same cotton plantation. His job responsibility was looking after the well-being and health of the employees including malaria prevention. While on duty, he contracted malaria.*

In this example, malaria is an occupational disease for Seid because he is exposed to "increased risk" of malaria contraction more than others due to his job responsibilities. Hence, he should be protected from such risk if he is to effectively render service without hesitation under the contract.

5.5.3. Exemption from liability

As indicated earlier, an employer's liability is limited to employment injury cases. Employment injuries as indicated above are predominantly injuries sustained at the place and time of work; and injuries somehow related to the work. Thus, the employer is not an all time (i.e. twenty-four hours) insurer of the employee, as regular working hours are only eight hours per day. Even for injuries sustained at the time and place of employment, there are exceptional situations where the employer can validly avoid liability. However, these are exceptions and rules of legal interpretation dictate us that exceptions are to be interpreted narrowly.

A case in point is "*an intentional infliction of harm by the employee exonerates an employer from liability*" (Article 96(2). Negligent infliction of harm upon oneself by the employee would not immune the employer from liability under this heading. Fault of a third party would not serve as a defence as well (*Mandefro Eshetie v. Fredirch Evert Stiftung; File No.36194: Vol.8*). In fact, even under the Civil Code era victim's (worker's) intentional fault was a valid defence against employer's liability (Article 2553). Nevertheless, the employer would have the burden of proof to show that the employee had indeed intentionally inflicted harm upon oneself.

However, there is a need to determine as to when an employee be considered to have intentionally inflicted harm upon herself. Admittedly, it is difficult to confidently determine one's intention as it is a state of mind. Nevertheless, it is well established that intention could be inferred from externally manifested acts of the author. With a view to limiting controversy in litigation, the Labour Proclamation (the Civil Code has similarly formulated provision) has laid down presumptions in which intentional infliction of harm could be inferred.

Accordingly, any injury resulting from the following acts shall be deemed to be intentionally caused by the worker (Article 96(2)(a and b):

- *non-observance of express safety instructions given by the employer or the provisions of accident prevention rules; or*
- *reporting to work in a state of intoxication caused by taking alcoholic beverages or drug that prevents him from properly regulating his body or understanding.*

It has been stated earlier that one of the statutory obligations of an employee is to report for duty in fit physical and mental condition (Articles 13 (4) and 14(2)(d)). Moreover, refusal to observe safety and accident prevention rules and to take the necessary safety precautions is a prohibited act for an employee (Article 14(2)(f)). Thus when an employee commits either of them, she or he, in effect, is violating one of his or her primary obligations. This seems the reason why such an employee is denied employment injury benefits in such situations. The employer will be exempted from liability and the damage will rest where it falls (Article 96). Indeed, justice demands that one should not benefit from one's intentional fault.

In *Mitiku Hailu v. Mesfin Tilahun; File No. 67201: Vol. 13* case, the employee reported for duty in state of intoxication. His immediate supervisor instructed him to leave the premises. But the employee resumed working ignoring the supervisor's instruction. He sustained injury while in the state of intoxication at the workplace. The employee brought an action against the employer with a view to collecting compensation for employment injury. The Cassation Division denied compensation reasoning that the employee intentionally inflicts harm upon himself.

5.5.4. Extent of liability

Once a certain injury is held to be an employment injury and the employer has no ground to invoke to avoid liability, the next step will be determining the scope of its liability. Although the scope of liability is closely related to the degree of injury sustained by the employee, there are common obligations which are applicable to all injuries. These are:

a) Immediate obligation

As soon as the employee is known to have sustained injury at work, the first step the employer is required to perform is:

- the provision of first aid service to the injured employee;
- transporting the injured employee to the nearest medical facility;
- notifying the appropriate government organ (labour inspection office) about the incident.

b) Medical expenses

Subsequent obligations imposed on the employer will be, covering the following costs of medical expenses:

- costs of medical and surgical care;
- hospital and pharmaceutical costs;
- cost of artificial facilities for the injured when recommended by Medical Board.

Problem ***for discussion:***

What if the injury sustained by the employee requires and is verified by the Medical Board for medication abroad, will the employer be obligated to cover such costs? Is the duty limited to locally available medical facility or even beyond?

Note of information:

In a court case decided on the bases of the Civil Code at the time of the Emperor, *Voice of Labour*, a periodical bulletin issued by CELU (Confederation of Ethiopian Labour Unions) had recorded the following story;

"The high production and upkeep of duty expected from a worker could be acquired only if the necessary medical care and hospitalization in maintaining the health of the worker is looked after. Such a duty of maintaining the worker's health is of course laid upon the employer under Arts. 2548-2552 and 2556-2559 of the Civil Code of 1960.

In spite of such an obligation imposed upon the employers, some employers create problems either by ignoring such a duty or purposely trying to avoid it or even by trying to interpret the law to mean that such an obligation is limited only to hospitalization at home (i.e. in Ethiopia) alone.

Whatever the allegations of employers may be with regard to such a responsibility, CELU and its affiliates have, on many occasions, tried to have rights of the worker maintained and the obligation of the employer ascertained. It was in one of such fights that the Supreme Imperial Court recently ascertained the responsibility of the employer to include hospitalization abroad.

The Court in its decision stated: Article 2556(1) which provides the employers responsibility to include all the medical, pharmaceutical, hospitalization and other expenses is not limited to a particular place as such; it includes hospitalization abroad as well. <u>Therefore, if a worker who is injured has exhausted all means of treatment in Ethiopia and is ascertained to have a better chance if sent abroad, he should, at the expense</u>

of the employer, be sent abroad and get proper treatment. (Underline added.)

This decision was passed against the Dire Dawa Cotton Company. A 25-year-old worker, Ato Fikre Kebede, was seriously injured while at work. Ato Fikre was told could get cured abroad but that there was little that doctors here can do to help him. But the Company refused to finance Fikre's medical care and hospitalization abroad.

The Union took the case to the Labour Relations Board which decided by majority vote in favour of the Company, denying the injured worker medical care abroad. The Union soon took the case on appeal to the Imperial Supreme Court. The Court studied the matter thoroughly and passed the following decision:

A group of doctors should examine the injured worker; and if they decide that he can only be cured abroad, the employer has the responsibility to cover all the expenses incurred as stated in Article 2556 Section I of the Civil Code. As a result, Ato Fikre was sent to England for hospitalization and medical care in accordance with the above stated decision".

Extracted from '*Voice of Labour*' Special Issue: April, 1971)

Incidentally, it is worth mentioning that after so many years, the Ethiopian judiciary was once again faced with similar issue for disposition. In *Salini Construction v. Tiglu Frehiwot* case; File No. 46363: Vol. 9, Tiglu who was an employee of Salini, sustained an employment injury while working at the Gilgel Gibie Project. The injury was very serious and demanded medical attention abroad. The employee requested this medical coverage but the employer was not willing to positively respond to this request. The case was litigated up to the Cassation Division.

According to the Cassation Division, the liability of the employer to cover medical expenses in employee injury cases does not include the duty to cover the expenses of medication abroad. Some of the reasons offered for such a holding were:

- what is provided in the labour law is minimum entitlement to the employee, and medication abroad could by no means be a minimum benefit; and
- as the labour law is a domestic legal instrument, it should be interpreted to pertain to facilities that are domestically available.

Interestingly, the relevant provisions both in the Civil Code and the Labour Proclamation have been similarly formulated. But the two cases showed that the Imperial Supreme Court and the Federal Supreme Court Cassation Division rendered entirely opposite decisions. *Which position do you think is in line with the legislative intent? Why?*

5.5.5. Disability Benefits

The employer's liability is not limited to medical costs. It will further be obligated to provide disability benefits to the employee. As body organs do not have market value, disability is to be assessed in light of the reduction in working capacity due to the injury. Experts in the medical field are important to make this determination. In a sense this is a medico-legal issue. The amount of the disability benefit is dependent upon the degree and duration of disability.

Ordinarily, disability may be temporary or permanent. It may also be total or partial; the worst-case scenario, of course, is death.

<u>E.g. (1)</u>

Amare sustained a severe car accident while delivering goods for the company and he was prevented from rendering his employment service for six months due *to the accident. Such disability is temporary because the employee was temporarily from providing service.*

E.g. (2)

Petros lost his right arm due to an accident associated with his employment. This kind of injury is partial and permanent. It is partial disability because, by losing an arm, the employee is not to lose 100% of his working capacity because of the said injury. Nevertheless, it is permanent injury because it will remain with him throughout his lifetime.

The law has regulated these different scenarios differently. For the purpose of the Labour Proclamation, temporary disability is a reduction in working capacity that may last for a maximum duration of twelve months starting from the date of the occurrence of the injury (Article 107(1)(a) and 108). The employer, in addition to covering the medical expenses of the employee, is obligated to make payment to such an employee. The mode of payment is a periodical payment and the amount will be full wage for the first three months; not less than 75% of the employee's monthly wage for each of the next three months; and not less than 50% of the monthly wage for each of the remaining six months (Article 108(2).

For instance, let us assume an employee who was earning Birr 6000/month sustained temporary disability which lasted for eight months. His disability payment will be Birr 6000/month for the first three months; not less than Birr 4500/month for the next three months and finally Birr 3000/month for the remaining six months. It is worth noting that such payment is exempted from income tax (Article 112). Nevertheless, the employee may be denied of these payments if she or he fails to observe doctor's advice or behaves in a manner that prolongs the time needed for recovery.

In cases where the injury resulted in permanent disability, the employer will be obligated to provide lump sum compensation to the injured. The maximum payment available for an employee who suffers total permanent disability due to employment injury is a sum equal to five times of the employee's annual wage

(Article 109(3)(a)). The employer's liability, therefore, is both limited and liquidated. If the injury sustained resulted in permanent and total disability, the above-mentioned payment shall be calculated in proportion to the degree of the disability accordingly.

For instance, if an employee who was earning Birr 6000/month sustained *total and permanent disability,* due to employment injury, his disability benefit will be:

6000 (monthly wage) * 12(yearly wage) * 5(years) = Birr 360,000

However, if the employee who lost his/her right arm was verified by a medical board to have lost 30% of his working capacity, and was earning Birr 6000/month prior to the accident; his/her disability benefit will be:

6000*12*5*30/100 (degree of disability) = Birr 120,000

At this juncture, it is important to note that the verification of the medical board is not conclusive and binding on the courts. Courts have the power and flexibility to customize the medical board's verification with the detailed facts of the case before them. For instance, in *Dereje Wuletaw v. Walia Leather Processing (File No.49273: Vol.9)* case, the employee lost three fingers each from his hands due to employment injury. The Medical Board verified that the victim has been disabled 65%. The Cassation Division however reasoned that the verification of the medical board does not take into account the reduction in working capacity; it merely assesses the level of disability sustained by the victim due to the employment injury to a human being in general. The Cassation Division thus ruled that the loss of six fingers results in 100% reduction in working capacity and thereby awarded five years wage of the employee. However, reduction in working capacity is not to be assessed in light of capacity to work the pre-injury tasks but other gainful tasks as well *(Agricultural Products Promotion and Supply Enterprise v. Getachew Gedlie; File No.43370: Vol.8*).

As indicated in the case of temporary disability benefit, the permanent disability benefit is also exempted from tax. In another note, it is important to underline that an employee will not be entitled to permanent disability benefit if they have already a pension scheme or an insurance scheme arranged in advance by the employer.

For instance, in public enterprises or the civil service sector, if an employee suffered permanent injury of serious nature, they will automatically be pensioned and thereby benefit from the government pension scheme. In such cases the employee will not be entitled to employment injury compensation as she cannot benefit from two sources for a single injury. The same principle applies where the employer arranged an insurance scheme for the benefit of the employee provided that the payment based on the insurance policy is not below the amount prescribed by law. However, if the payment based on the insurance policy is below this amount the difference shall be covered by the employer because the amount prescribed by the law is the minimum amount (*Mihret Alene v. Ethiopian Tourist Enterprise;* File No.97512:Vol.16).

Unlike the Labour Proclamation where the maximum ceiling of liability is capped, employer's liability for permanent employment injury cases under the Civil Code was not a predetermined and liquidated amount. The employer had the duty to supply maintenance to the employee and their family unless the victim had other family members to maintain them. For how long, how much and other related issues were to be determined by the court. The relevant provision reads as follows:

Article 2558 - 3. *Obligation of maintenance*

1) *Where the employee is permanently deprived by the reason of the accident or the disease, of half or more than half of his capacity to work, the employer shall maintain the employee and his children who are under age.*
2) *Such obligation shall not bind the employer unless the employee cannot obtain maintenance from members of his family.*

3) *It shall be governed by the provisions of the Book of this Code relating to "Family Relationship" (Art.807-825).*

Finally, if an employee dies due to employment injury, the employer will be obliged to pay "dependent's benefit" to the dependents of the deceased. The amount of such payment will be the employee's five years wage to be paid in the form of lump sum. Furthermore, the employer will cover the funeral expenses for the deceased employee as well. In order to avoid controversy the law has formulated forced definition as to who the deceased's "dependents" are:

Dependents are nominated by the law itself and hence "nominated beneficiaries" these are:

- the employee's widow/widower;
- children of the deceased who are under the age of eighteen;
- any parent of the deceased who was being supported by the same.

As per the above explanation, it is not all dependents of the deceased who will be entitled to the dependents' benefit. It is only the close relatives, nominated beneficiaries, of the deceased who will be the beneficiaries. It appears that the widow/widower's benefit is automatic because unlike the other two, the law did not attach any condition and it is available by virtue of being a widow or widower. However, the Cassation Division in *Dr. Mandefro Eshete v. Fredrich Evert Stiftung;* File No.36194:Vol.8 case, a widower and his minor daughter brought an action against an employer for fatal accident sustained by his wife and the child's mother. It was determined that the widower had his own means of living at the time. The Cassation Division held that since the widower has his own means of subsistence, he is not entitled to dependent's benefit; it is only the deceased's daughter who is entitled to dependent's benefit. It seems debatable as to whether the spirit of the law is as interpreted by the Cassation Division or not. *What do you think?*

Be that as it may, beneficiaries other than the widow or widower have additional conditions attached to them which is a "means test" in order to benefit. For example, the children of the deceased should have been under eighteen years of age at the time of the claim. In case of parents also, it must be shown that they were being supported by the deceased; but if the parents had independent means of livelihood, they will not be beneficiaries of the dependents' benefit.

Where the deceased left a widow or widower, children and parents behind, the dependents' benefit (i.e. the deceased's five years wage) shall be shared among them on the following basis:

- Widow or widower-50%
- Children-10 % (each)
- Parents-10 % (each)

In addition to these, a minimum of two months' wage, in the form of funeral expenses is due as per Article 110(1)(b). All payments under this heading are non-taxable (Article 112).

Depending on the number of beneficiaries without affecting the share apportioned to the widow or widower, the share available to other dependents could increase or decrease. In *Yonatan Nega Teshager v. Legesse Abera* (File No. 40529: Vol.9), case, the deceased left a minor child behind without any other dependents. The child, through his guardian, brought an action for dependent's benefit against the employer (defendant). The defendant admitted that the child is a beneficiary but argued that he is entitled to only 10% of the total amount of compensation. The lower courts accepted the argument of the defendant; and awarded the child only 10% of the total sum.

The guardian of the child brought the case to the attention of the Cassation Division through a cassation proceeding. While reversing the lower courts' decision, the Cassation Division ruled that as long as it is established that the child is the sole dependent, the total amount payable in the form compensation for fatal employment injury cases, which is five years wage of the deceased, shall be due to him.

Problem for discussion:

It is noted that you have already studied the Law of succession in your previous law study years.

- *How are dependents under this section similar to and different from successors at law?*
- *Should dependents be required to bring certificate of heir in order to collect dependents' benefit under this section?*
- *Should a widow be required to show marriage with the deceased or should irregular union be sufficient for the purpose?*

Incidentally read: Ethiopian Insurance Corporation v. Kifleyohannes Tessema et al; File No.72645: Vol.13

To recapitulate our deliberations on this part, it elaborated issues associated with the individual employment relations. The various chapters under this part focused mainly on the individual employee as to his or her rights and duties during employment and upon separation. The next part will be devoted towards examining the relevant regulatory frameworks pertaining to collective aspects of industrial relations. Under this part, employees in their collectivity will be the focus of our discussion. Issues of unionization and collective bargaining will be examined in Ethiopia and internationally as well. Compared to the preceding part, issues of this second part are less litigated before labour tribunals may be because both employees' organizations and employers' associations are too weak organizationally and economically to exert pressure on each other; and on the government.

PART II

COLLECTIVE EMPLOYMENT RELATIONS

Chapter VI

Freedom of Association in Employment in Ethiopia

6.1. General

Freedom of association is the right to come together with others to collectively express, promote, pursue and/or defend common interests. In the context of employment relations, freedom of association manifests itself in the form of the right to unionization and the right to form employers' associations. By making it possible to establish organizations of workers and employers and by providing them with the means to further and defend the interests of their members, freedom of association is a factor in the achievement of social justice and one of the principal elements in the achievement of lasting peace.

In fact, collective employment relations are unthinkable without ensuring the right to freedom of association because it is through associating with one another that individuals become a collective body. Association brings about organized and collective voice. However, there were times in labour history when such rights were not given recognition. It was through passage of time that the right has been given due recognition. Similar historical trends, as we shall see later, have been observed in Ethiopian labour history.

History of freedom of association in Ethiopia dates back to the 1963 Labour Proclamation. Proclamation No.210/1963 stated that:

a) *Employers may create and join employers' associations and employees may establish and join labour unions. Said organizations, when registered by the Minister, may engage in all lawful activities.*

b) *No employer or employee may belong to more than one employers' association or labour union, respectively, at the same time.*

c) No labour union may be created in an enterprise employing less than fifty persons; provided, however, that employees of such enterprises may join general labour unions.

d) The Minister may, in exceptional circumstances, waive the provisions of paragraph (b) and (c) of this Article 20.

Even though the introduction of the law on freedom of association was considered a step in the positive direction, the stipulation that "no labour union may be created in an enterprise employment less than fifty persons had limited its applicability as enterprises employing fifty and above were very few by then. ILO jurisprudence considers that the establishment of a trade union may be considerably hindered, or even rendered impossible, when legislation fixes the minimum number of members of a trade union at obviously too high a figure, as in the case, for example, where legislation requires that a union must have at least fifty founding members.

It was with the coming into force of Labour Proclamation No.64/1975 that the minimum number of membership was reduced to twenty. ILO writings are of the view that the legal requirement that there be a minimum number of twenty members to form a union does not seem excessive and, therefore, does not in itself constitute an obstacle to the formation of a trade union. Subsequent legislation maintained this acceptable threshold and to some extent further reduced the minimum membership requirement. Currently, the minimum membership requirement is ten.

Currently, the right to freedom of association is no longer a right emanating only from an ordinary legislation. It is rather a constitutionally recognized right. The relevant provisions are reproduced hereunder.

Article 31: Freedom of Association

Every person has the right to freedom of association for any cause or purpose. Organizations formed in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited.

Article 42: Rights of Labour

1. *(a) Factory and service workers, farmers, farm labourers, other rural workers and government employees whose work compatibility allows for it and who are below a certain level of responsibility, have the right to form associations to improve their conditions of employment and economic well-being. This right includes the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests.*

   (b) Categories of persons referred to in paragraph (a) of this sub-Article have the right to express grievances, including the right to strike.

   (c) Government employees who enjoy the rights provided under paragraph (a) and (b) of this sub-Article shall be determined by law.

The right to freedom of association has both positive and negative features. In its positive aspect, the right encompasses, the right to form an association or join an already established association. Conversely, the negative freedom of association is manifested through the right not to join any association or to withdraw from membership of an association at any time. In terms of scope, based on the ILO Convention No.87, freedom of association should be guaranteed "*without any distinction whatsoever*" in the sense that it should be available without discrimination of any kind based on occupation. Thus it is available not only to workers in the private sector of the economy, but also to civil servants and public service employees in general.

Since, Ethiopia is a signatory to the Convention, its Constitution has followed a similar pattern in stating that freedom of association is available to factory and farm workers on the one hand; and to employees of the private sector and civil servants as well. However, with respect to civil servants, the Constitution does not seem to accord freedom of association to all civil servants. The right is rather limited to civil servants "…*whose work compatibility allows for it [for associating] and who are below a certain level of responsibility*". In order to determine those "whose job position allows for association" and at "what level of responsibility" is allowed for association, the Constitution promised that a law would be issued. But the promised law has not yet gone into effect though more than twenty five years have elapsed since the Constitution was promulgated in 1995.

Pursuant to ILO Convention No.87, all public service employees (with the sole possible exception of the armed forces and the police, as indicated in Article 9 of the Convention No. 87), should, like workers in the private sector, be able to establish organizations of their own choosing to further and defend the interests of their members. It was indeed considered inequitable to draw any distinction in trade union matters between workers in the private sector and public servants, since workers in both categories should have the right to organize for the defence of their interests.

In view of the importance of the right of employees of the State and local authorities to constitute and register trade unions, the prohibition of the right of association for workers in the service of the State is incompatible with the generally accepted principles that workers, without distinction whatsoever, should have right to establish organizations of their own choosing without previous authorization. From this perspective, since, as stated earlier, Ethiopia is a signatory to ILO Convention No.87, it is high time that the Ethiopian legislature should come up with a law that would enable civil servants to associate if it is to comply with its ILO obligations.

Paradoxically, however, in *National Bank of Ethiopia Employees Trade Union v. MOLSA*; File No.55731: Vol.11) we had the following facts: Employees of National Bank had a duly registered and certified trade union for almost thirty years. In 2008, the National Bank was re-established by Regulation No.157/2001 on the basis of which its employees are to be regulated by a special law. As soon as MOLSA learnt that the Bank's employees are excluded from the ambit of the labour law, it brought an action before the Federal High Court for the cancellation of the registration of the trade union. The High Court ruled that the grounds of cancellation under Article 120 of Proc. No.377/2003 (Article 121 in

Proclamation No.1156/2019) do not include change of regulatory regime as ground for cancellation. Hence, it denied the application.

The Ministry lodged an appeal against the decision of the High Court. The Federal Supreme Court appellate division held that since employees of the Bank are excluded from the applicability of the Labour Proclamation pursuant to Article 3(2)(e) of same, the application for de-registration is appropriate; and hence the registration of the trade union should be cancelled.

The trade union petitioned for cassation proceedings contending that the appellate court committed fundamental error of law by ignoring the Article 31 of the FDRE Constitution and ILO convention No.87 and 98 to which Ethiopia is a party as they allow formation of association available to all employees without distinction whatsoever. Nevertheless, the Cassation Division upheld the appellate court's ruling on the reasoning that employees who are entitled to form association by virtue of the Labour Proclamation should satisfy the definition of employees under that particular law. Once they are excluded from its applicability, they cannot be considered employees for the purpose of that law. Thus, the Cassation Division reasoned, de-registration is appropriate. Therefore, the mind-set at the executive level and judiciary seem restrictive in the sense that leave alone to allow unionization of civil servants in the near future, those civil servants who were formerly unionized have been subjected to dissolution.

Be that as it may, in order to give effect to the provisions of the Convention and the Constitution and to create an enabling environment towards unionization, the Labour Proclamation has articulated provisions here and there under its operative part. Herein below are some of the most pertinent ones.

Article 14(1)(d): It shall be unlawful for an employer to coerce any worker by force or in any other manner to join or not to join or cease to be a member of a trade union or to vote for or against any given candidate in elections for trade union offices.

Article 26(2): The following shall not be deemed to constitute legitimate grounds for the termination of a contract of employment;

(a) his [the worker's] membership in a trade union or his participation in its lawful activities;

(b) his seeking or holding office as a workers' representative;

Article 43(1):

Where a contract of employment is terminated because of those grounds mentioned under sub-Article (2) of Article 26 [above], the employer shall be obliged to reinstate the worker, provided, that the worker shall have the right to payment of compensation if he wishes to leave his employment.

In order to encourage employees form or join trade unions, one of the first and most important steps is to offer legal protection against anti-union discrimination because history of trade unions documented that, more often than not, employers tended to cultivate hostile attitude against union organizes and union members. Towards this end, there is a need to provide assurance that no person shall be prejudiced in his/her employment by reason of their trade union membership or legitimate trade union activities, whether past or present. It must be underlined that protection against acts of anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker.

Since inadequate safeguards against acts of anti-union discrimination, in particular against dismissals, may lead to the actual disappearance trade unions, additional measures should be taken to ensure fuller protection for leaders of all organizations, and delegates and members of trade unions, against any discriminatory acts. Thus, legislation should lay down explicitly remedies and penalties against acts of anti-union discrimination in order to ensure the effective implementation of the right to association. Consequently, with a view to providing a maximum safeguard to dismissals associated with union leadership and union activities, the Ethiopian legislature prescribed reinstatement as a remedy pursuant to Article 26 cum Article 43 (1) as indicated above. Moreover, penalty in the form of fine has been imposed for unlawfully terminating a contract of employment (Article 14(1)(c) cum Article 185(2) (c).

Article 113: The right to form association

1) *Workers and employers shall have the right to establish and organize trade unions or employers' associations, respectively, and actively participate therein.*

Article 114: Formation of associations

1) *A trade union may be established in an undertaking where the number of workers is ten or more, provided, however, that the number of members of the union shall not be less than ten.*
2) *Workers who work in different undertakings but in similar activities which have less than ten workers may form a general trade union, provided, however, that the number shall not be less than ten.*
3) *Trade unions may jointly form trade union federation and federations may jointly form trade union confederations as well.*
4) *Employers' associations may jointly form employers' federation and employers' federations may jointly form employers' confederation as well.*
5) *No trade union or employers' association may form a confederation without forming trade union of employers' federations.*
6) *Any federation or confederation of trade unions or employers' associations may join international organizations of trade unions or employers.*
7) *No worker may belong to more than one trade union at any given time for the same employment. Where this provision is not observed, the latest membership shall prevail; and where the formalities of membership were simultaneous, all of them shall be without effect.*

Article 115(1)(a)

Where there exist more than one trade union at a given undertaking, the trade union which will be the exclusive bargaining agent and undertaken consultation with authorities, is the one which secures 50% plus one membership of all employees of the undertaking.

Article 118. By-law of the Association [Constitution]

Trade unions and employers' associations shall freely formulate their own by laws. The Constitutions may include, among other things, the following;

1) *Name of the Association;*
2) *Address of the Head Office of the association;*
3) *Objectives of the association;*
4) *Date of establishment of the association;*
5) *Emblem of the association;*
6) *Requirements for assumption of leadership positions of the association;*
7) *Union due of its members;*
8) *Financial and property administration of the association;*
9) *Meeting and election procedures of the association;*
10) *Disciplinary procedures;*
11) *The conditions for dissolution of the association; and*
12) *Status of the property in case of the dissolution of the association.*

In connection with "model constitution", the ILO is of the view that "any obligation on a trade union to base its constitution on a compulsory model (apart from certain purely formal clauses) would infringe the rules which ensure freedom of association. The case is quite different, however, when a government merely makes model constitution available to organizations that are being established without requiring them to accept such a model. The preparation of model constitutions and rules for the guidance of trade unions, provided that there is no compulsion or pressure on the unions to accept them in practice, does not necessarily involve any interference with the right of organizations to draw up their constitutions and rules in full freedom." Consequently, Article 118 has listed out elements which should be included in the constitution of a trade union.

Exercise:

Please prepare a model constitution (by-laws); one for a trade union; and another for employers association.

Article 119: Registration of Associations

1) *Every association shall be registered by the Ministry or the appropriate authority in accordance with this proclamation.*
2) *Every organization shall, upon application for registration, submit the Ministry or the appropriate authority the following documents:*
   a) *By-laws of the association;*
   b) *Documents containing the names, address and signatures of its members and leadership;*
   c) *In case of a general union, the names of undertakings where the members are working;*
   d) *Where the association is a federation or a confederation, the names, address and signatures of their leadership and the member trade unions or employers' associations;*
   e) *Name and emblem of the association.*
3) *The Ministry or the appropriate authority shall after examining the documents and ascertaining that they are duly completed, issue a certificate of registration within fifteen working days of receiving the*

application. Where the Ministry or the appropriate authority does not notify its decision within the prescribed period, the association shall be deemed registered. In such cases, a certificate of registration shall be issued to the association.

4) *An organization which is not registered in accordance with the provisions of this Article may not perform functions set forth in this Proclamation.*
5) *The first registration of a trade union shall be exempt from stamp duty.*

Conventionally, if conditions for granting of registration are tantamount to obtaining previous authorization from the public authorities for the establishment or functioning of a trade union, this would undeniably constitute an infringement of Convention No.87. This, however, would not seem to be the case when the registration of trade unions consists of solely of a formality where the conditions are not such as to impair the guarantees laid down by the Convention.

Although registration procedure very often consists in a mere formality, there are a number of countries in which the law confers on the relevant authorities more or less discretionary power in deciding whether or not an organization meets all the conditions required for registration, thus creating a situation which is similar to that in which previous authorization is required. Similar situations can arise where a complicated and lengthy registration procedure exists, or where the competent administrative authorities may exercise their powers with great latitude; these factors are such as to create a serious obstacle for the establishment of a trade union and lead to a denial of the right to organize without previous authorization.

Article 121(1)

The Ministry or the appropriate authority may file before the competent court to cancel the certificate of registration of an association, on any of the following grounds:

In principle, measures of suspension or dissolution by the administrative authority constitutes serious infringement of the principles of freedom of association. Dissolution by the executive branch of the government pursuant to a law conferring full powers, or acting in the exercise of legislative functions, like dissolution by virtue of administrative powers, does not ensure the right of defence which normal judicial procedure alone can guarantee and which the Committee on Freedom Association considers essential.

However, by virtue of Labour Proclamation No.42/1993, the Ministry had the power to suspend or dissolve associations (Article 120). It was for the association concerned to lodge an appeal to the competent court in order to nullify the administrative measure. This position of the law was being criticized for its inconsistency with Ethiopia's commitment to ILO instruments because Article 4 of Convention No.87 to which Ethiopia is a party prescribes that associations may not be suspended or dissolved by administrative body. This has been rectified since the coming into force of Labour Proclamation No.377/2003.

The total sum up these all provisions of the Labour Proclamation tend to indicate the following:

- The minimum number of membership to establish trade unions has been fixed so low at ten members (Article 114(2) that it enables employees in small enterprises to associate. Besides, relaxed registration procedure in the sense that the registering organ shall respond within 15 working days; and no response within the prescribed period amounts to acceptance of registration (Article 119 (2) is another favourable environment for associations. Exempting original trade union registration from payment of stamp duty (Article 119(5) is helpful as well.

- The fact that associations could not be dissolved by an executive organ safeguards them from arbitrary interferences of administrative organs in the associations' day to day activities. It is rather a competent judicial organ which is the labour division of the regional appellate court that is empowered to entertain such cases (Article 140(1)(f). Moreover, by formulating a legal framework that allows for the establishment of more than one trade union in an enterprise (Article 115(1)(a)), the law introduced the so called "*plurality of unions*" policy. This policy is considered to be a paradigm shift towards the ILO desired direction, away from the previous policy of "mono-union" system.

Problem for discussion:

Concerns have been raised from different corners that allowing more than one trade union in an enterprise would create a fragmented labour force which would adversely affect unity and solidarity. Based on this concern, trade union leaders are sceptical that laws which allow plural unions are against the interest of the labour force.

On the other hand, others contend that legislative prescription which stipulates only one union can be established in an enterprise is an interference on freedom of association. The argument goes; it should be left to the members how to associate and how many unions to form.

What is your view on this topic?

6.2. The legal framework for employment related Freedom of Association in Ethiopia: A historical perspective

6.2.1. Introduction

Extracted from "Privatization in Ethiopia: Its impact on Unionization and Collective Bargaining" PhD thesis by Mehari Redae (University of Warwick-UK-2015)-footnotes omitted.

The preceding chapters assessed issues associated with individual employment law in Ethiopia. This chapter, for its part, will focus on the legal framework for freedom of association in general and trade unionism in Ethiopia in particular. The challenges and opportunities trade unionism have had under the three successive Ethiopian regimes (the Imperial, the Derg and the post-Derg regimes) will be assessed. The first two sub-topics of the chapter will generally narrate the development of the right to freedom of association and its transformation to the status of one among the "core" labour rights. Besides, its mode of operation in the era of the globalized economic order shall be dealt with as well. This will provide an analytical framework for understanding the fundamental nature of the rights.

The failure of "freedom of contract" to bring about fair outcomes in industrial relations principally is owing to the structural imbalance in the bargaining power of the parties; and it demanded some sort of remedial measure to redress the inequality. Employees tried to mitigate the effect of the power imbalance by organising themselves in trade unions, thereby seeking to negotiate as a collective organ instead of individually. However, at earlier times in labour history, formation of associations by employees was treated as "cartel", and thereby incompatible with the then prevailing free market philosophy due to its alleged market distortion effect on the supply and price of labour.

Trade unionism was also, at times, considered to be tantamount to conspiring against the economic and property rights and interests of the employer, and hence a prohibited act. For instance, in the United Kingdom, the Combination

Act of 1799, took a prohibitive stand towards combinations of workers. Germany also had a law with equivalent effect until it was repealed in 1869. In order to bypass these prohibitions, workers at those times were compelled to associate themselves in non-industrial societies, such as social clubs, friendly societies and self-help groups.

It was with passage of time that formation of associations was generally tolerated and permitted. Even when allowed, employers at the stage of recruitment or thereafter would require their employees to commit contractually either not to join or if already a member, to withdraw from union membership as a condition to employment or the continuity thereof. The so called 'yellow dog' contracts of the time were geared towards this purpose and they had been given legal effect as binding contractual terms. Intimidation and dismissal of union organisers and unionists was also widely practiced. Resistance either by employers and/or governments to workers' associations emanated from the perceived danger to economic and political stability respectively. Hence, uneasiness towards employees' combinations may emanate from employers or governments or both. The history of labour movements has recorded these challenges overtime.

In the context of Africa, the history of trade unionism has been impacted by the varied traditions and histories of their colonial powers and the continent's heterogeneous nature in terms of people and cultures. According to Schillinger "the setting up of African trade unions took place with the blessing and open support of the colonial administration which saw in it a means of keeping social peace". Similarly, Kaufman documented that "as long as these unions did not become overtly militant and hotbeds for nationalist independence, the British tolerated them and even saw value in their activities". However, in French-controlled Africa, a relatively repressive stance towards the indigenous labour movement and trade unions prevailed. Hence, the pattern of development for trade unionism in Africa had diverse historical backgrounds.

6.2.2. Freedom of association: International sources

It has been understood that human beings are social animals in that it is difficult to think of a human person outside of a collective way of life. Indeed, no matter how rudimentary it may have been, human beings even in traditional societies had a collective dimension to life in order to collectively counteract more powerful natural or man-made challenges. According to Dunning, Pope Leo XIII underlined, in 1891, which "the State should not prohibit employers' and workers' organizations, because it was the natural right of men to come together in this way". From an industrial relations perspective, an employees' association is a source of strength for defending common interests through an organised voice on issues of common concern against comparatively more powerful employers; and from a human right perspective, it is an expression of human freedom.

Although developments in freedom of association may have features peculiar to specific countries, a degree of commonality is provided to freedom of association at the international level by human rights instruments of both global and regional coverage. Among the instruments of global application are: the Universal Declaration of Human Rights (UDHR) (1948), the International Covenant on Civil and Political Rights (ICCPR) (1966), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966). Article 20 (1) of the UDHR provides that "everyone has the right to freedom of peaceful assembly and association" while sub-Article (2) of the same Article provides that "no one may be compelled to belong to an association." Article 22 of the ICCPR, for its part, provides: "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." The ICESCR also has a provision on "the right of everyone to form and join the trade unions of his/her own choice." Although the UDHR technically is a non-binding instrument, the latter two instruments were adopted through the treaty making process of the UN General Assembly, and theoretically their scope of application is global with respect to states that ratified them.

As regards instruments of regional scope, the right to freedom of association has been incorporated under various human rights instruments such as the European Convention on Human Rights (1950), The American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1981). The international human rights instruments have been drawn up under a broad framework in a manner that enables every human person to have the right to associate. This formulation covers all possible combinations of an economic, social and political nature, ranging from the formation of political parties and consumers' associations to associations of hobby clubs.

There are also more specific and specialized instruments relevant to workplaces. These are the Freedom of Association and Protection of the Right to Organise Convention No.87 (1948); and the Right to Organize and Collective Bargaining Convention No.98 (1949). Both of these were adopted under the auspices of the International Labour Organisation and hence applicable within the sphere of the ILO's mandate. The right to freedom of association, in this context, is available both to employers and employees. Indeed, the Treaty of Versailles of 1919, the source document for the establishment of the ILO, underlined that "the right of association for all lawful purposes" by the employed as well as by the employers was held to be among "the principles of special and urgent importance."

The Philadelphia Declaration of 1944, which has been incorporated into the ILO Constitution, reaffirmed the Organisation's commitment to four most important principles among which "freedom of association" is one. In addition to these principles, membership of the ILO has been made conditional upon formal acceptance of the Constitution including the Declaration of Philadelphia, the right to freedom of association being enshrined in both instruments. However, since the Constitution and the Declaration were stated in very broad terms, it was with the coming into force of Conventions No.87 and 98 that freedom of association was translated into specific enforceable rights and obligations available to workers as well as employers.

It is important to underline, however, that though the right to freedom of association is available both to employees and employers, in real terms; it was employees who demanded and most in need of associations. Employees urge for collectivization mainly emanated from their weak bargaining positions when and if employees sought to bargain individually. It can after all be argued by way of justification that "the individual employer is already a collective power in being a holder of capital." Records of the Committee on Freedom of Association confirmed that almost all of the complaints before it that are associated with impediments to freedom of association have been brought by trade unions.

In fact, the framers of the various international instruments seemed to be conscious of the needs-based approach, when they formulated a specific provision on the right to form and join trade unions addressed solely to workers. This was in addition to the general provision on freedom of association, which enables both employer and employee to associate. This should not, however, lead us to the conclusion that freedom of association is irrelevant to the employer altogether. Rather, in the face of organised labour, a single employer may relatively prove to be weak and hence the need also for employers' to associate. Moreover, an employers' association may also help them deal with host governments with a view to lobby for *business-friendly* policies and laws.

In the African context, trade unionism had distinct political as well as economic dimensions. It was very much associated with the introduction of industrialization, and industrialization was closely related with colonisation. Except for small scale indigenous handicraft activities, industrialization and industrial relations were brought with colonial powers into Africa. Industrial relations during colonialism expressed itself, among other things, in discriminatory treatment in general, and discrimination between foreigners and the indigenous labour force in particular. A struggle against this discriminatory treatment appeared to be one among the many objectives of trade unionism in Africa. Unionization was also instrumental in expressing the organised voice of labour against exploitation by capital and, in some cases; it was instrumental in the struggle against colonialism. It, thus, had social, economic and political objectives as a result of which significant overlap between the various goals was being observed in union activities. Hence, unionization, in colonial Africa, had multiple objectives and responsibilities to accomplish.

6.2.3. Production and regulatory challenges to Trade Unionism

The current global economic order and social interactions have brought their own unique features on the manner of production and marketing of goods and services. With the advent of globalisation, production processes have undergone profound transformation in terms of location and organisation. The underpinning rationale is that in order to obtain maximum benefit out of comparative advantage variables, the part of the production process requiring intensive labour will be undertaken in territories where cheap, compliant and appropriately skilled labour exists; and the remaining part of the production would be processed in an area where the required input is cheaper. One consequence of such a decentralized production process has been the emergence of labour market flexibility.

To benefit from labour market flexibility, the use of home workers, casual or part-time employees, rather than permanent ones; the outsourcing and subcontracting of aspects of the production process rather than performing it in-house have become the norm of workplace arrangement and management. As a result, the workforce profile has significantly changed from permanent and full-time employment to more of temporary engagement.

New forms of work may be contrasted to the period of the steam engine and later during the industrial revolution where thousands of employees worked in assembly lines in close proximity to each other, in full time arrangements and under a single and common employer, the current production brought a paradigm shift. Rather the current economic order has introduced a decentralized production process, thereby bringing in multiple employers and multiple locations into the production scene. The conventional in-house and assembly line production system, sometimes referred to as the “Fordism” model, for car manufacturer Henry Ford, has been transformed into extra-territorial production chains where a single product crosses multiple national borders while undergoing its completion process. This decentralisation of the production process has been made possible due to, among other things, cheap and smooth transportation, together with quick and user-friendly information and communication technology which are manifestations of the global economic order.

Such transnational production systems and labour arrangements have made the formation of trade unions in their traditional combination and composition less feasible. At times it has been argued that "laws on unionization have remained mainly local, while the production process has become transnational." Moreover, in the developed world, with the fast development of the service sector, the labour force profile has changed from predominantly manual to more of a "white collar" work or knowledge work.

White collar labour appears to be less interested in unionization than the manual labour. Even from the perspective of the developing countries, Fashoyin recorded a substantial increase of temporary and fixed term employees and informalisation in Kenya since the 1990s. According to him this labour force profile has adversely affected union membership density as these workers have been uninterested or less interested in unionization.

Furthermore, globalisation has provided favourable conditions for the easier movement of capital across borders. Legal assurances for the international movement of capital that have been secured through bilateral, regional and multilateral agreements have made movement of capital easier than ever before. Conversely, relative to capital, labour, particularly unskilled and semi-skilled labour, is less mobile and at times immobile altogether. Owing to its mobility and threat of mobility, capital has gained strong bargaining leverage in its relation with host governments and trade unions. As a consequence, countries have entered into competition among each other in attracting and retaining investment through the provision of facilitative policy and legal frameworks.

From the investment point of view, ensuring political stability and infrastructure facilities available, though still necessary, has no longer been sufficient to attract and retain investment. In addition to these considerations, tax incentives, lax environmental regulations and low labour standards have become additional offers of incentive from some investment destinations particularly from the developing world. Compa in his general report documented that "many countries have adopted labour law reforms that reduce labour standards". Moreover, there have been attempts to attract capital through the establishment of *de jure* or *de facto* 'union free' workplaces.

For instance, in some developing countries, measures have been taken for the establishment of Export Processing Zones (EPZs) where protective labour laws were withdrawn from application. In some situations, though the protective labour law may not be expressly repealed for fear of political backlash, their enforcement would be deliberately avoided or delayed. One of the protective laws that may be at risk in such circumstances has been the right to unionization as there is a perception that organised labour is much more demanding than would be the case with a non-unionised workforce. Unlike the pro-active attitude of many states in labour affairs at the early and mid-twentieth century, the era of globalisation brings about *'business-friendly'* states, which hesitate and, at times, seemed incapable of intervening in labour relations. As a result, an implied policy to postpone enforcement and to stay the execution of labour rights until such time economic growth is attained has developed.

However, the position of the ILO Committee on Freedom of Association is explicit in this regard and states that "where governments of host countries offer special incentives to attract investment, these incentives should not include any limitation of workers' freedom of association (…)." It is, thus, in contravention of such an express ILO position that countries enter into a "race to the bottom" competition to attract capital at the expense of labour rights.

In this regard, there are theoretical and empirical arguments that contend lower labour standards do not necessarily attract investment. It is believed that motivation, productivity and innovation could be obtained only when employees are granted freedom of action and humane treatment. The argument is that lower labour standards would bring about de-motivated and at times ill-motivated labour to the detriment of industrial peace, productivity and investment. However, it is contended that higher labour standards do not necessarily imply lower profitability. Empirical studies also show that the general flow of investment is towards the high labour standard jurisdictions. It is even argued that "in most cases, jurisdictions with higher labour standards have been successful in impressing investors."

Generally, it seems that investors are more interested in the availability of factors such as, political and macroeconomic stability; conducive infrastructure facilities and independent and expeditious dispute resolution together with skilled and disciplined labour rather than low labour standards. Under this view, the decision where to locate an investment is mainly dictated by considerations other than labour standards. Moreover, it was argued that economic liberalisation will have an effect of upgrading labour standards as transnational companies have had the tendency of bringing in "management technique more respectful of workers and often pay higher wages than the local firms".

While the establishment of 'union free' workplaces approach tends to consider labour standards as the decisive factor in determining investment locations, the countervailing argument that labour standards do not have an impact on investment decisions fails to appreciate that labour standards constitute one among the many factors that will be taken into account in selecting investment destinations. In particular, when the investment under consideration is a labour intensive one, consideration of labour costs would not be taken lightly as it impacts cost of production-thereby competitiveness.

Of course, factors such as infrastructure, political stability, and the existence of independent dispute resolution machinery are important factors to be considered in determining investment locations. However, when the competing jurisdictions are more or less similar in respect of these factors, the issue of labour standards may be factored in the decision making. It is important to note that "a marginal increase in labour costs due to higher labour standards will put a nation at a competitive disadvantage in relation to its competitors".

An illustration of this labour cost factor can be found in a plant level study conducted in 2003 on a decision by Nike, one of the major sportswear companies, to relocate its operations. The study found that Nike had plans to relocate to Vietnam some of its factories situated in Indonesia, apparently on grounds of better political stability in the former. However, the actual reason for the relocation was the wage level which was much lower at the new destination. Similarly, in the United States where the other factors relevant for investment such as infrastructure, market access, political stability, and an independent judiciary have been evenly distributed among the federated states, studies have shown that "(…) those states with high rates of unionization and high wage rates have had significantly lower rates of manufacturing growth over a long period of time".

In general, regardless of the diversified views in this regard, in the current economic order, the overall trend towards unionization, union density and the role of unions have been on the decline. These are mainly the outcome of the changes in production and regulatory regimes dictated by the global economic order and fierce global competition.

The situation of trade union in Africa is more or less similar with what has been narrated above in the sense that similar cost sensitive relocation measure from Nigeria was reported. Moreover, Kosor and Hayter recently described the African situation in the following manner:

> (…) privatization began reducing the employment in state enterprises which has been hitherto the bastion of unionism across Africa. Export processing zones where associational rights are constrained began to emerge in crucial locations, and the number of hostile private employers [towards

unionization] began to increase [as a result] trade unions lost substantial part of their constituency and potential members.

With this broad framework on the subject of trade unionism in mind, in the subsequent sections, an assessment will be made on the development of unionization in Ethiopia in historical perspective to understand where and how it emerged and where it now stands so that future challenges and opportunities could be anticipated.

6.2.4. Early labour combinations in Ethiopia

There has been evidence that awareness towards modern industrial relations practices first came during the early to mid-20th century when Ethiopian workers had the opportunity to work with or under the supervision of French and Italian nationals. Some Ethiopian Franco-Ethiopian railway company employees had working visits to France through which field observation on employment relations was gained. This mixture of labour profile was more visible with the influx of many Italians as workers and supervisors during the Italian occupation of Ethiopia in the Second World War. The opportunity to work alongside Europeans enabled the Ethiopian employees to acquire experience as to how employment relations operated elsewhere where industrial relations were well-entrenched.

Working in close proximity with foreign workers, though advantageous in terms of acquiring experience, was however associated with discriminatory treatment in general and discriminatory payment in particular. Foreign workers were relatively favourably treated compared to their Ethiopian counterparts even in comparable job positions. Thus, though all employees had common grievances against their employers, Ethiopian employees had additional grounds for discontent. Nevertheless, there were common concerns to all workers such as issues of job security, safe and healthy working environment, excessive working hours and the absence of paid leaves.

There was, for instance, an incident resulting in discontent of all workers which was associated with sick leave of an employee. This incident occurred, in 1951, at the "Ethio-fibre factory" which employed 200 workers at the time.

> A female employee of the factory fell sick and was absent from work. Her close relatives communicated her sickness to the employer in due time. However, the employer was suspicious as to the accuracy of the information and demanded that the employee should somehow appear before it. She was transported to the premises of the factory on a stretcher. Unfortunately, she died while on the shoulders of the people carrying her back home, after verifying to the satisfaction of the employer that she was indeed seriously ill.

Immediately after that incident, a wild-cat strike broke out within the workers' community in general and at the premises of Ethio-fibre factory in particular. Indeed, prior to this incident, there had been another similar strike, in Dire Dawa, at the Franco-Ethiopian Railway Company where around 1500 workers consisting of French, Italian, Greek, Djiboutian and Ethiopian nationals demanded, among other things, wage increments, limitation of daily working hours and decent working conditions. The incident suggested that employees' differences in nationality or other variables did not necessarily pose any impediment to waging a united struggle towards a common purpose. Moreover, the fact that these incidents ignited such wide-ranging anger indicated that there was a deep rooted and cumulative but hidden sense of discontent in the workforce waiting for an opportune moment.

However, there was no room for unionization until 1963. In the absence of a legal framework for association, there were times when workers had to march to the Palace to present petitions directly to the Emperor. Nevertheless, with the numerical increase of the labour force and the increase in volume and complexity of the discontent, the opportunity for personal appearance before the Emperor was not readily available whenever the workers wanted it.

The absence of any legal basis did not, however, completely inhibit attempts to organise. The Franco-Ethiopian Railway Company employees, for instance, formed an association, named '*Syndicate des Cheminots Ethiopien*' and managed to obtain *de facto* recognition by their employer in 1947. By representing its members, the association gained concessions from the employer in narrowing the wage differential between Ethiopian and expatriate employees and in limiting the employer's arbitrary measure of dismissal. Inspired by the successes of the employees of the Franco-Ethiopian Railway Company, many employees in various enterprises organized themselves in establishing groups and friendship societies among co-workers, locally known as *Idir (*self-help association) and *meredaja* (mutual assistance) in their respective premises. However, these associations did not have direct dealings with the employers. They, nevertheless, helped in mitigating the employees' economic hardships created by employers' unilateral and arbitrary measures such as dismissals, uncompensated employment injuries, old age and illnesses.

Thus, at the early stages of labour movements in Ethiopia, as the formation of trade unions was not permitted by law, employees were inclined to associate themselves in the form of mutual assistance and cooperative societies. This historical trend seemed to resemble the early labour combinations in other jurisdictions where "friendly societies" of employees were the way towards helping each other among the co-workers in times of need.

6.2.5. Constitutional recognition of freedom of association in Ethiopia

With the promulgation of the 1955 Revised Constitution of Ethiopia, freedom of association was for the first time officially and constitutionally recognized in the country. The then Emperor, Haileselassie I, handed down the Constitution to his 'subjects' with the following introductory remark in the preamble: "*We, Haileselassie I, (…) hereby proclaim and place into force and effect as from today the Revised Constitution of the Empire of Ethiopia, for the benefit, welfare and progress of Our beloved people*".

The Revised Constitution devoted a full chapter to the "Rights and Duties of the People". Among the rights relevant to labour relations which were enshrined in the Constitution were 'freedom of speech' (Art.41), the right to 'peaceful assembly' (Art.45) and 'the right to form or join associations' (Art.47). However, all of those provisions were accompanied by a limiting phrase such as '*in accordance with the law'* or '*within the limits of the law.*' The phrase "in accordance with the law" or "within the limits of the law" pre-supposed the need for the issuance of legislation for the proper implementation of the constitutional provisions. Thus, in order to make freedom of association meaningful, the Revised Constitution should have been followed by legislation with detailed rules for implementation. But, until the adoption of the Labour Relations Proclamation of 1963 (eight years later) no implementing legislation was put in place pertaining to the formation of industrial associations. Due to this, Bahru was of the view that 'the human rights provisions, such as freedom of speech and of assembly, were inserted [in the Revised Constitution] largely for public relation exercises meant mainly to appease international partners rather than a genuine commitment at respecting and implementing the specified rights'.

Meanwhile, workers were inclined to conduct clandestine meetings as to how they should best deal with their employers. For instance in 1961, leaders from self-help workers' organisations representing eleven companies met secretly in Addis Ababa to discuss a 'united front' to deal with their respective employers and the government. Following this, a series of wild-cat strikes and demonstrations were held at the premises and against the companies. The most serious of the strikes was one called by the Franco-Ethiopian Railroad Company workers which lasted more than a month. Frequent wild-cat strikes not only adversely affected the production and service provision thereby industrial peace but also began to harm social and political stability.

Although the country's employed workforce at the time was estimated to be no more than 50,000, the geographic concentration of the labour force was within and adjacent to the Addis Ababa-Dire Dawa railway route which was then an 'industrial corridor'. Hence, 'the small number of the labour force was compensated by its concentration' in close proximity to the political centre of the country. This provided the labour force with the leverage to pressure the government to address these concerns and the government was 'unable to resist the pressure from labour any longer'. Therefore, the need to prevent or at least to regulate strikes came to the forefront so that production process could be unhampered; and social and political stability maintained. Hence, at around the first half of the 1960s, instead of trade union suppression, legalising their existence and regulating their activities was considered appropriate policy response thereby leading towards the adoption of Labour Proclamation in 1963.

6.2.6. Formal establishment of industrial associations in Ethiopia

The 1960s in Ethiopian history was a period when 'modernity' along the lines of Western values through legal reform was attempted to be introduced. Until this time, despite its longstanding ILO membership, Ethiopia appeared to have dragged its feet in laying down the necessary legal framework for the formation of industrial associations. It was in 1963 (after 40 years of ILO membership) that it adopted a law (Proc. No.210/1963) to regulate the formation of industrial associations and their mode of operation. Incidentally, it is also worth noting that the two important ILO conventions on freedom of association (Conventions No.87 and 98) were ratified by Ethiopia in 1963.

The decision to adopt the Labour Relations Proclamation, it can be argued, might have been dictated by a combination of domestic, regional and international situations. Domestically, it had been seen that demands for respect to unionization were usually accompanied by wild-cat strikes, which not only affected the production process but also brought social unrest. Moreover, while the labour force was displaying such a sense of discontent against the contemporary legal and social order, an attempted military coup, in December, 1960, had promised, among other things, job creation and respect for fundamental and democratic rights. It appeared that by raising economic and social issues pertinent to the labour force, the coup organisers were looking for the support of the Ethiopian labour force in their effort to overthrow the then

Emperor. Even though the coup failed, the government seemed to have felt the need to respond positively to the labour forces' longstanding demand for unionization with a view to pre-empting future social and political unrest.

There was also a regional factor to be considered here. With some African countries gaining independence since the second half of the 1950s, preparation for the establishment of an 'Organization of African Unity' (OAU) was under way in the early 1960s. Addis Ababa was selected to host the first meeting of the African Heads of State in May, 1963. By then most of the newly independent African states had vibrant trade union movements symbolising an organised voice against both exploitation and colonisation. The fact that Ethiopia was not physically colonised by any colonial force was believed to be one of the main reasons for selecting Addis Ababa to host the Summit. Given this impression, it would have been ironic if Ethiopia, the 'symbol of independence', were devoid of legally recognized trade unions. On this issue, Ananaba stated that 'policy makers in Addis Ababa thought that it would be most embarrassing if it were known, particularly by the more militant African leaders, that Ethiopia was the only independent country which had no legal trade union movement (…)'.

Beyond the regional considerations, at the international level, the ILO was influential. Formal participation at the ILO Conferences requires Member States to comprise their respective core delegation with four members: two government representatives, one employers' association representative and another trade union representative. As a result, formation of associations was a precondition for fully-fledged attendance at the ILO Conferences. The ratification of Conventions No. 87 and 98 had also required an implementing instrument to give them effect domestically.

An additional influence at that time was a by-product of the 'Cold War.' The International Confederation of Free Trade Unions (ICFTU) representing the 'Western bloc' labour movements was actively involved in African labour movements with a view to broadening its ideological sphere of influence. Similarly, the World Federation of Trade Union (WFTU) representing the

'Eastern bloc' labour movement was engaged in a functionally equivalent effort. Both were putting pressure on African governments to introduce labour friendly laws and policies. In general, it is argued that the second half of the twentieth century has been designated as the "age of rights." All these internal and external factual circumstances seemed to have pressed the then Ethiopian Emperor to urgently issue a 'Decree' without even waiting for the parliament to reconvene from its recess.

The consequence was that as soon as the Labour Relations Proclamation (1963) entered into force, 109 trade unions consisting of 60,000-70,000 workers were formed and registered with an appropriate agency within less than a year. The significantly high number of trade unions being formed within a short period indicated that workers were eager for unionization. In April 1963, within months of the promulgation of the Proclamation, the CELU was established, as an umbrella labour organisation at the national level. This development was mirrored on the employers' side by the creation of an organisation named the "Ethiopian Employers' Federation". The formation of associations for both employees and employers enabled an Ethiopian tripartite delegation to attend an ILO General Conference for the first time, the 47th annual General Conference in June 1963.

Although its adoption was considered a success for workers, the Proclamation appeared to have an explicit objective of restricting the labour force from general political activities. In this regard, the law had an express provision prohibiting associations from engaging in any political activity whatsoever (Article 22(c)). The then Secretary General of CELU, Beyene, documented the challenge of the time in the following manner:

> (….) we [the trade union leaders] continued organizing workers in enterprises; however, the political atmosphere was very tense and members of the National Security and the Palace were hindering the progress of our undertakings. Some of our members would be arrested while others were physically intimidated.

It is debatable whether the Ethiopian labour movements at the time had political inclinations since their major concerns were 'bread and butter' issues. Unlike trade unions in many parts of the African continent whose activities were combined against, and at times overlapped with the struggle against colonialism, this was not the case in Ethiopia since it was never physically colonised. Nevertheless, it is believed that the express exclusion of industrial associations from political activities was geared towards 'disciplining' workers in their relation with the government by requiring them to be apolitical.

Moreover, in order to avoid frequent strikes, the Proclamation spelt out a long list of what amounts to 'unfair labour practices' for the parties which included initiating industrial action 'prior to submission of the labour dispute to the Labour Relations Board and before the expiration of a period of sixty days following such submission.' Thus, the law, while granting the right to unionization also had an implicit objective of minimizing the frequency of strikes to the maximum extent possible.

In this regard, the following highly critical reaction to the labour law by a union leader is very revealing and worth quoting at length:

> Your union has tied our hands and feet. Before you allow us to organize, we used to get substantial concessions from employers by merely threatening to walk out. The employers know that we do not kid when we threaten-the work [walk-out], even the equipment was not safe. Yet now you have advised us that through the union we have first to discuss with our employers, then if we are not satisfied, we have to submit our grievances to the Labour Relations Section of the Ministry and if we are not reconciled by the Section, we have to lodge our dispute with the 'Labour Relations Board'. The case does not stop there; either employers or employees can appeal to the Supreme Imperial Court on the decision of the Board (…). We neither have the money, the time nor the manpower to follow up our disputes through these channels. Your union [law] has only tied us to the benefit of our employers.

On the other hand, the employers' side was of the view that the coming into force of the law which legalised unionization was not necessary to the country's then prevailing stage of industrial development. An employer in a major enterprise had, then, spelt out his objection to the labour law in the following manner.

> Trade unionism to developing Ethiopia is a luxury. You merely follow the system and practices of developed countries like England and France and are crippling our budding economy. You are discouraging foreign investment [by issuing such a law] (…).'

Although the representativeness of the above-mentioned views may be debatable, in general terms, union activists seemed to consider the law as restrictive to union activities while employers were of the view that it was a premature and untimely instrument to then existing infant industrial development. Regardless of these divergent views, however, the coming into force of the 'Labour Relations Proclamation' paved the way for the development of labour law as a distinct branch of law outside of the Civil Code in terms of structure and content. Its distinct nature may be inferred from the contents of the proclamation among which the following points are particularly noteworthy.

First, the labour law incorporated detailed rules for the formation of employer and employee associations and spelling out their rights and obligations. Second, the registration of these associations was entrusted to a distinct ministry (the Ministry of National Community Development and Social Affairs) a different ministry from the Ministry of Internal Affairs which was empowered to register and monitor all other not-for-profit associations in the country. Third, detailed rules on collective bargaining and collective agreements were put in place. Fourth, the Law provided for the establishment of a 'Labour Relations Board', a tripartite labour dispute settlement forum outside the ordinary courts.

As regards the substantive power of the Ministry, it had no mandate to provide prior authorization for the formation of associations; its power was limited merely to the registration of associations. Even with registration, 'if the Ministry failed to take any action with respect to the application for registration within thirty days, the association was deemed to have been registered.' Thus, any delay in taking action on an application for registration amounted to an acceptance of registration which provided a relaxed procedure for the formation of associations. Furthermore, the Ministry, being an administrative organ, was not empowered to dissolve associations. Its power was limited to petitioning the regular courts to declare dissolution which is consistent with the ILO prescription in this regard (Convention No.87, Art.4).

Apparently these were suitable measures towards union formation. Nevertheless, the labour law fixed a threshold of fifty employees in an enterprise to form a first-level trade union. Given the low level of industrial development in the country at the time, this threshold was considered high since there were very few enterprises that employed that size of a workforce. Thus, it was argued that though the adoption of the labour law providing for union formation was considered a positive step, the high threshold of membership placed a substantial restriction on the exercise of the right. Subsequent labour legislations, as will be seen later, have progressively reduced the minimum membership requirement to form a trade union.

The Committee on Freedom of Association of the ILO Governing Body, in principle, has not been against laws prescribing minimum level of membership to form a trade union. It, however, has been of the view that 'union formation should not be considerably hindered or even rendered impossible by fixing too high a figure'. Indeed, the Committee had expressly stated that 'a law that required a threshold of fifty employees was too high'. Therefore, the law was inconsistent with Ethiopia's international obligation under the ILO in this respect.

6.2.7. Industrial associations under the Military Rule

It was mentioned earlier that the military government claimed to have followed a socialist-oriented path of development. Through this ideological lens, it was viewed that private capital was exploitative and a class enemy while labour was considered a source of wealth and development. With this ideological mind-set, the Labour Proclamation of 1963 that was designed to treat employers and employees on equal footing in the formation of associations was incompatible with this ideological orientation. Thus it came up with another pro-labour employment law (Proc. No.64/1975) that entitled employees to form trade unions without providing equal opportunity to the employers. The ILO Committee of Experts criticized and reminded Ethiopian authorities that their measure, in this regard, was in contradiction to Ethiopia's obligation under the ILO Convention No. 87. However, this law remained in force until the demise of the military rule.

Moreover, the labour law of the military rule reduced the minimum number of membership to form a trade union at the enterprise level to twenty employees, a figure less than half of the threshold of the preceding law. Indeed, workers were being encouraged to become members of trade unions as they were considered essential partners to the fulfilment of the centrally planned and command economy which was an important feature of the economy. As a result, encouraged by the new political setting, around 290,000 employees were organised under various industrial unions within a short period of time.

Unlike the time of the Emperor, where some employers were hostile towards trade unionists and union organisers, there was no fear of retaliation during the military regime as long as unions were not acting against the political system. Although privately owned major means of production and distribution were nationalised, in some cases, the old management group remained in office to administer those enterprises as replacing the technocrats within short period of time was not practicable. Thus, trade unions were considered as *'vigilante groups'* entrusted with the role 'to check possible economic sabotages by the management group that was considered ideologically hostile to the new socialist political system'.

Furthermore, the labour law of the military government included provisions which granted immunity to trade union leaders from managerial measures of control and discipline. For instance, with the coming into force of the Trade Unions' Proclamation of 1982, employers were prohibited from suspending a trade union leader from work on disciplinary grounds without the prior approval of the Minister. Besides, transfer of a trade union leader from one place of work to another was not lawful without the consent of the employee concerned or the prior approval of the Minister. Although taking disciplinary measure against employees and deciding on transfer of employees were conventionally among managerial prerogatives, this law had significantly limited the power of the management over trade union leaders in this regard. It granted immunity to trade union leaders by making the management powerless against them.

In this state of affairs and on the perception that the then prevailing ideology was favourable towards trade unionism, trade unions were extensively organised and, as of 1985, there were 174 basic trade unions made up of around 300,000 members across the country. Moreover, there was no law empowering the Ministry to suspend or dissolve associations except that it was authorised to refuse registration of an association on legally enumerated grounds in which case the association had the right to appeal to a court of law.

There was, however, a trade-off against such a 'union-friendly' environment. The then labour proclamation prescribed that it was only a single trade union that could be lawfully established at an enterprise level, thereby expressly declaring the "mono-union" policy. It was also politically affiliated with the ruling party. At times, there existed an overlapping of responsibilities in the sense that trade union leaders were at the same time influential figures in the political party structure. For instance, in 1980s, the then President of the All Ethiopian Trade Union was, at the same time, a Central Committee member of the Workers' Party of Ethiopia (the only lawful and ruling party). The affiliation between the Party and the trade union was so intimate that the line of demarcation was so blurred.

Interestingly, as indicated above, the Imperial regime had put legislative measures in place and employed surveillance activities to restrict trade unions from engaging in political activities. Conversely, the military government introduced a paradigm shift by encouraging trade unions to step into the political arena. The politicisation of trade unions was not, however, a blank cheque given to the unions in that they were not at liberty to make affiliation with any political party of their own choosing. On the contrary, trade union leaderships who were not politically allied with the military regime were subjected to ill treatment.

An additional constraint was that the law made basic trade unions subordinate to higher ones. Article 50(7), for instance provided that 'lower level trade unions shall be obliged to accept and implement the decisions of the higher trade unions'. Finally, the law provided for the establishment of an 'All Ethiopia Trade Union' as a single umbrella trade union at the national level instead of leaving such issues to be decided internally by the unions themselves. As a result, first-level trade unions were in effect treated as branch offices to the higher levels.

A further restrictive dimension relates to international affiliations. Article 51(2) of the labour law limited the establishment of international affiliation so that it could be undertaken only by the national association at the top without offering such an opportunity to first-level or mid-level trade unions. Nevertheless, the relevant ILO conventions allow associations at all levels to freely establish international affiliations. It is, therefore, arguable that the apparently favourable legal framework towards unionization during the military government had a trade-off in terms of loss of autonomy and independence of the trade unions.

As indicated previously, private employers were denied the right to associate under the military rule. As the government was the major employer even in the economic sphere due to the nationalisation of the major means of production and distribution, it can be said that there were few private employers, as such, to be organised. But there were small and numerous enterprises such as garages, bars and bakeries still under private ownership co-existing with the state ownership system. In consequence, the denial to employers of the right of establishing associations was a decision more of ideological than practical considerations. Moreover, the command economy and the lack of managerial autonomy did not enable the state owned enterprises to run their businesses in an economically rational way. Due to this, most state owned enterprises, at the time, were loss making-thereby regularly being subsidized from the state treasury.

This state of affairs suggested that, in the absence of a favourable policy environment towards private sector development, economic growth would not be achieved and in the absence of economic growth, no matter how well labour rights might be articulated in paper, they would remain an empty shell. Thus the feasible way appears to be to strike a reasonable balance between providing sufficient economic space for private sector development on the one hand; and ensuring the promotion and protection of fundamental labour rights on the other.

However, Owing to denial of the right of association during the military rule, private employers were highly marginalized not only economically due to nationalisation of property but also organisationally. Thus, it may be argued that neither the employers nor the employees benefited from such an arrangement. Regardless of the outcome, however, the era of trade union regulation of the Imperial rule was transformed to an over-regulated trade unionism during the military regime in terms of autonomy, independence and political orientation of the trade unions.

6.2.8. Industrial associations during the post-Derg period

With the collapse of the military regime in 1991, a change in ideological orientation and a new economic policy were introduced. The socialist path of development gave way to a capitalist path of development while the command economy was replaced by market-led political economy. The international climate since the early 1980s was one of economic liberalisation mainly manifested through privatization accompanied by, among other things, market and price deregulation. The fall of the Berlin Wall and the dismemberment of the 'communist bloc', in Central and Eastern Europe were also taking place at those times, thereby eroding the ideological basis for a highly visible state involvement in the economy.

Moreover, the poor economic performance under the military rule meant that a command economy had not been viable. It was even argued that 'war and *Derg's* policies had left a crippled economy and an impoverished people'. Consequently, though the incoming force, the Ethiopian People's Revolutionary Democratic Front (EPRDF) which toppled the Derg, was a socialist in words and deeds, it was neither willing nor capable of ignoring such a visible change of circumstances. The national and international situation at the relevant time (1991) was not conducive to governments with communist inclinations. Therefore, the EPRDF led Transitional Government adopted a market-led economic policy within six months after assuming power, an economic policy which was incompatible with its former Albanian style political orientation.

With a market oriented and liberalised policy framework, the government declared its preparedness to withdraw from micro-managing state enterprises in order to provide autonomy and economic space for private sector development- except in those 'key establishments' of the economy. Hence, privatization of state owned enterprises was commenced. In conformity with this political and economic disposition, a new labour proclamation which repealed that of the military government was issued in 1993. It was stated in the preamble for the proclamation that one of the rationales for its adoption was to ensure compliance of the labour law with the international [ILO] conventions and other legal commitments to which Ethiopia is a party.

More specifically where freedom of association is concerned, in contrast with the previous law which only granted the right to form association to the employees, the right to establish organisations was recognized and became even-handedly available both to employers and employees. From the employees' perspective, the minimum level of membership to form a first-level trade union was maintained at twenty by the Labour Proclamation of 1993. Moreover, subordination of basic trade unions to that of the higher levels was an express requirement for unions to operate. Finally, protection against anti-union discrimination was been explicitly legislated for the benefit of trade unionists and trade union leaders.

This did not mean, however, the removal of all direct potential administrative control. The Ministry of Labour and Social Affairs, an administrative organ, was empowered to cancel the registration of an association by providing thirty days prior notice specifying the reason(s) for cancellation and the opportunity to challenge it (Article 120). This stipulation was inconsistent with the ILO jurisprudence which expressly stated that 'administrative dissolution of trade union organisations constitutes a clear violation of Article 4 of Convention No.87' to which Ethiopia is a party. Furthermore, the mono-union policy of the military regime was also carried over to the new labour proclamation.

However, with the adoption of Labour Proclamation No.377/2003 and the repeal to Proclamation No. 42/1993, further liberalisation towards union formation and administration has been observed. Accordingly, the minimum membership level to form a basic trade union has been again reduced to ten. This change further paved the way for employees of small enterprises to unionise. The possibility of forming more than one trade union in an enterprise (plurality of unions' policy) has also been expressly legislated for.

Moreover, since the issuance of the Labour Proclamation of 2003, the power of the administrative organ to cancel the registration of an association has been withdrawn. As a result, it is the regular court, consistent with the prescription of the ILO jurisprudence, which has the power to decide on cancellation of registration issues. The right of the administrative body is limited to making application to the court to order cancellation of an association. With these legislative reforms, many of the outstanding issues as to the non-conformity of the previous laws with ILO standards have been positively addressed.

Nevertheless, it may also be argued that the current labour law brought a fresh problem of its own from the standpoint of a suitable legal framework for trade unionism. This is associated with the exclusion of the management staff from joining trade unions and how the 'management staff' is defined. The ILO jurisprudence accepts the exclusion of 'management and supervisory staff' from union membership of non-managerial employees as managerial employees are believed to be representing the interest of the employer at workplaces. However, the Committee on Freedom of Association of the ILO Governing Body is of the view that "(…) the categories of such staff [the management staff] are not to be defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present or potential membership." Similarly, the ILO Committee of Experts on the Application of Conventions and Recommendations has been of the view that the "scope for managerial staff should not be defined so widely as to weaken trade unions by depriving them of a substantial proportion of their potential membership."

It should be recalled that the labour proclamations of the previous regime (i.e. the military government) defined the 'management staff' from the organisational structure perspective whereby "only those officials directly accountable to the General Manager or his [her] deputy were categorized within it and hence excluded from trade union membership." The residual part of the labour force outside of this structural linkage was entitled to establish or join trade unions of their own choosing.

Labour Proclamation No. 377/2003, however, defines the "management staff' from the angle of the function the employee performs rather than the post he assumes in the enterprise's organisational structure (i.e. functional approach). Accordingly all employees engaged in managerial functions, regardless of their structural position are considered to be members of the management staff. For the purpose of the present law, managerial function includes, *inter alia,* possessing the power to "(…) take disciplinary measure (…)." Disciplinary measures, for their part, range from the issuing of a written reprimand or - even an oral warning for that matter- to imposing disciplinary dismissal decisions. Hence, as far as the formulation of the law is concerned, any employee who is authorised to hand down any or many of such measures is categorized as a member of the management team. According to a senior member of Confederation of Ethiopian Trade Union (CETU), the broad definition accorded to the 'management staff', excluded appreciable number of potential members from union membership, thereby making unions weak economically and in leadership quality. This has been, however, rectified by the current labour proclamation (Proc.No.1156/2019) by narrowing down the definition of managerial staff to those who exercise genuine managerial functions.

6.2.9. Summary

As with the development of organised labour movements elsewhere, unionization in Ethiopia was transformed from self-help associations to fully-fledged trade unionism over-time. Although Ethiopia was one of the oldest members of the ILO; and though the ILO Constitution required member states to accord freedom of association as a matter of urgent importance, it had to wait for forty years (1923-1963) before the introduction of domestic law on freedom of association. Even after forty years, it could be argued that it was mainly due to pressure from the labour force together with favourable regional and international situations rather than governmental political will that the law was brought into being.

At a time when many countries in colonial Africa had laws on trade unionism that paved the way for the establishment of vibrant trade unions that were instrumental in the struggle against economic exploitation and colonisation, the Imperial regime of non-colonised Ethiopia was concerned that organised labour would endanger the very foundation of the absolute monarchy of the royal dynasty. The Imperial view was that social peace could be maintained by denying the collective rights rather than granting them. Consequently, it can be said that the fact that Ethiopia was not physically colonised by any foreign power did not bring about any better protection for labour rights. Petitioning the Emperor for justice and at times wild-cat strike or threat of strikes was the modality the labour movement had adopted as a course of action.

However, with the attempt to introduce modernity to the traditional Ethiopian society through legal reform in early 1960s, a policy of suppression of trade unionism gave way to recognising trade unionism but accompanied by restrictions from engaging in any political activities. Only apolitical trade unions were tolerated.

A dramatic change of direction came with the military period with highly centralized and partisan approach to trade unionism in which politicisation of trade union, ‘mono-trade union system’ and ‘democratic centralism’ in trade union administrative structure were introduced and the right to associate for employers was denied.

Finally, the labour law of the post-military rule progressively adopted more liberal positions. Thus the general pattern of the legal framework for trade unionism has moved from suppression to regulation, and from regulation to over-regulation; and finally from over-regulation to minimal regulation. The pattern reflected the economic and political disposition of the three regimes in that the over-regulation was associated with the command economy of the military rule; while the minimalist regulation has been correlated with the market oriented economy.

Generally, though the development has been slow and incremental, and at times registering significant regression, the general trend is that the ILO conventions on freedom of association have positively influenced the contents of the successive Ethiopian formal labour laws as many of the stipulations of the conventions have been incorporated over-time. However, due to lack of uniform and consistent policy towards unionization by the three successive Ethiopian regimes, industrial associations have been weak owing to lack of consistency and continuity.

Unlike the colonial and post-colonial Africa where vibrant labour movements existed in many countries, labour movement in Ethiopia has not been strong and vocal in economic, social or political issues. However, the fact that the labour force was concentrated in the ‘industrial corridor’ which is also in close proximity to the centre of the politics pressed successive regimes in Ethiopia to put the labour force at close surveillance. In practical terms, compared to its counterparts elsewhere in the African continent, organized labour's role in the political arena was very minimal except during the time of the military regime where they were considered as vigilante group to protect nationalised means of production.

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Problem for discussion:

1. *What have been some of the causes for the unevenness in the development of trade unionism in Ethiopia?*
2. *Some tend to argue that freedom of association in enterprises is a manifestation of "industrial democracy". According to them, industrial democracy is helpful to productivity, profitability and competitiveness. They even attempt to establish analogy between democratic states and unionized enterprises. It is argued that democratic states have been peaceful, prosperous and developed; while dictatorial regimes have been destabilized, poor and under-developed. Similarly, the argument goes, unionized enterprises are cooperative, productive and competitive; whereas non-unionized enterprises are confrontational, devoid of industrial peace and less productive. What is your view?*
3. *Why have trade unions not been as vocal as in Ethiopia as in other African countries?*

It is well understood that unionization is not an end by itself. It is rather mainly to protect and promote one's interest that employees embark upon unionization. Once unionization is achieved, the next step would be entering into collective bargaining with the other party (i.e. employer or employers' association). The next chapter will be devoted towards analysing procedures and processes to collective bargaining. It will discuss the scope and status of collective agreement which is the desired outcome of collective bargaining as well.

Chapter VII

Collective Bargaining and Collective Agreement in Ethiopia

7.1. General

As indicated above, it must be underlined that formation of an association is not an end by itself. It is in view of defending and furthering the interests of the collective body that an association is mainly established. Thus, association though necessary, is not sufficient to serve its intended purpose. Undertaking collective bargaining and concluding collective agreement are important steps towards achieving this final goal.

As mentioned in Chapter 6 of this text, the right to collective bargaining has been offered constitutional recognition. The detailed bargaining process, however, is to be articulated by ordinary legislation. To help understand the legal processes towards collective bargaining and collective agreement, let us spell out the relevant provisions of the current labour proclamation:

Article 125: Definition

1) *"Collective agreement" means an agreement on conditions of work concluded in writing between one or more trade unions and one or more employers or representatives or agents of employers' associations.*
2) *"Collective bargaining" means a negotiation process between employers and workers organizations or their representatives concerning conditions of work in order to reach at collective agreement or the renewal or modifications thereof.*

The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and formulate their programmes.

In the Ethiopian legal framework, establishment of trade unions is a pre-condition in order to undertake collective bargaining because as can be gathered from the definition above, collective bargaining is to be conducted between an employer or employers' association on the one hand; and trade unions or their representatives on the other. There does not seem a room for recognition, registration and enforcement of collective agreements, negotiated and signed by non-unionized workers. Moreover, the Labour Proclamation anticipates the free choice of bargaining level in the sense that sector-level or regional-level collective bargainings is possible and lawful, in the Ethiopian current practice, however, negotiations are enterprise level.

In some jurisdictions, even if there is no trade union in the enterprise, non-unionized workers could still nominate representatives and negotiate with their employer. In fact, the Committee on Freedom of Association does not object to this practice. The Committee's concern is in cases where there exists a trade union and the employer engages in direct negotiation with the employees by-passing the representatives of the trade union because such practice would be contrary to the Convention's objective that is encouragement and promotion of effective collective bargaining.

Article 129: Subject matters of a collective agreement

> *Matters concerning employment relations and conditions of work as well as relations of employers and their associations with trade unions may be determined by a collective agreement.*

Article 131: Procedure for collective bargaining

1) *A party desiring to initiate a collective bargaining may request the other party in writing. It shall also prepare and submit a draft proposal necessary for the negotiation.*
2) *The requested party shall within 10 working days of receiving the request appear for collective bargaining.*
3) *The parties shall before commencing collective bargaining draw up the rules of procedure for bargaining.*
4) *Each party shall have the duty to bargain in good faith.*
5) *Issues on which the parties could not reach agreement by negotiations in good faith may be submitted to the competent labour tribunal.*

The principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided. Moreover, it is important that both employers and trade unions make every effort to reach an agreement and genuinely and constructively negotiate with a view to reaching an agreement. Since good faith is a state of mind, it can only be deduced from the externally manifested acts of the parties. Other than those stated above, good faith may manifest itself through making objectively reasonable proposals, employing objectively reasonable practices and procedures while conducting negotiations and complying with the agreements which are concluded.

Incidentally, it is important to note that failure to make oneself available for bargaining within ten working days after receiving request and proposal for bargaining by the other party; and failure to bargain in good faith have been serious violations to which fine in the form of sanction has been imposed pursuant to Article 186 (2). A related issue would be how the sanction to be effected. Fine generally is a penal sanction. In order to impose penal sanction, the prosecution office handles the case and the Criminal Bench renders the decision. However, for the purpose of the labour law, the situation is entirely different.

Enforcement of violations under the Labour Proclamation are to be handled labour inspectors. Labour inspectors are empowered to institute an action against suspects before the labour division of first instance court. However, the fine is to be delivered to the state treasury. Therefore, the Labour Proclamation has its own unique procedure and organs of dispute settlement.

The other issue associated with collective bargaining is in cases where more than one union have been formed in an enterprise with whom would an employer be obliged to bargain in good faith. One possible solution would be to entitle every union to bargain with the employer with respect to working conditions of its members. However, this proposition has some limitations. First, under this arrangement, the employer would be compelled to undertake multiple negotiations in which substantial part of its managerial time would be spent in negotiating. Second, an employer may be pressed to accept heterogenous working conditions at enterprise level as every trade union may propose differing working conditions. This outcome is undesirable to the employer since it would like to have homogenous working condition at enterprise level.

ILO jurisprudence has proposed a solution in such circumstances. It is adopted a working system that states that “the most representative union shall be the exclusive bargaining agent”. This proposition again raises new issues to be resolved: How to determine the most representative union? And what does exclusive bargaining agent mean?

This will take us to ILO jurisprudence again. The Committee of Experts of the ILO Governing Body stated that it is not necessarily incompatible with the Convention to provide for the certification of the most representative union in a given unit as the exclusive bargaining agent for that unit. This is the case, however, only if a number of safeguards are provided. The Committee has pointed out that in several countries in which the procedure of certifying unions as exclusive bargaining agents has been established, it has been regarded as essential that such safeguards should include the following:

- certification to be made by an independent body;
- the representative organizations to be chosen by a majority vote of the employees in the unit concerned;
- the right of an organization which fails to secure a sufficiently large number of votes to ask for a new election after a stipulated period;
- the right of an organization other than the certified organizations to demand a new election after a fixed period, often twelve months, has elapsed since the previous election.

Similarly, the Ethiopian labour proclamation stipulates that where there exist more than one trade unions at a given undertaking, the trade union which will be the exclusive bargaining agent and undertake consultation with authorities, is the one which secures 50% plus [and more than] one membership of all the employees of the undertaking (Article 115(1)(a); and if an organization subsequently failed to secure the majority membership of workers, the other organization that secure majority shall be recognized instead (Article 115(1)(c).

Finally, if there is no union covering more than 50% of the workers in a unit, the solution offered by the Committee on Freedom of Association is, collective bargaining rights should nevertheless be granted to the unions in this unit, at least on behalf of their own members. Ethiopian law is silent on this issue. *What way out do you propose? Do you subscribe to the solution offered by the Committee? Why? Why not?*

Article 132: Registration of collective agreement

1) *Upon signing a collective agreement, the parties shall send sufficient copies of same to the Ministry or the appropriate authority for registration.*
2) *Unless there exists a valid reason to deny registration, the Ministry or the appropriate authority shall register the collective agreement within 15 working days from the date of receipt of copies thereof.*

Article 134: Duration and validity of collective agreement

1) *Any provision of a collective agreement which provides for conditions of work and benefits which are less favourable than those provided for under this Proclamation or other laws shall have no effect.*
2) *Unless otherwise provided therein, a collective agreement shall produce legal effect as of the date of signing by the parties.*
3) *Unless expressly stipulated otherwise in a collective agreement, no party may challenge the collective agreement within three years from the date of its validity.*

Problem for discussion:

Article 27(1)(k) envisages that a collective agreement may stipulate additional grounds for dismissing of an employee without notice other than those grounds of termination provided by law. This implies collect agreement can bring in less favourable terms (i.e. additional grounds for summary dismissal) to the employee.

On the other hand, Article 134(1) prescribes that "any provision of a collective agreement which provides for conditions of work and benefits which are less favourable than those provided for under this Proclamation or other laws shall have no effect."

Is there any inconsistency between the two provisions of the same instrument?

<u>Please refer to</u>*: Bole Sub-city Kebele 01/02 Recreation Center v. Masresha Hussien; File No.49750: Vol.9*

(Herein below is an Article on the ILO's principles on Collective bargaining and Collective agreements. It is hoped that the piece will provide readers with a better insight on the matter).

"ILO PRINCIPLES CONCERING COLLECTIVE BARGAINING"

Bernard GERNIGON, Alberto ODERO and Haracio GUIDO; International Labour Review, Vol.139 (2000), No.1 (footnotes omitted).

Collective bargaining, as was only to be expected, has felt the impact of the major changes affecting the world over the past 25 years: the general acceptance of the market economy following the fall of the Berlin wall; the debate on the role and structure of the state; economic restructuring and globalization; the ready availability of efficient ways of fighting inflation; the growth of non-standard forms of work and temporary contracts; the on-going process of political and social democratization; the growing autonomy of trade unions from political parties, and many other factors too numerous to mention.

All these factors have had a varied and significant impact on collective bargaining. The scope of collective bargaining in terms of the categories covered has diminished, owing to, *inter alia,* high levels of unemployment and the growth of the informal sector, of subcontracting and of the various forms of non-standard employment relationship (which make unionization more difficult); there has, however, been a certain tendency for collective bargaining to develop in the public sector. Collective bargaining has lost some of its margin for manoeuvre as a result of the successive economic crises and the subjection of national economic policy to processes of rationalization and economic integration and agreement with the Bretton Woods institutions.

The increasingly harsh competition brought about by technological innovation and globalization has led to a reduction in the influence exercised in many countries by sectoral agreements and has given added importance to collective bargaining at the enterprise level (and at lower levels, such as the work unit, the factory or the workplace), strictly taking into account the criteria of productivity and output. Flexibilization and deregulation of work have thus encouraged the growth of collective bargaining at enterprise level.

At the same time, there has been an increasing need for bilateral and tripartite agreements at national level, since certain issues of collective interest cannot be treated in enterprise- or even branch-level bargaining, especially when a country displays significant regional or sectoral differences. The bilateral or tripartite pacts agreed in many countries have a scope reaching beyond conditions of work in the strict sense, given that they cover employment, vocational training, inflation and other social issues. These agreements enhance the prestige of collective bargaining, as they settle questions formerly covered at most by non-binding consultations between the social partners.

The ILO has carried out an enormous amount of standard setting work during the 80 years of its existence as it has sought to promote social justice, and one of its chief tasks has been to advance collective bargaining throughout the world. This task was already laid down in the Declaration of Philadelphia, 1944, part of the ILO Constitution, which stated "the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve … the effective recognition of the right to bargaining". This principle is embodied in the right to organize and collective bargaining Convention, No. 98, which was adopted five years later in 1949, and which since has achieved near-universal acceptance: as of January 2000, the number of member states having ratified it stood at 145, which demonstrates the force of the principles involved in the majority of countries.

More recently, in June 1998, the ILO took another step forward by adapting the Declaration on Fundamental Principles and Rights at work and its follow up. This states that "all members, even if they have not ratified the [fundamental] Conventions, have an obligation, arising from the very fact of membership in the organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those [fundamental] Conventions". These principles include the effective recognition of the right to collective bargaining, along with freedom of association and the elimination of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in employment and occupation.

The framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations; it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers' organization by representatives of workers, employers and governments.

History has shown that the principles contained within this framework have retained their validity ever since Convention No. 98 was adopted 50 years ago, despite subsequent radical changes in the world-which is why the present article seemed opportune.

The purpose of this article is to set out the ILO's principles of collective bargaining as they emerge from the various international standards adopted by the Organization and the comments made by its supervisory bodies (notably the Committee of Experts on the application of conventions and Recommendations and the Committee on Freedom of Association). The definition and purpose of collective bargaining, the workers and subjects covered will first be set out. Then follow the principles of voluntary negotiation and good faith, the intervention of the authorities and the particular case of the public service. Finally, a summary of the principles is presented along with some final observations on the degree to which the right to collective bargaining is applied across the world.

Definition and purpose of collective bargaining

In the ILO's instruments, collective bargaining is deemed to be the activity or process leading up to the conclusion of a collective agreement. In Recommendation No. 91, paragraph 2, collective agreements are defined as:

> *All agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or*

> *one or more representative workers' organizations, or, in the absence of such organizations, the representatives of the workers duly elected and authorized by them in accordance with national laws and regulations, on the other hand. (ILO, 1996b, p.656).*

The text goes on to state that collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded and that stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement. However, stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement.

In 1951, Recommendation No. 91 set out the binding nature of collective agreements and their precedence over individual contracts of employment, while recognizing the stipulations of individual contracts of employment which are more favourable for workers.

On several occasions, the Committee on Freedom of Association has expressed its preference for collective agreements over individual employment contracts, objecting to equal status being given to the latter or to their being used to the detriment of workers belonging to a union.

Thus, in a case concerning the United Kingdom, the Committee on Freedom of Association indicated that avoiding a representative organization and entering into direct individual negotiation with employees is contrary to the promotion of collective bargaining. For its part, the Committee of Experts considers that granting primacy to individual agreements over collective agreements does not encourage and promote collective bargaining as required by Article 4 of Convention No. 98.

Convention No.98 does not contain a definition of collective agreements, but outlines their fundamental aspects in Article 4:

> *Measures appropriate to national conditions shall be taken … to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements (ILO, 1996b, p. 640).*

In the preparatory work for Convention No. 151 (1978) the interpretation of the term "negotiation" was accepted as being "any form of discussion, formal or informal, that was designed to reach agreement", the term "negotiation" being deemed preferable to "discussion", which did not emphasize the need to endeavour to secure agreements.

Convention No. 154, adopted in 1981, defines collective bargaining in Article 2 as follows:

> *[T]he term "collective bargaining" extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more workers' organizations, on the other, for: (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations (ILO, 1996d, p. 93).*

The ILO supervisory bodies have also stated that the parties to collective bargaining are entitled to choose, independently and without any interference from the authorities, the level at which the negotiation is to be conducted (central, sectoral or enterprise level), and that trade union federations and confederations should be able to conclude collective agreements.

Subjects, parties, and issues in collective bargaining

ILO instruments, as explained above, clearly permit collective bargaining only with representatives of the workers concerned if there are no workers' organizations in the area in question (enterprise level or higher). This standard is set out in paragraph 2 of Recommendation No. 91 and is confirmed in Convention No. 135, which provides in Article 5 that "the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives" ; and in Convention No. 154, which also provides in Article 3, paragraph 2, that "appropriate measures shall be taken, whenever necessary, to ensure that the existence of these [workers'] representatives is not used to undermine the position of the workers' organizations concerned".

The preparatory work for the collective agreements Recommendation, 1951 (No. 91), shows that the possibility for representatives of workers to conclude collective agreements in the absence of one or various representative organizations of workers is envisaged in the recommendation, "taking into consideration the position of those countries in which trade union organizations have not yet reached a sufficient degree of development, and in order to enable the principles laid down in the Recommendation to be implemented in such countries".

The Committee on Freedom of Association maintained in one case that "direct settlements signed between an employer and a group of non-unionized workers, even when a union exists in the undertaking, does not promote collective bargaining as set out in Article 4 of Convention No. 98". Going into greater detail, in another case, the Committee on Freedom of Association stated that the possibility for staff delegates who represent 10 per cent of the workers to conclude collective agreements with an employer, even where one or more organizations of workers already exist, is not conductive to the development of collective bargaining in the sense of Article 4 of Convention No. 98.

The Committee of Experts did not address these issues in its last general survey on freedom of association and collective bargaining of 1994 on Conventions No. 87 and No. 98, although it has done so in observations on the application in certain countries of the conventions on freedom of association and collective bargaining, in which it has expressed a similar point of view to that of the Committee of Freedom of Association with regard to collective agreements concluded with non-unionized grouped of workers.

It is important to emphasize that, for workers' organizations to be able to fulfil their purpose of "furthering and defending the interests of workers" through collective bargaining, they have to be independent and must be able to organize their activities without any interference by the public authorities which would restrict this right or impede the lawful exercise thereof. Moreover, they must not be "under the control of employers or employers' organizations."

In this respect, Convention No. 151 provides in Article 5 that "public employees' organizations shall enjoy complete independence from public authorities", while Recommendation No. 91 indicates in paragraph 2 that "nothing in the present definition [of collective agreements] should be interpreted as implying the recognition of any association of workers established, dominated or financed by employers or their representatives".

The requirement of a certain level of representativeness

Another issue which needs to be examined is whether the right to negotiate is subject to a certain level of representativeness. In this respect, it should be recalled, depending on the individual system of collective bargaining, that trade union organization which participate in collective bargaining may represent only their own members or all the workers in the negotiating unit concerned. In this latter case, where a trade union (or, as appropriate, trade unions) represents the majority of the workers, or a high percentage established by law which does not imply such a majority, in many countries it enjoys the right to be the exclusive bargaining agent on behalf of all the workers in the bargaining unit.

The position of the Committee of Experts is that both systems are compatible with the Convention. In a case concerning Bulgaria, when examining the question raised by the complainant organization that some collective agreements apply only to the parties to the agreement and their members and not to all workers, the Committee on Freedom of Association considered that “this is a legitimate option – just as the contrary would be – which does not appear to violate the principles of freedom of association, and one which is practiced in many countries”. The Committee of Experts has stated that:

[W]hen national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents [representing all the workers, and not just their members], certain safeguards should be attached, such as: (a) the certification to be made by an independent body; (b) the representative organization to be chosen by a majority vote of the employees in the unit concerned; (c) the right of an organization, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (d) the right of any new organization other than the certified organization to demand a new election after a reasonable period has elapsed.

[I]f no union covers more than 50 per cent of the workers, collective bargaining rights should be granted to all unions in this unit, at least on behalf of their own members.

The Committee on Freedom of Association has upheld principles and decisions and decisions along the same line as the Committee of Experts, and has justified that decisions concerning the most representative union should be made “by virtue of objective and pre-established criteria so as to avoid any opportunities for partiality or abuse.

Recommendation No. 163 enumerates various measures designed to promote collective bargaining, including the recognition of representative employers’ and workers’ organizations.

Workers covered by collective bargaining

Convention No. 98 (in Articles 4-6) establishes the relationship between collective bargaining and the conclusion of collective agreements for the regulation of terms and conditions of employment. It provides that "the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations", and also states that "this Convention does not deal with the position of public servants engaged in the administration of the state, nor shall it be construed as prejudicing their rights or status in any way". Under this Convention, only the armed forces, the police and the above category of public servants may therefore be excluded from the right to collective bargaining. With regard to this type of public servants, the Committee of Experts has stated the following:

> *The Committee could not allow the exclusion from the terms of the Convention of large categories of workers employed by the state merely on the grounds that they are formally placed on the same footing as public officials engaged in the administration of the state. The distinction must therefore be drawn between, on the one hand, public servants who by their functions are directly employed in the administration of the state (for example, in some countries, civil servants employed in government ministries and other comparable bodies, as well as ancillary staff) who may be excluded from the scope of the Convention and, on the other hand, all other persons employed by the government, by public enterprises or by autonomous public institutions, who should benefit from the guarantees provided for in the Convention.* The Committee on Freedom of Association has made statements in the same vein.

Subjects covered by collective bargaining

Conventions No. 98, No. 151 and No. 154 and Recommendation No. 91 focus the content of collective bargaining on terms and conditions of work and employment and on the regulation of the relations between employers and workers and between organizations of employers and of workers.

The concept of working conditions used by the supervisory bodies is not limited to traditional working conditions (working time, overtime, rest periods, wages, etc.), but also covers "certain matters which are normally included in conditions of employment", such as promotions, transfers, dismissal without notice, etc. This trend is in line with the modern tendency in industrialized countries to recognize "managerial" collective bargaining concerning procedures to resolve problems, such as staff reductions, changes in working hours and other matters which go beyond terms of employment in their strict sense.

According to the Committee of Experts, "it would be contrary to the principles of Convention No. 98 to exclude from collective bargaining certain issues such as those relating to conditions of employment" and "measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention".

Nevertheless, although the range of subjects which can be negotiated and their content is very broad, they are not absolute and need to be clearly related to conditions of work and employment or, in other words, matters which are primarily or essentially questions relating to conditions of employment. Moreover, the supervisory bodies allow the exclusion from the subjects covered by negotiation of matters which are for the employer to assignment of duties and appointments. They also allow the prohibition of certain clauses, such as discriminatory clauses, clauses of trade union security, or clauses which are contrary to the minimum standards of protection set out in the law.

The Committee on Freedom of Association has indicated that certain matters can also reasonably be regarded as outside the scope of negotiation, such as "matters which clearly appertain primarily or essentially to the management and operation of government business". In a recent case against the government of Canada (Ontario), the Committee on Freedom of Association noted that:

Determining the broad lines of educational policy has been given as an example of a matter that can be excluded from collective bargaining; … However, [the Committee indicated that] policy decisions may have important consequences on conditions of employment, which should be the subject of free collective bargaining.

Governing principles

The principle of free and voluntary negotiation

The voluntary nature of collective bargaining is explicitly laid down in Article 4 of Convention No. 98 and, according to the Committee on Freedom of Association, is "a fundamental aspect of the principles of freedom of association". Thus, the obligation to promote collective bargaining excludes recourse to measures of compulsion.

During the preparatory work for Convention No. 154, the Committee on Collective Bargaining agreed upon an interpretation of the term "promotion" (of collective bargaining) in the sense that it "should not be capable of being interpreted in a matter suggesting an obligation for the state to intervene to impose collective bargaining", thereby allaying the fear expressed by the Employer members that the text of the Convention could imply the obligation for the state to take compulsory measures.

The Committee on Freedom of Association, following this line of reasoning, has stated that nothing in Article 4 of Convention No. 98 places a duty on a government to enforce collective bargaining with a given organization by compulsory means, and that such an intervention by a government would clearly alter the nature of bargaining.

It cannot therefore be deducted from the ILO's Conventions on collective bargaining that there is a formal obligation to negotiate or to achieve a result (an agreement). Nevertheless, the supervisory bodies have considered that the criteria established by law should enable the most representative organizations to take part in collective bargaining, which implies the recognition or the duty to recognize such organization. Moreover, the Committee of Experts, when examining the application of Convention No. 98, has not criticized the prohibition of certain unfair labour practices in the process of negotiation likely to hinder the development of collective bargaining. Similarly, the principles of the supervisory bodies emphasize that the machinery which supports bargaining (the provision of information, consultation, mediation, arbitration) should be of a voluntary nature, in spite of which many national legislations oblige the parties to follow fixed procedures setting out all the stages and phases of the negotiation process, and under which there are frequent and compulsory interventions by the administrative authorities with predetermined time limits.

However, in practice, the supervisory bodies have accepted the imposition of certain sanctions in the event of conduct which is contrary to good faith or which constitutes unfair practice in the course of collective bargaining, provided that they are not disproportionate, and have admitted conciliation and mediation imposed by law within reasonable time limits. These criteria have undoubtedly taken into account of promoting collective bargaining in situations in which the trade union movement is not sufficiently developed. They have also taken account of the underlying concern in much legislation to avoid unnecessary strikes and precarious and tense situations resulting from the failure to renew collective agreements, particularly where they cover extensive categories of workers.

Free choice of bargaining level

In this respect, Recommendation No. 163 provides that "measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, then undertaking, the branch of activity, the industry, or the regional or national levels".

Similarly, the Committee of Experts, after recalling that the right to bargain collectively should also be granted to federations and confederations, and rejecting any prohibition of the exercise of this right, has stated that:

> *[L]egislation which makes it compulsory for collective bargaining to take place at a higher level (sector, branch of activity, etc.) also raises problems of compatibility with the partners themselves, since they are in the best position to decide the most appropriate bargaining level, including, if they so wish, by adopting a mixed system of framework agreements supplemented by local or enterprise level agreements.*

The Committee on Freedom of Association has developed this point further along the following lines:

> *According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative authority or by the case-law of the administrative labour authority.*
>
> *… Thus, the Committee does not consider the refusal by employers to bargain at a particular level as an infringement of freedom of association. Legislation should not constitute an obstacle to collective bargaining at the industry level.*

In this respect, the Committee considers that the requirement of the majority of not only the number of workers, but also of enterprises, in order to be able to conclude a collective agreement on the branch or occupational level could raise problems with regard to the application of Convention No. 98. The Committee of Experts shares this view. Furthermore, it should be sufficient for the trade union at the branch-level to establish that it is sufficiently representative at the enterprise level.

As regards the principle that the parties involved decide by mutual agreement the level at which bargaining should take place, the Committee has noted that, in many countries, this question is determined by a body that is independent of the parties themselves. The Committee considers that in such cases the body concerned should be “truly independent”.

The supervisory bodies have not established criteria concerning the relationship between collective agreements at the different levels (which may address the economy in general, a sector or industry, an enterprise or group of enterprises, or an establishment or factory); and which may, according to the individual case, have a different geographical scope. In principle, this should depend on the wishes of the parties. In practice, the supervisory bodies accept systems in which it is left to collective agreements to determine how they are to be coordinated (for example, by establishing that a person resolved in one agreement cannot be decided upon at other levels), as well as systems in which legal provisions distribute subjects between collective agreements, give primary to a specific level, adopt the criteria of the standards which are the most favourable to the workers, or which do not establish criteria and leave these questions to practical application. Recommendation No. 163 indicates in Paragraph 4 that “in countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is coordination among these levels”.

The principle of good faith

In the preparatory work for Convention No. 154, it was recognized that collective bargaining could only function effectively if it was conducted in good faith by both parties; but as good faith cannot be imposed by law, it “could only be achieved as a result of the voluntary and persistent efforts of both parties”.

The Committee on Freedom of Association, in addition to drawing attention to the importance that it attaches to the obligation to negotiate in good faith, has stated that the principle of good faith implies making every effort to reach an agreement, conducting genuine and constructive negotiations, avoiding unjustified delays, complying with the agreements which are concluded and applying them in good faith; to this may be added the recognition of representative trade union organizations. The principle of the mutual respect for commitments entered into in collective agreements is explicitly recognized in Recommendation No. 91, which provides that "collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded".

For its part, the Committee of Experts has stated that:

> *In several countries' legislation makes the employer liable to sanctions if he refuses to recognize the representative trade union, an attitude which is sometimes considered as an unfair labour practice. The Committee recalls in this connection the importance which it attaches to the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement, the more so in the public sector or essential services where trade unions are not allowed strike action.*

Voluntary procedures and compulsory arbitration

The role of machinery to facilitate negotiations

According to the Committee of Experts, the existing machinery and procedures should be designed to facilitate bargaining between the two sides, leaving them free to reach their own settlement. The Committee on Freedom of Association has established the following:

> *The bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent, and recourse to these*

bodies should be on a voluntary basis. Certain rules and practices can facilitate negotiations and help to promote collective bargaining and various arrangements may facilitate the parties' access to certain information concerning, for example, the economic position of their bargaining unit, wages and working conditions in closely related units, or the general economic situation; however, all legislation establishing machinery and procedures for arbitration and conciliation designed to facilitate bargaining between both sides of industry must guarantee the autonomy of parties to collective bargaining.

The supervisory bodies admit conciliation and mediation which are voluntary or imposed by law, if they are within reasonable time limits – as well as voluntary arbitration – in accordance with the provisions to Recommendation No. 92 which indicates that: "Provision should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute *or ex officio* by the voluntary conciliation authority".

Compulsory arbitration

One of the most radical forms of intervention by the authorities in collective bargaining, directly under the terms of the law or as a result of an administrative decision, is the imposition of compulsory arbitration when the parties do not reach agreement, or when a certain number of days of strike action have elapsed. Compulsory arbitration may also be sought by one of the parties, but always conflicts with the voluntary nature of negotiation, since the solution which is imposed is not derived from the will of both parties, but from a third party to whom they have not had recourse jointly.

The supervisory bodies admit recourse to compulsory arbitration at the initiative of the authorities, or of one of the parties, or *ex officio* by law in the event of an acute national crisis, in the case of dispute in the public service involving public servants exercising authority in the name of the State (who can be excluded from the right to collective bargaining under Convention No. 98) or in essential services in the strict sense of the term, namely, those services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Evidently, compulsory arbitration is also acceptable where it is provided for in the collective agreement as a mechanism for the settlement of disputes. It is also acceptable, as the Committee on Freedom of Association, following the Committee of Experts, has recently indicated in cases where, after protracted and fruitless negotiations, it is obvious that the deadlock in bargaining will not be broken without some initiative on the part of the authorities.

Intervention by the authorities

In the ILO's Conventions on collective bargaining, there are no provisions covering possible conflicts between the specific interests of the parties and the general interest of the population. This omission was deliberate, and not a result of negligence. In practice, in situations of extremely serious economic crisis (such as situations of war or in the subsequent periods of economic reconstruction) or in order to combat inflation, achieve a balance of payments or combat unemployment or other economic objectives, governments have resorted to restrictive policies on wages and incomes. These have been implemented through measures to freeze wages or confine wage rises to certain limits, and have also often included mechanisms requiring the approval, modification or annulment of collective agreements that are in force. A freeze is often also imposed in prices and in guaranteed minimum wage levels which affects low-paid workers. The measures taken to pursue these policies may or may not have been adopted with the agreement of employers' and workers' organizations, which are sometimes consulted or included in commissions responsible for developing the policies.

As will be seen below, the limitations implied by such adjustment policies are not acceptable in the view of the supervisory bodies in cases where they change the content of collective agreements which have already been concluded. However, they are admissible when they are imposed on future negotiations, provided that the situation is urgent and a series of guarantees are secured, which are enumerated below. The various types of intervention by the authorities in collective bargaining are covered below. Depending on the case, these may be adopted for technical, legal or economic reasons.

Drafting and registration of collective agreements

In the opinion of the Committee on Freedom of Association, intervention by the public authorities in the drafting of collective agreements is not compatible with the spirit of Article 4 of Convention No. 98, unless it consists exclusively of technical aid.

According to the supervisory bodies, refusal to approve a collective agreement is permitted only on grounds of errors of pure form or procedural flaws, or where the collective agreement does not conform to the minimum standards laid down by general labour legislation. However, legislative provisions are not compatible with Convention No. 98 where they permit the refusal to register or approve a collective agreement on grounds such as incompatibility with the general or economic policy of the government or official directives on wages or conditions of work; a situation which requires prior approval of collective agreements by the authorities amounts to a violation of the principle of the autonomy of the parties to negotiate.

Nevertheless, for reason of general interest, governments establish mechanisms so that the parties take into account considerations relating to their economic and social policy and the protection of the general interest. Both the Committee of Experts and the Committee of Freedom of Association accept these mechanisms, provided that they are not of a compulsory nature. The Committee of Experts has indicated that:

> *The public authorities could also envisage a procedure to draw the attention of the parties in certain cases to considerations of general interest that might call for further examination by them of proposed*

agreements, provided, however, that preference is always given to persuasion rather than coercion (ILO, 1994a, para. 253).

The Committee on Freedom of Association has stated that if the public authority considers that the terms of the imposed agreements are clearly contrary to the economic policy objectives recognized as being in the public interest, the case could be submitted for advice and recommendation to an appropriate consultative body, provided, however, that the final decisions would rest with the parties. However, these considerations must not be confused with stabilization policies which result in significant and generalized restrictions on future wage negotiations, which will be specifically examined in a separate section below.

Interference in the application of collective agreements in force

When the outcome of collective bargaining is restricted or annulled by law or by decision of the Administrative authorities, industrial relations are destabilized and workers lose their confidence in their trade union organizations, particularly when this type of intervention implies wage restrictions. These interventions violate the principle of free and voluntary negotiation of agreements and take various forms, which have been strongly refuted by the Committee on Freedom of Association. These are: the suspension, interruption, annulment or forced renegotiation of the agreement, by law or by decree, without the consent of both parties.

The compulsory extension of the validity of collective agreements by law, particularly where this occurs following previous government interventions, is only admissible in cases of emergency and for brief periods of time, since such measures amount to interference with free collective bargaining.

Restrictions on future negotiations

The Committee of Experts has noted that, in the belief that the national economic situation requires stabilization measures, an increasing number of governments have taken steps to restrict or prevent the free fixing of wages by means of collective bargaining. In this respect, the Committee of Experts has established the following basic principle.

> *[I]f, under an economic stabilization or structural adjustment policy, that is for imperative reasons of national economic interest, wage rates cannot be fixed freely by means of collective bargaining, these restrictions should be applied as an exceptional measure and only to the extent necessary, should not exceed a reasonable period and should be accompanied by adequate safeguards to protect effectively the standard of living of the workers concerned, in particular those who are likely to be the most affected (ILO, 1994a, para. 260).*

The Committee on Freedom of Association has expressed itself in very similar terms and has added that, in any case, any limitation on collective bargaining by the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement.

The Committee has indicated that the basic principle with regard to wage restrictions in the context of stabilization policies and the required guarantees are also applicable in cases in which the law obliges future collective agreements to respect productivity criteria, or the negotiation of wage increases beyond the level of the increase in the cost of living.

With regard to the duration of restrictions on collective bargaining, the Committee has considered that a three-year period of limited collective bargaining on remuneration within the context of a policy of economic stabilization constitutes a substantial restriction, and the legislation in question should cease producing effects at the latest at the dates mentioned in the legislation, or indeed earlier if the fiscal and economic situation improves. Similarly, where wage restraint measures are taken by a government to impose financial controls, care should be taken to ensure that collective bargaining on non-monetary matters can be pursued.

Collective bargaining in the public service

The exercise of the right of freedom of association by organizations of public officials and employees is now a reality in industrialized countries and in many developing countries. Convention No. 98, adopted in 1949, excluded from its scope public servants engaged in the administration of the state, but requiring States to promote machinery for negotiation or such other methods as allow representatives of public employees to participate in the determination of their terms and conditions of employment. According to Article 1, the only categories which can be excluded (apart from the armed forces and the police, as in previous Conventions) are "high level employees whose functions are normally considered as policy making or managerial" and "employees whose duties are of a highly confidential nature".

A few years later, in 1981, came the adoption of Convention No. 154, which promotes collective bargaining in both the private sector and the public service (with the exception of the armed forces and the police) and only allows, for the public service, the fixing of special modalities of application of the Convention by national laws or regulations or national practice. A state which ratifies the Convention cannot confine itself to consultations, but has to promote collective bargaining with the aim, *inter alia*, of determining working conditions and terms of employment. It should be pointed out, as a matter of interest which facilitated the inclusion of the public service that, in contrast with Convention No. 98, Convention No. 154 no longer refers to the determination of terms and conditions of employment by means of formal collective agreements (which in many countries have force of law, while in certain countries ordinary agreement between parties are not even legally binding). Such a provision would have made it impossible for this right to be included, in view of the objections of the states which were prepared to recognize collective bargaining in the public service, but without renouncing at the same time a statutory system.

Summary of ILO principles on the right to collective bargaining

The standards and principles emerging from the ILO's Conventions, Recommendations and other instruments on the right to collective bargaining, and the principles set forth by the Committee of Experts and the Committee on Freedom of Association on the basis of these instruments may be summarized as follows:

A. The right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental Principles and Rights at work and its follow-up)

B. Collective bargaining is a right of employers and their organizations, on the one hand, and organizations of workers, on the other hand (first-level trade unions, federations and confederations); only in the absence of these latter organizations may representatives of the workers concerned conclude collective agreements.

C. The right to collective bargaining should be recognized throughout the private and public sectors, and it is only the armed forces, the police and public servants engaged in the administration of the state who may be excluded from the exercise thereof (Convention No. 98).

D. The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.

E. Collective agreements should be binding. It must be possible to determine terms and conditions of employment which are more favourable than those established by law and preference must not be given to individual contracts over collective agreements, except where more favourable provisions are contained in individual contracts.

F. To be effective, the exercise of the right to collective bargaining requires that workers' organizations are independent and not "under the control of employers or employers' organizations" and that the process of collective bargaining can proceed without undue interference by the authorities.

G. A trade union which represents the majority or a high percentage of the workers in a bargaining unit may enjoy preferential or exclusive bargaining rights. However, in cases where no trade union fulfils these conditions or such exclusive rights are not recognized, workers' organizations should nevertheless be able to conclude a collective agreement on behalf of their own members.

H. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.

I. In view of the fact that the voluntary nature of collective bargaining is a fundamental aspect of the principles of freedom of association, collective bargaining may not be imposed upon the parties and procedures to support bargaining must, in principle, take into account its voluntary nature; moreover, the level of bargaining must not be imposed unilaterally by law or by the authorities, and it must be possible for bargaining to take place at any level.

J. It is acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining, provided that reasonable time limits are established. However, the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is only admissible: (1) in essential services in the strict sense of term (those whose interruption would endanger the life, personal safety or health of the whole or part of the population; (2) with regard to public servants engaged in the administration of the State; (3) where, after prolonged and fruitless negotiations, it is clear that the deadlock will not be overcome without an initiative by the authorities; and (4) in the event of an acute national crises. Arbitration which is accepted by both parties (voluntary arbitration) is always legitimate.

K. Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. These interventions include: the suspension or derogation of collective agreements by decree without the agreement of the parties; the interruption of agreements which have already been negotiated; the requirement that freely concluded collective agreement be renegotiated; the annulment of collective agreements; and the forced renegotiation of agreement which are currently in force. Other types of intervention, such as the compulsory extension of the validity of collective agreements by law are only admissible in cases of emergency and for short periods.

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Problems for discussion:

1. *After closely reading the extensive piece reproduced above, to what extent are ILO principles concerning collective bargaining incorporated in the current Ethiopian labour law?*
2. *The Ethiopian legal framework for collective bargaining prescribes that each party to a collective bargaining has not only the duty to bargain but also the duty to bargain in good faith(Article 131(2) and(4)). These provisions seem to have introduced "mandatory bargaining" on the parties. On the other hand the relevant ILO instruments provide that bargaining should be a voluntary engagement of the parties and cannot be imposed on the parties. Consequently,*

some contend that by making bargaining mandatory, Ethiopian law deviates from the ILO jurisprudence in this regard. Others, for their part, argue that as long as the duty to agree is not imposed on the parties, compelling them to bargain does not have any wrong. It is merely assisting towards making collective bargaining effective. What is your view?

3. *Assume that representatives of the trade union and the employer agreed to undertake collective bargaining. Further assume that they drew up the procedure for discussion and as an item for such procedure it was stated that every discussion and points of agreement should be written down in minutes. Minutes of the previous discussion were to be adopted at the commencement of the next day of the meeting. This procedure went smoothly as prescribed by the procedure. All items presented for bargaining were discussed and agreed. Nevertheless, when the representative of the employer was required to put her signature on the draft collective agreement, she refused to do so stating that she had changed her mind regarding some of the terms. Should the employer be compelled to sign or would there be any other way out?*

(Please refer to: Federal Supreme Court Cassation Division decision on "*Fincha Sugar Factory v. Fincha Sugar Factory Trade Union*"; File No: 54451, Vol.11

7.2. The Development of Legal Frameworks for Collective Bargaining in Ethiopia

7.2.1. Introduction

Extracted from "Privatization in Ethiopia: Its impact on Unionization and Collective Bargaining" PhD thesis by Mehari Redae (University of Warwick-UK-2015)-footnotes omitted.

This chapter examines issues pertaining to the development of laws on collective bargaining and collective agreements in Ethiopia and tries to identify whether there are distinctive aspects to be considered in the light of the international principles. The first part is intended to highlight a general overview of the development of collective bargaining and the challenges it faced in the era of globalized economic order. The discussion on the Ethiopian situation will follow thereafter.

Although ILO Convention No.98 on the Right to Organise and Collective Bargaining did not itself provide a definition as to how 'collective bargaining' should be understood, the Collective Bargaining Convention (No.154 of 1981), defines it in the following manner in Article 2:

> The term 'collective bargaining' extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations on the one hand, and one or more workers' organisations, on the other, for: (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.'

By negotiation, Article 2 means any formal or informal discussion between the social partners with a view to arriving at an agreement on issues of common interest and benefit. Collective bargaining has served as a method or process of rule making of a private nature which is intended to regulate the relations of negotiating parties. Collective bargaining is also a way of attaining beneficial and productive solutions to potentially confrontational relations between the social partners. In effect, collective bargaining is a process in which the social partners to industrial relations may regulate and manage their industrial relations by their own through a 'give and take' mode of operation.

Letting the parties bargain does not, however, imply that the state has no role in collective bargaining. On the contrary, it has an irreplaceable role in establishing a suitable environment for the parties by laying down the basic rules of the game for negotiation; and in some cases to mediate and conciliate the negotiating parties, if and when the need arises. There are jurisdictions where organs of the state have been entrusted with the responsibility to enforce the terms of the collective agreement and provide sanctions for breach of the agreements in a manner similar to any other breach of contract. Conversely, some other systems rely on extra-judicial sanctions such as industrial action for the enforcement of the terms of collective agreement. Generally, collective bargaining is a regulatory mechanism of private nature for industrial relations. In a sense, it is an aspect of "private ordering."

As indicated earlier, many states intervened in individual employment relations by prescribing substantive benefits in the form of 'minimum employment conditions' that employers are required to 'meet or exceed' in their dealings with individual employees. The nature of state intervention in collective bargaining is, however, primarily limited to drawing up procedural mechanisms to be complied with by the parties when seeking to reach an agreement. It is for the parties to determine and fix the substantive matters by themselves. While the intervention of the State in individual employment relations is mainly prescribing the minimum terms, it usually has more of a procedure formulating role in cases of collective bargaining.

However, the sort of facilitative role by the state suggested above is not inevitable. Indeed, in earlier periods of industrial relations, collective bargaining was considered as a "restraint of trade" and hence inconsistent with then prevailing free market economic philosophy. It was feared that such 'concerted action' of employees would give a monopolistic power to employees to take away profit and power from employers and was viewed with hostility by employers. As a result, both the formation of trade unions and collective bargaining were held to be undesirable working systems, with market distortion effects, within the framework of the freedom of contract and market oriented economy. In fact, such an understanding persists even in recent times.

Even after unionization was tolerated and had eventually permitted, collective bargaining did not necessarily operate simultaneously with unionization because “recognition” of trade unions for collective bargaining purposes remained at the discretion of the employers. In such an arrangement well organised and strong trade unions succeeded in bringing reluctant employers to the bargaining table through collective action or the threat of such action. Conversely, poorly-organised and weak unions did not succeed in obtaining recognition from employers. Therefore, the decision whether or not to undertake collective bargaining was the private decision of the parties, mainly of the employers.

Within the ILO legal framework, the scope of the right to collective bargaining lacked sufficient clarity. Even though the ILO Constitution of 1919 had an explicit statement on the right to freedom of association, it was silent about the issue of collective bargaining. Similarly, although the Philadelphia Declaration (1944), which has been an integral part of the ILO Constitution, indicates ‘the recognition of effective collective bargaining’, it was not made part of the four fundamental principles on which the Organisation is based.

Moreover, ILO Convention No. 87, which regulates the right to freedom of association in a detailed manner, is directed towards regulating the autonomy and independence of associations from governmental interference rather than regulating the relationship of the social partners. Article 10 of the Convention merely indicated the objective for formation of association to be “furthering and defending the interest of the members.” More importantly, the ILO Convention No.98 of 1949 on the Right to Organize and Collective Bargaining failed to expressly provide for the right to collective bargaining. It rather limited its regulatory scope to the prohibition of interference by the social partners with each other and prohibits anti-union discriminations of various types. Therefore, at the international level too, the right to collective bargaining was not expressly spelt out, even if freedom of association was regulated and legally recognized.

It may be argued that in most cases formation of association is not an end in itself. It is rather to protect members’ interests that associations are formed. It could, thus be contended that freedom of association should be interpreted to include the right to collective bargaining because one of the measures for ensuring members' interest is believed to be collective bargaining. The Committee on Freedom Association of the ILO Governing Body has interpreted the right to freedom of association to encompass "the right to bargain freely with employers with respect to conditions of work as it constitutes an *essential* element in freedom of association" (…).

At supra-national level, a similar conclusion has been reached by the European Court of Human Rights, while interpreting Article 11 (1) of the European Human Rights Convention, which is similarly phrased to that of other human right instruments. Accordingly, the Court in *Demir and Bayraka v. Turkey*, through the evolution of case law, held that "the right to bargain collectively with the employer has, in principle, become one of the *essential* elements of the rights to form and to join trade unions for the protection of one's interests."

It might even be noted that the European Court of Justice (ECJ) has taken the interpretation a step further. The ECJ in disposing cases before it such as *Viking* and *Laval* consistently held that the right to freedom of association stipulated in the various international and regional instruments implicitly grants the *fundamental right to collective action*. Indeed, the Court interpreted the phrase 'collective action' not only in the limited sense of collective bargaining but further extended its meaning to include the right to strike. As a result, although there is no explicit provision on the right to collective bargaining in the various instruments, through a purpose-oriented interpretation, the right to collective bargaining was read into "the right to form or join a trade union *to protect one's interest."* The Ethiopian legal system, as will be seen below, has expressly recognized the right to collective bargaining both in its Constitution and labour laws rather than relying in the interpretation of the enforcement machineries.

However, even when the right to collective bargaining is recognized expressly or implicitly, there remains another outstanding issue. Whether the right to collective bargaining for one party would impose a duty on the other party to appear for bargaining against its will needs to be considered. In this connection, the Committee on Freedom of Association has held that 'Member States should ensure collective bargaining assumes a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining'. This seems to imply that collective bargaining is a juridical act that should be entered into voluntarily and hence neither party would be compelled to bargain against its will. Similarly, Gernigon *et al* have contended that collective bargaining may not be imposed by law on the parties.

The European Court of Human Rights appeared to have held similar position in this regard. In *Wilson v. UK,* while interpreting Article 11 (1) of the European Convention of Human Rights, the Court accepted that the right to organise and join trade unions for the protection members' interests should enable trade unions to engage in collective action towards that end. However, the Court stated that Article 11(1) should not be construed as imposing an obligation on the employer to engage in collective bargaining against its will. The Court was of the view that the Convention did not impose a duty on an employer (a private actor) to bargain without its consent. The Convention merely obligates the State, the public power, to ensure that unions are not prevented from representing their members in negotiations with a view to regulating working conditions with their employers.

It is worth noting, however, that Article 4 of ILO Convention No. 98 obligates Member States "*to take, where deemed necessary, measures appropriate to national conditions to encourage and promote the use of collective bargaining with a view to regulating conditions of employment.*" It seems to offer "a margin of discretion" to nation states to undertake measures, including legislative measures, which they consider necessary and feasible in order to encourage and promote collective bargaining appropriate to their particular circumstances. This interpretation has been reinforced by Article 5 (1) of the ILO Convention No.154 which prescribed that "measures adapted to national conditions *shall be taken* to promote collective bargaining' in order to make collective bargaining practicable and effective" (emphasis added). As a result, it could be argued that Member

States are within their duty of promoting collective bargaining if they prescribe mandatory procedures for collective bargaining so long as they do not impose an obligation on the parties to reach an agreement.

It thus seems that how to encourage and promote collective bargaining has been left to Member States as a result of which they are entitled to come up with facilitative legislation towards bargaining. In fact, Schregle contended that "in most countries of the Third World [developing countries] governments cannot sit back and adopt a purely passive role in industrial relations but must, in a spirit of innovation and imagination, take the initiative in promoting sound industrial relations through legislation and promotional action."

Due to these divergent views as to the scope of the right to collective bargaining, national labour laws adopt heterogeneous positions. In some jurisdictions the right to bargain collectively merely imposes a negative duty not to interfere in the other party's collective representations; while in others, it goes as far as imposing a positive duty to bargain on the other party at the pain of sanction. In particular, the desire of nation states to maintain harmonious industrial relations and to avoid or limit frequent industrial action compels them to resort not only to draw up a facilitative legal framework for bargaining but also to impose a duty on the social partners to bargain. In support of such a pro-active governmental measure, Cox remarked that:

> By imposing the duty to bargain what the law actually does is to escort the trade union representatives to the door of the employer and say, 'here they are, the legal representatives of your employees'. What happens behind the doors is not inquired into and the law does not seek to inquire into it (…).

Similarly, Davies has also been of the view that:

> Where the union has a high level of support but cannot persuade the employer to bargain, the law should intervene. This would not contradict the inherent voluntariness of negotiations because the law

only forces the employer to take part in the procedure, not to reach a particular agreement.

7.2.2. Current challenges to collective bargaining

Even though the Convention on the recognition of collective bargaining (1949) was adopted one year after the adoption of the Convention on Freedom of Association and Protection of the Right to Organize (1948), due to the interdependence of the two instruments, their developmental pattern has been inseparably linked. It is contended that effective collective bargaining could be best served in situations where there exists an independent union committed to the interests of its members. In this sense unionization is a basic prerequisite for collective bargaining. Conversely, collective bargaining enables the labour force to articulate an organised voice in industrial relations, thereby strengthening unity and solidarity of the labour force.

There have been challenges of production decentralisation and measures of regulatory competition and, at times, hostility towards unionization in the global economic order. Similar challenges are prevalent with respect to collective bargaining. In fact, the employers' uneasiness towards union formation under the stiff competition of globalisation mainly emanates from the fear that organised labour will, in the final analysis, seek to establish collective bargaining with a possible outcome where the amount of profit and managerial power available to the employer becomes more limited. Thus, it could even be argued that, from the employers' perspective, it has been mainly to pre-empt collective bargaining that unionization has been held at bay.

Although it is believed that organised labour is more beneficial to even the employer than a non-organised workforce in terms of productivity, efficiency and stability, there still exists in many cases a constant and consistent fear by employers towards unionised labour. The source of such a concern has commonly been the perception that collective bargaining would enable unions to raise wages and other benefits above productivity levels, thereby adversely affecting competitiveness. In particular, the stiff global competition heightened the extent of the fear to the highest level as multiple competitors originating from diverse locations with heterogeneous labour standards compete through international markets. The perception is that products originating from those jurisdictions where higher labour standards apply tend to loss competitiveness due to the high labour cost associated with them. "Employers argue that diminished labour standards are needed in order to be globally competitive." However, such an understanding fails to appreciate the fact that low labour costs may be associated with demotivation and low productivity. On the contrary, higher labour standards are also likely to bring about motivated, initiated and productive labour force. Therefore, it does not necessarily follow low labour standards is associated with competitiveness and profitability.

Nonetheless it is indisputable that fear of an organised voice in the workplace is manifestly visible in many countries. As manifestations of such a fear, there have been instances where companies have threatened to relocate if workers propose collective bargaining on the anticipation that collective bargaining may bring about better concessions for the labour force, thereby increasing cost of labour. As mentioned earlier, in the global economic order various multilateral and bilateral arrangements and agreements have been put in place and created conducive conditions for capital to move freely across national borders with little or no restriction. This ease of capital mobility provides capital enhanced bargaining leverage against trade unions. Faced with the possible flight of capital and jobs, trade unions could not afford to risk taking an action detrimental to the interest of their members. Hence, there are views that the role of collective bargaining and the power of trade unions in protecting the interests of labour have been on the decline. The general impression is that collective bargaining has been weakened as globalisation "boosts the bargaining [power] of capital at the expense of labour."

In addition to the economic factors favouring capital over labour mentioned above, influential supra-national institutions such as the ECJ seem to adopt an interpretation that tended to make the right to collective bargaining subordinate to the right to the freedom of movement of capital and other economic freedoms. For instance, the ECJ held that the right to collective action is a fundamental right but it might be subject to limitations for the benefit of other rights in the EU Treaty. According to the Court, without prejudice to its fundamental nature, collective action should not be exercised and applied in a manner that will restrict "economic freedoms" emanating from the EU Treaty such as "freedom of establishment" and "freedom to provide services," thereby granting unfettered opportunity of relocation for economic establishments within the borders of member states.

Although the ECJ accepted the right to collective action as a fundamental right, it, nonetheless, held that collective action is not an absolute right; rather its exercise must be reconciled with economic rights such as "freedom of establishment" and freedom to provide services in accordance with the principle of proportionality and provided that there is no other least restrictive measure to attain the objective. The Court's view is that "freedom of establishment and freedom to provide services are to be exercised freely while collective action is to be employed *on condition* that it does not impose disproportionate restriction on these freedoms." The holding of the Court tended to accord higher emphasis on the economic goals to which social goals can readily be sacrificed.

This perspective can also be seen, arguably in a more extreme fashion, in the approach of the World Bank (WB). The WB's influential annual survey entitled *Doing Business,* assesses the level of business friendliness of the various countries in the world and allocates grades to them. The rankings in "*Doing Business"* use "Employment Indicators" such as ease of hiring and firing with the outcome that the lower the cost of hiring and firing, the higher grade the county receives. It does not take into account the candidate country's compliance or non-compliance with labour rights such as freedom of association and collective bargaining since they are not included in Bank's check list. In so doing, it awards low grades, among other things, to those countries whose laws comply with the ILO's international standards whereas highest points are accorded to countries which deny freedom of association and the right to collective bargaining.

Faundez has a valid concern when he pinpointed the implications of the *Doing Business* publication in which business-friendly and flexible labour markets have been encouraged. However, his contention that the *Doing Business* material allocates highest grades for those countries that deny freedom of association is not strictly accurate because it is not for denying freedom of association that they have been accorded higher grades in the assessment. It is rather for adopting flexible labour markets in terms of such matters as ease of hiring and firing of employees that higher marks has been allotted. This is not to deny that the WB approach as manifested in *Doing Business* may have an adverse effect on collective bargaining but it would be indirect rather than a direct and explicit one.

The approaches of the ECJ and the WB described herein above all tend to suggest that collective bargaining has been exposed to challenges of various legal and practical constraints. Moreover, in the domestic setting, though African experience was not included in his national reports, Compa summarized various national reports indicating that in some jurisdictions "national courts have been influenced by globalisation debate to favour employers' interests and more receptive to changes in the economic winds," thereby adopting investment-friendly interpretations at the expense of labour rights.

Despite the challenging situation in which collective bargaining has found itself, studies have shown that collective bargaining has been instrumental in creating industrial peace, productivity and equitable income distribution. For instance, empirical studies found a positive correlation between workers' participation in decision making on the one hand and workers' motivation and productivity on the other. One way of enabling workers to participate in decision making is through collective bargaining. Palley also argued that '(…) by allowing for formation of independent trade unions that bargain collectively, recalibration of the system of income distribution could be ensured. Furthermore, Hayter argued that '(…) countries with strong collective bargaining institutions including strong trade unions and employers' organizations, high levels of collective bargaining coverage (…) are those with better measures of income distribution'. Critics of globalisation accuse the global economic order of aggravating an inequitable benefit sharing within social groups both domestically and among states internationally. It is thus claimed that strengthening collective bargaining institutions would have added value to the credibility, legitimacy and sustainability of the new global economic order.

However, under the global economic order the tendency has been mainly to view collective bargaining as a man-made constraint against the smooth and natural course of the market. Consequently, developing countries and transition economies that are engaged in economic reforms and adjustment programmes have been advised, by multilateral lending and donor institutions, to sidestep strong labour institutions due to the perception that such institutions are obstacles to the smooth running of the anticipated reforms. As a result, nation states particularly in the developing world have been unable or reluctant to exert pressure to adjust the power imbalance between capital and labour.

In order to fill the regulatory gap emanating from the unwillingness or inability of state actors in this regard, 'self-regulation' of companies through corporate codes of conduct towards voluntary compliance with labour standards has been proposed as a feasible measure of protection. Moreover, certification of companies by independent firms for 'socially responsible production process' was also proposed as an option to ensure compliance with labour standards among which the right to collective bargaining is one.

However, trying to resolve the issue through self-regulation or certification of companies does not seem a reliable way of tackling the problem. First, many certification firms have been much more interested in environmental issues, and if they show any concern for labour friendly production processes, this tends to revolve around an audit of the non-occurrence of forced labour, child labour and non-discrimination. Second, corporate codes of conduct or certification exercises will not have a meaningful effect if their implementation is not impartially monitored. In reality, however, monitoring activities are being conducted in the form of in-house audit through self-assessment, hired auditors or retained 'independent' private consultants without the involvement non-partisan third parties.

In effect, companies are becoming rule makers and judges in their own cases. It is even argued that these mechanisms are more of public relation exercises aimed at preventing damage to the reputation of corporations. In the words of Arthurs "(…) codes of conduct help them [transnational companies] pacify workers, neutralize unions, and reassure non-governmental organisations (NGOs) and governments." As a result, efforts to enforce core labour standards through measures and activities of private and voluntary nature, though necessary and important, do not also seem sufficient and effective to be fully relied upon.

The ILO, which is entrusted, amongst other responsibilities, with promoting collective bargaining, seemed to find itself in a challenging position in its effort to promote and protect collective bargaining in the global economic order. With due credit to its effort and success in incorporating the right to collective bargaining as one among the "core" labour rights, effective collective bargaining in many cases appears to be an aspiration. Presumably by considering the reality on the ground where capital occupies a strong bargaining position over labour, the ILO began to employ softer terminologies of industrial relations such as "social partners" instead of "negotiating parties"; "social dialogue" instead of "collective bargaining"; "consultation" instead of "negotiation"; and "consensus" instead of "agreement." It tries to avoid more forceful tones and binding arrangements in formulating its recent working documents. It does not mean that the soft and more of cooperation, rather than confrontational, terminologies are ineffective to industrial relations. It only means that they tended to manifest a milder commitment to the concern of collective labour. By realising these facts, Davies remarked that "globalization is often regarded as having created an "identity crisis" for the ILO."

To sum up, though the positive contributions of collective bargaining in bringing about industrial peace, productivity and competitiveness seemed to obtain visibility to a certain extent; and even though its role in bringing about fair and equitable distribution of wealth and power between the social partners is also noted, it appears that collective bargaining finds itself in a precarious condition. In particular, in the African continent, the role of collective bargaining has diminished due to, among other things, the withdrawal of the state from the economy, the expansion of the informal sector and the casualization of employment. Bearing in mind the above-mentioned broad context, the remaining part of this chapter will examine the Ethiopian situation on the subject under discussion.

7.2.3. Evolution of collective bargaining in Ethiopia

The proposition that the history of collective bargaining has been co-extensive with the history of unionization since the former would not be meaningful and effective in the absence of the latter, seemed to hold true in the Ethiopian context, too. Undeniably, the workers' association at the Franco-Ethiopian Railroad Company had, since the late 1940s, bargained and obtained concessions from the employer. This happened prior to the issuance of the 1963 labour law that paved the way for unionization and collective bargaining. However, that was an isolated incident rather than a general rule.

Even though the 1955 Revised Constitution recognized "the right to freedom of association" as a constitutional right, the subsequent instrument, the Civil Code of 1960, contained provisions only applicable for the establishment of "not-for –profit" civil associations. Thus, there was no law for the regulation of issues relating to recognition of unions, negotiation procedures, or the scope and status of collective agreements.

Even where the Civil Code mentioned collective bargaining, the reference was formulated in such a way that collective bargaining remained a voluntary engagement in which the government undertook no role to prescribe "mandatory recognition" and other rules and procedures for collective bargaining. Thus employers were at liberty to extend or deny recognition to associations of employees. Admittedly, employees of large companies such as the Franco-

Ethiopian Railroad Company had frequently employed their power of collective action in the form of wild-cat strikes to obtain "volunteerism", thereby bringing reluctant employers to the bargaining table. However, the Ethiopian Penal Code of 1957, in its Article 570 (1) had the following prescription:

> Whosoever, by intimidation, violence, fraud or any other unlawful means, whether alone or with others, compels another (…) to refuse or withhold his labour, with the object of imposing on an employer by force the acceptance or modification of terms of employment is punishable upon complaint with simple imprisonment or fine.

What the express words of that provision of the Penal Code criminalized was "intimidation, compulsion, fraudulent act or any other unlawful act upon another." It could, thus, be argued that *persuading* another to withhold his service with the object of imposing on the employer terms of employment was beyond the scope of the Penal Code and hence non-punishable. The problem, however, is, at the margin and in practice, it is difficult to demarcate exactly where *persuasion* ends and *intimidation* or *compulsion* begins. Although not "tried and tested" before our courts, a strike or threat of strike with a view to bringing the employer to the bargaining table, theoretically, carried with it a criminal liability at the time. In particular, the fact that the Penal Code of 1957 was adopted subsequent to the promulgation of the Revised Constitution of 1955 placed the political commitment of the Imperial regime towards collective bargaining in a highly questionable position.

Even in cases where a collective agreement was signed by the parties, the Civil Code required the *approval* of the collective agreement by "competent public authorities" for its validity. As a result, the parties had no ultimate control over the contents of their collective agreements. Given the fact that the terms of the collective agreements might have an impact on the general interest of the public and the national economy at large, it seemed that government intervention in content verification was considered appropriate. The approval mechanism might also be necessary in order to ensure that the terms of the collective agreements did not fall below the legally stipulated minimum labour condition of the Civil Code.

Indeed, the duration of the collective agreement was also to be fixed by the law. The duration was limited by law to one year after which either party might terminate it by giving six months' prior notice to the other party even if contrary provisions were spelt out in the collective agreement. Based on these arrangements, whether to conduct collective bargaining and the manner of conducting thereof was left to the decision of the parties. But once collective agreement was reached it was no longer the parties' private affair as the competent public authorities (the government) were empowered to step in to deal with content verification and determination of the agreement's life span.

Consequently the government appeared to be in a dilemma between regulating and deregulating the collective bargaining and its outcome in that it deregulated the process while regulating the substance and the duration of validity. Under subsequent labour laws, as will be seen later, the authority of public authorities has been limited to *registering* (not to approving) the collective agreements. The content and the duration of the collective agreement are to be fixed by the parties (except that terms of collective agreements which are less favourable than what is provided by law or contract will not be given effect) and it is only if and when the parties fail to spell out the duration that the duration stipulated by law (i.e. three years) will serve as a gap filling instrument.

In earlier times, the longstanding master and servant mentality of understanding the relationship, in Ethiopia, made some employers reluctant to make themselves available to bargain on an equal footing with their 'servants.' There existed records of various modalities of 'feet dragging' tactics from the employers' side with a view to avoiding, delaying or frustrating collective bargaining engagements. For instance, the bargaining process for the first collective agreement in Ethiopian labour history which was signed between the Wonji-Shewa Sugar Factory and the Wonji-Shewa Sugar Factory Trade union, was concluded after eight months of intense negotiation.

Ananaba further cited another incident in relation to the Ethiopian Printing Workers' Union that tried to bargain with the employers for two years but failed in its efforts. The first-level trade union subsequently reported the matter to the national labour association (CELU) and the latter took up the case with the Government. The appropriate Government organ invited the employer for discussions but it failed to appear with impunity. Hence, unionization, in Ethiopia, did not automatically pave the way towards effective collective bargaining. Although the Labour Proclamation of 1963 introduced concepts such as 'recognising each other for bargaining' and 'bargaining in good faith', it did not attach any sanctions with a view to making them effective.

7.2.4. Subject matter of collective bargaining in Ethiopia

The history of labour movements has shown that the initial objective of collective bargaining was just to regulate "working conditions." Traditionally, the term "working conditions" was narrowly understood to mean terms such as working hours, overtime pay, rest periods and wages, which were predominantly economic matters. Overtime, however, the scope of collective bargaining began to widen to include social issues such as paid leave of different sorts (annual leave, maternity leave, sick leave etc.). Social security benefits and skill development measures such as education and training have also been included in many collective bargaining tables. A further step is where managerial issues such as employees' recruitment, transfer, promotion, disciplinary issues and retrenchment, all traditionally within 'managerial prerogatives,' have been included in collective bargaining negotiations in many countries. Consequently, the subject matter of collective bargaining has ranged from purely economic issues to various aspects of social security and power sharing items with its scope of coverage gradually but steadily expanding. In this regard, Schregle observes that:

> Developments in many countries in various parts of the world show that collective bargaining is no longer limited to the determination of wages and working conditions. More and more matters which, in the

past, were considered management prerogatives are being included in the scope of collective bargaining.

The Committee of Experts on the Application of Conventions and Recommendations of the ILO held that ‘it would be contrary to the principles of Convention No. 98 to exclude from collective bargaining any issue relating to conditions of employment.’ However, in connection with the appropriateness of employees’ participation in management, the position is not yet settled. It might be argued that whereas exigencies of business transaction anticipate prompt decision making, employees’ participation in such decisions is likely to have a delaying effect to the detriment of the enterprises’ legitimate business interests. Moreover, shareholders and potential investors may lose confidence in the decision-making process of the enterprise once ‘non-owners’ (i.e. employees) are involved in decision taking.

However, there are compelling reasons to support employees’ participation. As Schregle notes “workers are entitled to have a say in the management of their enterprises irrespective of ownership simply because they work there” More practically mutual understanding of the views and concerns of the parties could be enhanced, as a result of which tensions and industrial disputes could be minimized. Employees, it may be claimed, would cultivate an enhanced commitment to the causes of the enterprise and a sense of belonging to the enterprise would be improved. Hepple also argued “giving workers a voice generally improves efficiency.” Unfortunately, Compa’s Report documented that in the global economic order the general trend is towards widening management’s prerogative to unilaterally run the enterprise by excluding trade union participation on personnel management issues.

Turning then to consider how the Ethiopian experience reflects the several points raised above, it can be immediately noted that the first labour proclamation that recognized the right to collective bargaining stipulated the subject matter in general terms, stating simply that ‘labour conditions’ shall be the objects for bargaining. However, apart from providing an illustrative listing as to which subject matters could be included, the law did not provide a working definition for the phrase 'labour conditions.' This tended to imply that the subject matter for bargaining would be demarcated by the parties themselves. This 'open-ended' approach of the law was consistent with the view held by the Committee of Experts on the Application of Conventions and Recommendations stated above. In reality, however, due to lack of experience and weak organisational set up of trade unions in Ethiopia, at the time, the issues at the bargaining table were no more than "bread and butter" issues, such as wages, over-time pay and working hours.

Nevertheless, over-time, the subject matter for collective bargaining began to become more diverse in content. In particular, with the adoption of Proc. No.64/1975 at the time of the military regime, items for bargaining extended beyond economic issues to cover social and managerial issues. The proclamation specifically stated that improvement of workers' educational standards and vocational skills and workers' participation in the management of the enterprises shall be among the subject matters eligible for collective bargaining.

It may be argued that as most of the enterprises during the military rule were under state ownership; such an extensive coverage of bargainable subject matters was intended to apply to those state-owned enterprises. However, the scope of application of the Labour Proclamation was not restricted to state owned enterprises. It was applicable to any 'undertaking', regardless of ownership issues. Consequently, employees including employees of private enterprises which employed twenty or more employees were entitled to form trade unions and to collectively bargain on the issues identified above. Thus, issues of development of employees' skills and participation in managerial matters, both in state owned and private enterprises, which were conventionally within the realm of the employers' prerogative, were made subject matters open for collective bargaining. Since then, collective agreements, in Ethiopia, have begun to insert provisions dealing with employees' skill development schemes and participation in managerial activities in addition to the traditional "bread and butter" issues of everyday life.

There are countries where the right of employees' participation in management emanates from legislation, not from a collective agreement. For instance, India adopts the right of employees' participation in management by stipulating law to this effect rather than leaving it for collective bargaining. Accordingly, under Indian law, employees' representatives for the purpose are to be elected by the general meeting of the labour force (unionised and non-unionised) rather than through trade unions. Its application was also in enterprises that at least employ 100 workers. As far as the Ethiopian situation is concerned it is different in this respect. First, the right to participate does not emanate from legislation; rather from a collective agreement. Second, since a trade union has been the exclusive bargaining agent under Ethiopian law, there will not be another organ that will be elected for the purpose of workers' participation. Third, its application has also been open to all enterprises, regardless of the number of employees of the enterprise, where trade unions are established.

With the overthrow of the military rule and a change of government, to a certain extent, an approach similar to that of India emerged as regarding employees' participation in managerial activities. Based on the Public Enterprises Proclamation (Proc. No.24/1992), employees' representatives have been entitled to not more than one-third vote in the Managing Board of the enterprise. Employees' representatives for the Managing Board are also to be elected by the general assembly of the labour force even if a trade union exists. On the basis of this arrangement, participation emanates from legislation and the representatives are elected from and represent all the employees both unionised and non-unionised. Thus, employees at state owned enterprises have obtained a co-decision making power by law.

From this perspective, employees' participation in top management at state owned enterprises has been legally guaranteed, rather than being left to the negotiation of the social partners. Nevertheless, as the Public Enterprise Proclamation applies only to state owned enterprises, this working arrangement is applicable only to employees of state owned enterprises. In the private sector, employees' participation in managerial activities emanates from a collective bargaining. Notwithstanding this variation between State owned and private enterprises, the general pattern of the laws of Ethiopia has been gradually but consistently to expand, at least formally the scope and coverage of employees' participation in the managerial affairs to penetrate deeper into the province of the management prerogatives regardless of the nature of ownership.

It should be noted that conducting collective bargaining and concluding collective agreement though necessary are not sufficient achievements unless the terms of the collective agreement are implemented and remain stable until replaced. In this regard, the successive labour laws of the country have addressed the issue in the following manner. Under the labour proclamation of 1975 it was stated that "unless replaced by legislation or other collective agreement, conditions of work, benefits and workers' right stipulated in a collective agreement shall remain in force." This stipulation was retained by the labour proclamation that superseded it.

However, this principle of maintaining the status quo until replaced by another collective agreement has been withdrawn since the adoption of the labour proclamation of 2003. It has been stipulated that employment conditions formulated by an expiring collective agreement will lose their binding force unless replaced by another collective agreement within three months from the expiry date of the previous collective agreement. This recent position of Ethiopian labour law resembles what Compa observed in other countries' labour law reforms. In fact, by an amendment issued in 2006 it is provided that it is not the whole terms of the collective agreement that will cease to be effective, but rather those terms of the collective agreement pertaining to 'wages and other benefits' (which are of higher importance to the employees) that will lose their binding effect.

7.2.5. The duty to bargain and to bargain in good faith

As indicated earlier, the 1963 Labour Proclamation introduced, for the first time in Ethiopian labour history, provisions for the formation of employers' and employees' associations. These provisions included the procedures for collective bargaining and registration of collective agreements and the definition and prohibition of "unlawful labour practices." Concepts such as "the duty to bargain" and "bargaining in good faith" have also been incorporated since then into the Ethiopian labour law.

However, the way in which the provision on "the duty of bargaining in good faith" was incorporated in the 1963 proclamation was ambiguous as regards the scope of the duty. Article 26 of the law read as follows: "*Each party engaged in collective bargaining shall be required to recognize all of the other parties thereto and to negotiate with them in good faith.*" The first impression from a close reading of the above provision is that once the parties voluntarily agree to engage in bargaining, they are expected and, in fact required, to bargain in good faith. Nevertheless, it was unclear as to whether there was in fact a duty to bargain in the first place. This is because the law seemed to imply that it was only after engagement between the parties that the duty of good faith operates. It is thus doubtful whether this provision had, indeed, imposed a duty on the parties to bargain. Furthermore, though the law had a long list of 'unfair labour practices' for both parties, failure to appear for bargaining was not among them. Hence, no sanction was attached to it in case of non-compliance with the duty.

In reality, as indicated above, employers were rejecting requests for bargaining from trade unions with no legal consequences attached to the refusal. This ambiguity in the scope of the duty was similar to that we observed in the interpretations of international experience. Even if interpreted in a manner to mean that there was a legal duty to bargain, the labour law did not provide any sanction if and when one of the parties failed to appear for bargaining nor did it provide a time limit within which negotiations should commence. It thus remained as an empty promise with no enforcement mechanism in place.

Another important collective bargaining issue which the 1963 Proclamation failed to address was the issue of "disclosure." The law was silent as to whether each party was duty bound to disclose relevant information to the other so that well-informed and meaningful bargaining would be conducted. It may be argued that the duty to negotiate in good faith should be interpreted to include the obligation to provide information at one's disposal essential for the negotiation; and that withholding relevant information from the other negotiating party is a manifestation of bad faith. Nevertheless, for the benefit of clarity, duties should have been expressly stated so as not to provide room for doubt and debate. The ILO seemed to realize such a lack of uniform interpretation in disclosure when it drew up a Recommendation in 1981 recommending member states "to formulate measures adapted to national conditions (…) so that parties have access to the information required for meaningful negotiations."

It was indicated earlier that the implementing legislation for the establishment of trade unions was substantially delayed even after freedom of association was recognized by the 1955 Revised Constitution. Even after the law on unionization was adopted, the threshold membership to form a trade union was set at a high figure, thereby limiting its use. In the context of collective bargaining also, rules and procedures lacked clarity as to the scope and nature of the parties' duties. There was no express duty of disclosure nor was there a sanction against non-compliance even if the duty was held to exist. It could thus be said that, during the era of the Emperor, the laws on unionization and collective bargaining were too late in coming into force; and too ambiguous to implement. The introduction of the legal framework consequently appeared to be more of a public relations exercise than a serious political commitment to implement the rights. This conclusion is in line with Bahru's view arguing about the lack of genuine political will by the Imperial regime towards freedom of association.

A very different picture was presented by the approach of the successor military regime. The 1975 Labour Proclamation remedied some of the shortcomings in the duty to bargain of the 1963 labour law. For instance, Proc. No.64/1975 made 'availability for collective bargaining' one of the duties of the parties. The relevant part of the proclamation (Art.67 (2)) reads as follows: "*the party to whom a request under sub-Article (1) [request for bargaining] has been made shall within five days of receiving the request appear for collective negotiations*". With this stipulation in place, the parties were duty bound to make themselves available for bargaining within five days of receiving the request. Thus, the issue of recognition for bargaining purposes was no longer left to the voluntarism of the employers. Consequently, the principle of "mandatory recognition" for collective bargaining purposes has been introduced in Ethiopian labour law ever since the coming into effect of the Labour Proclamation of 1975.

Unlike the labour law of the imperial era that did not provide any sanctions for non-compliance with bargaining obligations, the 1975 Labour Proclamation prescribed a penalty. Thus, failure to appear for bargaining *within five days* was not only a violation of a duty but also a punishable offence to the extent of imprisonment. There is, however, no record of any prosecution for non-compliance with this duty ever resulting. It may be that as most enterprises during the military regime were under state ownership, recognition of trade unions for bargaining purposes was not a serious problem.

The 1975 Labour Proclamation also marked a clear change from the preceding position on disclosure of information. The law expressly spelt out the duties imposed on the employer during and in connection with bargaining. It obligated the employer with the responsibility of submitting all pertinent evidence and documents required during the negotiations at a pain of sanction. In employment relationships, it is commonly the employer who possesses essential information such as financial reports of the enterprise and who may be reluctant to disclose those to the other party. It can be argued that the absence of such information handicaps the trade unions to develop well-informed and even possibly objective bargaining proposals. Disclosure helps in avoiding this kind of information gap.

However, though there were favourable legal frameworks for collective bargaining during the military regime, measurable benefits from collective bargaining were less evident. Almost all state-owned enterprises at the time were loss makers and a WB report assessed the overall economic situation of the country at the time in the following manner:

> Production growth was impeded by the low level of investment reflecting relatively low levels of both domestic savings and external resource flows. Public savings have diminished as government current expenditure, especially for defence and public administration, rose faster than revenue. Meanwhile private saving and investment did not respond adequately to various government initiatives.

Thus, in practice, there was little or no benefit to be shared through collective bargaining. It can be argued that the mismatch between the apparently favourable legal framework for collective bargaining on the one hand, and the adverse consequences of a restrictive and command economic policy of the time on the other hand, did not bring any measurable gain to the labour force.

The next political change in Ethiopia, the overthrow of the military regime, led again in due course, in 1993, to a new labour proclamation, an instrument intended to reflect a change towards a more market-oriented economy. The Proclamation brought with it a slightly different approach towards issues of collective bargaining and collective agreements. Making oneself available for bargaining and bargaining in good faith were retained as express duties of the parties as was the provision of sanctions for non-compliance. Nevertheless, the sanction was now limited to a fine, with a maximum of Birr 1200 to be assessed by the First Instance Court labour division. Imprisonment as a possible sanction for labour law violation was withdrawn, and the Criminal Bench was no longer involved in entertaining labour matters. Moreover, since then, the responsibility to prosecute labour law violations has been entrusted to the Labour Inspection Service.

However, the inspection service in Ethiopia has been understaffed, under-resourced and has lacked the necessary skill to prosecute violations. It has been reported that they have prosecuted only two cases in court in recent years. The inspection service complained that “officials from other ministries, such as the Ministry of Trade and Industry, become involved in cases pending in court asserting that the inspectors should withdraw charges [against violators] because public knowledge of alleged violations [prosecutions] may interfere with investment strategies." This shows the ambivalent position of the Government in the sense that the desire to enforce labour rights from the side of the inspection office was in conflict with the desire to encourage investment even at the expense of labour rights as reflected by the position of the Ministry of Industry and Trade.

The other area where the post-military rule labour laws deviate from the labour law of the military regime is in the area of disclosure of information during bargaining. The duty of disclosure has been withdrawn from the list of duties specifically imposed on employers. It might be argued that this is not a significant deviation from the past in that even if the obligation to disclose information was not expressly spelt out, such a duty may be inferred from the duty to negotiate in good faith, and hence, the duty to disclose pertinent information remains intact. It may therefore be argued that an employer's duty to bargain in good faith includes the duty to equip the trade union representatives with adequate information to enable them understand and discuss the issues raised by the employer so that effective collective bargaining can take place.

The alternative and equally plausible argument is that the duty to disclose information to the other party does not exist under the existing legal framework for the following reasons. First, legal duties should be expressly spelt out with a view to avoiding doubt and unnecessary controversy as to their existence. Second, in cases where the previous law expressly provided it as a duty, and the subsequent law omitted it, a reasonable assumption would be that the duty no longer exists because had the legislature intended to retain such a duty, it would have spelt it out expressly as previously.

Trade union leaders complain that private employers have been reluctant to disclose particularly financial information of the enterprise to trade unions, alleging not only that it is a "business secret" which should not be divulged to persons other than the shareholders; but also that they no longer have the duty to disclose such information under the law. Nevertheless, the "business secret" defence is less persuasive given that the Commercial Code of Ethiopia of 1960 requires business organisations to annually submit the balance sheet and profit and loss statements of the company to the Ministry of Commerce and Industry for publication in the Official Commercial Gazette. This legal duty on business organisations tends to suggest that the financial information is not a "business secret." Rather, it is a public document that should be made public at the end of every budget year.

7.2.6. Summary

The legal frameworks for collective bargaining in Ethiopia have undergone significant transformation overtime. Union "recognition" for collective bargaining purposes, moved from the ambivalent position of the 1963 Labour Proclamation, to the "mandatory recognition" approach since the issuance of the 1975 labour law. Thus, unlike the relevant ILO instruments which do not expressly impose the duty to bargain on the parties, Ethiopian labour laws have since 1975 explicitly provided for the duty to bargain and to bargain in good faith at the pain of sanctions. It may be safe to conclude that since the laws do not impose the duty to reach at an agreement on the negotiating parties, imposing a duty to bargain on the parties is consistent with the intent and purpose of Convention No.98 which is promoting effective collective bargaining.

In terms of subject matter eligible for collective bargaining, the international experience has shown the tendency of expanding the subject matter on the bargaining table from purely economic issues to social and managerial issues. Similarly, the Ethiopian successive labour legislation gradually but steadily broadened the scope from purely economic matters of "bread and butter" issues, into, among other things, the territory of the managerial prerogatives and skill development issues. Consequently, as far as the letter of the law is concerned, economic, social and managerial issues have been opened up for collective bargaining. However, development in the legal rules do not necessarily tell us anything about the practical impact of those rules and what obstacles, if any, there are to their implementation and effectiveness.

Notwithstanding these positive legal developments, there are also appreciable reversals militating against effective collective bargaining, which were introduced side by side with the introduction of the market oriented economic policy. For instance, it was noted above that with the coming into power of the post-military rule and the adoption of a new labour law, the express duty of disclosure has been removed from the law. It may be that with the change to a more investment-friendly economic policy, the post-1991 government might have considered that maintaining employers' duty of disclosure would be an undue regulatory burden to business and therefore inconsistent with the government's market oriented economic policy. However, the effect is to shift the legal balance in a manner that is at the expense of equally important commitment of promoting effective collective bargaining which is limited unless there is disclosure of relevant information. It was indicated in the preceding chapters that trade unions in Ethiopia proved to be weak in terms of organisational strength and experience and these limitations require and justify facilitative state measures such as imposing the duty of disclosure if collective bargaining is to be meaningful and effective.

A further reversal concerns the pre-2003 provision that in order to ensure continuity of stipulated terms and conditions of employment collective agreements was to remain in force until replaced by new collective agreements. The labour law of 2003 stipulated for the withdrawal of the binding force of employment conditions established by a collective agreement even when re-negotiation to replace it is not yet finalized which tends to affect the status quo in collective labour relations. In fact, Compa (2006) documented a similarly flexible approach in labour law reforms of other jurisdictions which were covered by his report.

The other area of concern is that although the labour inspection service has been entrusted with wider powers of supervision and prosecutorial responsibilities against labour standard violations including violation of the duty to bargain in good faith, the inspection service is organised in such a manner that it is ill-equipped and understaffed to efficiently discharge its responsibilities. Even when it attempts to take prosecutorial actions within its mandate, pro-investment agencies such as the Ministry of Trade and Industry have tended to undermine the monitoring activities of the labour inspection service. The contention is that that such supervision may discourage investors and investment. Thus, the tendency has been that either the laws are being formulated in investment-friendly manner or the protective laws may be left intact but with their implementation neutralized by executive measures, thereby making them merely "tiger papers." The literature on the current challenges on trade unionism has recorded that there have been tendencies to withdraw protective labour laws or to deliberately ignore their enforcement on the belief that investment may be attracted and retained by so doing.

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Chapter VIII

Employment Dispute Settlement Mechanisms

8.1. General

This is the final chapter of the text book, which will highlight the mechanisms of employment dispute settlement. It must be noted that no matter how clear and well-articulated provisions of a law may be, there will always be disputes in their interpretation and application. Of course clear and well-articulated provisions may reduce the occurrence of such disputes. But they may not prevent or avoid the occurrence of disputes altogether. Hence, there is a need to lay down in advance dispute settlement mechanisms so that disputes could be managed and resolved accordingly if and when they arise.

Since the employment relation is a unique contractual relationship, it requires a unique dispute resolution arrangement. In many cases it is within the continuity of relationship framework that disputes may occur; and hence they need to be resolved in a manner that would not adversely affect the continuous relationship between them. Dispute settlement within the labour law regime differs from that of the civil service. The former is mainly a dispute of private nature, while the latter is a public one. Generally, the Regular courts and Labour Relations Boards are the most important dispute settling organs for labour law purposes. As regards to the civil service employment regime, disciplinary committees, administrative tribunals and regular courts have jurisdiction to entertain Civil Service employment disputes. We will discuss the labour law regime first, after which brief discussion for the civil service will follow.

8.2. Nature of Labour Disputes and Jurisdiction

From the preceding chapters, we will recall that employment relation manifests itself either in individual or collective features. The nature of the disputes may be reflections of such interactions in the sense that there will be individual and collective employment disputes as well. However, as freedom of association is not yet recognized for the civil service employment regime in Ethiopia, we do not have disputes of collective nature for that employment regime.

Under the labour law, other than conciliation and arbitration efforts, whether a dispute is under the jurisdiction of a regular court or a labour relations board depends on the nature of dispute. Admittedly under the Civil Code era there was no distinction between individual and collective labour relations. Since there was no freedom of association then, all labour relations at the time were individual, and hence the disputes were individual as well. Thus it was the regular civil court that had the jurisdiction to entertain labour disputes.

It was with the coming in to effect of the Labour Relations' Proclamation No.210/1963 that individual and collective labour relations were brought into existence. In fact, it was also through the promulgation of that law for the first time Labour Relations Board was introduced to the Ethiopian employment dispute resolution system. Emanating from these relations, individual and collective disputes began to crop up.

In terms of competence, individual labour disputes are within the jurisdiction of regular courts (labour division) while the collective labour disputes are under the competence of the Labour Relations Board. Therefore, determining whether a certain dispute is individual or collective is essential in deciding which organ has competence to entertain the case. But how individual labour dispute is to be distinguished from the collective one is a crucial issue to be resolved.

With this purpose in view, Proclamation No.64/1975 defined "individual trade dispute" and "collective trade dispute." Accordingly, "Individual Trade Dispute" means a claim of an aggrieved worker arising out of the violation or alteration of provisions contained in laws, regulations, work rules or individual contracts of employment or the non-application of established practices by the undertaking (Article 2(12). Conversely "Collective Trade Dispute" means any claim arising out of the interpretation or the improvement of existing provisions or benefits contained in laws or regulations or collective agreements or work rules or accepted practices and any dispute involving questions or representation by the workers or the undertaking or arising in the course of collective negotiations (Article 2(5).

However, since the adoption of Labour Proclamation No.42/1993, the legislature, instead of defining these concepts, resorted to spelling out illustrative listing so that similar issues could be included. The lists for each of them have been reproduced herein below.

Article 139: Labour Division of First Instance Court

1) *The labour division of a federal and regional first instance court shall have jurisdiction to settle and determine the following and other similar individual labour disputes (underline added);*
   a) *Disciplinary measures including dismissal;*
   b) *Claims related to the termination of employment contracts;*
   c) *Claims related to hours of work, remuneration, leaves and rest day;*
   d) *Claims related to the issuance of certificate of service and clearance;*
   e) *Claims pertaining to employment injury, transfer, promotion, training and other similar issues;*
   f) *Unless otherwise provided in this Proclamation, suits pertaining to violations of provisions of this Proclamation.*

Article 143: Duty and responsibility of Conciliator

1) *A Conciliator appointed by the Ministry or the appropriate authority shall to bring about a negotiated settlement on the following and other similar collective labour disputes (underline added):*
   a) *Issues of wages and other benefits which are not determined by work rules or collective agreements;*
   b) *Establishment of new conditions of work;*

c) *The conclusion, amendment, duration and invalidation of collective agreements;*

d) *The interpretation of any provisions of this Proclamation, collective agreements or work rules;*

e) *Procedure of employments and promotion of workers;*

f) *Issues affecting workers in general and the very existence of the undertaking;*

g) *Suits related to procedures issued by the employer regarding promotion, transfer and training;*

h) *Issues pertaining to reduction of workers.*

It must be admitted that the above cited provisions are not intended to define individual and collective labour disputes. It is rather indirectly that we can gather their definition therefrom. In fact, due to lack of sufficient clarity with this illustrative approach, the issue proved to be one of the most controversial in practice. As a result, the Federal Supreme Court Cassation Division was compelled to formulate a binding interpretation on this subject.

The core of the Cassation Division's interpretative note is "if the dispute revolves around individual claims or concerns individually or even collectively, it is individual labour dispute while if the resolution of the dispute will have the effect of affecting all or substantial part of the labour force, the dispute will be categorized as a collective one" *(KK Textile Industry v. KK Basic Trade Union;* File No.18180: Vol. I).

8.3. Organizational Composition and Working Systems

It must be clear from the outset that, though legislating labour law is within the competence of the federal legislature, its dispute settlement mechanism is partly entrusted to the regional states. In individual labour disputes, it is only in cases arising in Addis Ababa or Dire Dawa that the Federal First Instance Court Labour

Division would be involved. In all other cases, the first instance regional court labour divisions where the dispute arises have jurisdiction. Appeal from these fora is to be referred to the regional appellate courts except in Addis Ababa and Dire Dawa from which appeal is lodged to the Federal High Court. Therefore, it may be argued that, the principal competence for individual labour disputes falls under the regional courts.

A point to note is, Addis Ababa is the capital city of Ethiopia and at the same time a regional capital for Oromia Regional State. Due to this overlapping, determination of jurisdiction for labour disputes arising within Oromia state owned enterprises situated in Addis Ababa was an issue. Whether it is to be submitted to the Federal First Instance Court or to Oromia Region first instance court an unsettled issue. However, in *Teklie Haile et al v. Oromia Road Construction Enterprise*; File No.100950/2007 E.C. (unpublished) case, the Cassation Division ruled that it is the Oromia regional first instance court rather than the Federal First Instance Court which, has jurisdiction to entertain individual labour dispute cases where the defendant is Oromia state owned enterprises situated in Addis Ababa. Oromia Region has a zonal administrative structure named as "Finfinie Special Zone" where it has also established a first instance courts within the environs of Addis Ababa (Finfinie).

The Cassation Division's ruling on the case at hand was initiated by the Cassation Division on its own motion. The defendants did not challenge the material jurisdiction of the federal courts; nor did the lower courts raised the issue. They took it for granted that they possess the material jurisdiction over the case. Admittedly, the issue of material jurisdiction can be invoked by the courts at any level even if it is not raised by the parties to the dispute. Therefore, the Cassation Division is authorized to invoke it.

The issue however is, should federal courts be denied material jurisdiction due to the fact that one of the parties to the dispute is regional state-owned business entity? It seems to me that any business entity, regardless of the type of ownership, is a private person. In practice state enterprises own by the federal government have been summoned to appear before regional first instance court of labour divisions where they operate branch offices. They never challenged material jurisdiction of the regional courts because the way the Labour Proclamation is formulated tends to provide the nearest forum for the employees to submit their suits. But, now that the Cassation Division has handed down an interpretation with a new perspective, the purpose of the Labour Proclamation may not be adequately served. For instance, employees of Oromia state owned enterprises operating in Addis Ababa who may have a labour dispute will obligated to go as far as Menagesha (around thirty kilometres away from Addis Ababa) in search of Oromia Region first instance court labour division. Due to this I am of the view that the holding of the Cassation Division on the case at hand is liable to doubt and debate. In fact, in another case (East Cement Share Company *v.* Zelalem Tadesse; File No.95638: Vol.17), the Cassation Division held a slightly different position in the sense that it ruled that in labour disputes the identity of the disputants would not be taken in to account in determining jurisdiction of federal and regional courts.

Problem for discussion:

Please closely read the above cited two cassation cases and decide among yourselves whether the Cassation Division was consistent in its ruling on the issue.

Interestingly, the record shows that both cases were decided in the same year (2007 E.C.)

As regards to collective labour disputes, the law anticipates the Labour Relation Boards are to be established at federal and regional levels. The federal Labour Relations Board by the Ministry (currently Ministry of Labour and Skills) while in the regions by the respective regional labour offices. The Labour Relations

Board established by the Ministry entertains collective labour disputes in connection with federal government owned enterprises situated in Addis Ababa and Dire Dawa (Article 145(1). The Labour Relations Boards established in the regions entertain collective labour disputes arising in their respective regions. Addis Ababa and Dire Dawa administrations have labour relations boards as well with similar competence.

Appeal from the various labour relations boards is to be submitted to the Federal High Court or pursuant to the delegation provided given by the Federal Constitution to the Regional Supreme Court. Hence, it seems safe to conclude that the core competence for collective labour disputes rests on the federal adjudicative forum. The Labour Relations Boards are considered to be more knowledgeable than the courts in factual issues of industrial relations. As a result, factual determinations by the boards are conclusive. Nevertheless, it is important to note that, more often than not, delineation of issues of fact and law is difficult, if not impossible.

Be these as it may, the composition and the working systems of the regular court labour divisions and the Labour Relations Boards are significantly different. As regards to composition, the labour divisions of the regular courts are to be operated by sitting judges of the ordinary courts. The Ministry or the regional labour offices has no role or involvement in the appointment of such judges. Nor have the labour divisions reporting duty to the Ministry or the regional labour offices.

Conversely, Labour Relations Boards are composed of representatives of the employers' and employees associations in addition to the appointees of the government (i.e. tripartite arrangement). They are to be appointed by the Ministry or the respective regional labour office for those operating in their regions (Article 146(1). The Boards have also the duty to submit annual reports to the organ that appointed them (Article 157).

Labour Relations Board members are to be appointed by the Ministry or the appropriate authority [regional labour offices] which shall comprise of a chairperson, two members who have the knowledge and skill on labour matters, four members out of which two represent trade unions; and two represent employers' associations, and two alternate members one from each association (Article 146 (1). Two employers' representatives shall be nominated from the most representative of employers' associations and workers' representatives shall be appointed from the most representative of trade unions. The remaining board members including a secretary shall be appointed by the Ministry or the appropriate labour office.

Labour Relations Board members during the Emperor were five in number to be appointed by the Emperor upon recommendation by the Minister of the National Community Development and Social Affairs. During the military regime, Labour Relations Board as an organ was non-existence due to mainly employers' association was not allowed to be established from which some members of the Board were to be drawn. By virtue of Labour Proclamation No.42/1993, Labour Relations Board members were five in number because two members who have the knowledge and skill on labour matters were not included by then. It is with the promulgation of Labour Proclamation No.377/2003 that the number of board members was increased to seven due to the inclusion of two members with expertise in industrial relations.

With respect to the working systems, the labour divisions are expected to conduct business in accordance with the stipulations of the civil procedure in their judicial proceedings. Labour divisions are handled by single judge benches. Winner-loser determination is the final outcome in a judicial forum. In terms of time frame, *the labour division of a regional First Instance Court shall render its decisions within 60 days from the date on which the suit is filed* (Article 139(2). If one of the litigants prefers to lodge an appeal, it is stated that, the party who is aggrieved by the decision of the first instance court may, within 30 days from the date on which the decision was delivered lodge an appeal to the appellate court (Article 139(3). The appellate court shall render its decision within 60 days from the date when the appeal was lodged (Article 140 (3) and its decision shall be final (Article 140 (2) without compromising the right to refer the case to the Cassation Division upon invoking fundamental error of law on the final decision. The desire of the law seems that labour disputes should be disposed of as soon as possible, within less than six months. In practice, however, due to mainly case-load of courts, the time limit prescribed by the law for the courts has not been met in almost all cases.

Labour Relations Boards are expected to serve as more of negotiating forum rather than an adjudicating one. They are required to settle disputes before them in a manner acceptable to both of the disputing parties (Article 151(1). Therefore, a win-win solution is the preferred mode of settling disputes before the Boards. The reason for employing mutual agreed solutions as a preferred modality of dispute resolution seems that since collective labour dispute has broader impact on industrial relation, winner-loser determination would have adverse impact on industrial peace and on the future relationship of the disputants.

It is only when amicable settlement is not achieved that the Boards will resort to judicial settlement. Thus, judicial settlement of disputes before the Labour Relations Boards is the last resort which should be disposed within 30 days from the date when the claim filed (Article 152(1). Submission of cases before Boards is free of charge to all parties (Article 162(1) while exemption of payment of court fee only applies to the employee and the employees' association when cases are submitted to the labour divisions of the regular courts (Article 162(2).

Decisions of the labour divisions, as indicated above, are appealable to the upper floor in the judicial hierarchy and the decision of the appellate division is final (Article 140(2) irrespective of whether the appellate division affirms or reverses the decision of the lower court. Similarly, decisions of the Boards are appealable, *on issues of law only*, to the Federal High Court and the decision of the high court is final regardless of whether is agrees or disagrees with the Board's ruling (Article 155(2). It is important to note, however, that the final decision of the Federal

High Court is open to challenge before a Cassation Bench provided that fundamental error of law is shown to have been committed in the final decision.

In fact, in a case between *Ethio-Telecom South-Western and Gambella Region and Saba Mengesha*; File No.94102: Vol. 16), the Federal Supreme Court Cassation Division held that if the Region where the dispute was originally filed has established a Cassation Division in its court structure, application for cassation cannot be submitted to the federal Supreme Court Cassation Division without exhausting the remedy at the level of the regional cassation division. This implies there will be cassation over cassation in the sense that once the cassation at the regional level is exhausted, the aggrieved party will still have another chance for petitioning to the Federal Supreme Court Cassation Division.

Problem for discussion:

As per the Ethiopian Constitution, promulgation of Labour Code is within federal jurisdiction. If so, why should the Regional Court Cassation Division be empowered to examine fundamental error of a federal law? Do you agree with the holding of the Federal Supreme Court Cassation Division in this regard?

The other modality of employment dispute settlement pertaining to the labour law employment regime is strike or lock-down. Strike is an industrial action available for the labour force; while lock-out is to be exercised by an employer with a similar object and purpose in view. These are essentially self-help measures where the initiating party may withhold its contractual commitments in order to compel the other party to accept its demands. However, since such a unilateral measure is technically a breach of contract, it cannot be allowed to be undertaken at the pleasure of the initiating party. In fact, it must be a measure of last resort in the sense that it is after all other lawful avenues to resolve the dispute are exhausted that this self-help measure may be exercised.

More importantly, this right to industrial action is not available to all sectors of the economy. There are enterprises which are not allowed to undertake strike or lock-down. These are enterprises of "*essential public service undertakings*" that render services which should be provided to the general public without interruption (Article 137(2). Even for those strike or lock-down is permitted, the procedure is rigorously regulated under the labour law. Herein below, the relevant provisions of the labour on strikes and lock-out are reproduced.

Article 158: General

1) *Workers shall have the right to strike to protect their interests in the manner prescribed in this Proclamation.*
2) *Employers shall have the right to lock-out in the manner prescribed in this Proclamation.*
3) *The provisions of sub-Articles (1) and (2) of this Article shall not apply to workers and employers of undertakings providing essential services.*

Article 137: Definitions

1)…………

2) *"Essential public service undertakings" means those services which shall be rendered without interruption to the general public and are the following undertakings:*

a) *air transport services;*

b) *electric power supply;*

c) *water supply and city cleaning and sanitation services;*

d) *urban light rail transport service;*

e) *hospitals, clinics, dispensaries and pharmacies;*

f) *fire brigade services; and*

g) *telecommunication services.*

Article 159: Conditions to be fulfilled

Prior to initiating a strike or lock-out partially or wholly the following steps shall be taken:

1) *The party initiating a strike or lock-out shall give advance notice to the other party indicating its reasons for taking the said action.*
2) *Both parties shall make every effort to solve and settle their labour dispute in a mutually amicable manner.*
3) *The strike to be taken by the workers shall have to be supported by simple majority of the workers concerned in a meeting in which at least two-third of the members of the trade union were present.*
4) *Measures shall be taken to ensure the observance, by employers and workers, of safety regulations and accident prevention procedures in the undertaking.*

Article 160: Procedure of notice

1) *The notice under Article 159 (1) of this proclamation shall be given by the party initiating a strike or lock-out to the other party, and to the Ministry or the appropriate authority.*
2) *The notice specified in sub-Article (1) of this Article shall be served 10 days in advance taking action.*

Article 161: Prohibited acts

1) *Without prejudice to the provision Article 160(1) of this Proclamation, a strike or lock-out shall be unlawful if initiated after a dispute has been referred to a Board or to a court and 30 days have not elapsed before any order or decision is given by the Board or the prescribed period has elapsed before the court has given decision.*
2) *It shall be unlawful to resist or unduly delay the execution of an order or a decision of a Board or court disposing, in whole or in part, a labour dispute or to take or continue to strike or to lock-out in protest to such*

order or decision of the board or court; provided, however, that the strike or lock-out shall not be unlawful if initiated in order to ensure compliance with such order or decision.

3) *It is prohibited to conduct strike or lock-*out *accompanied by violence, threats of physical force or with any act which is illegal.*

In order to undertake a lawful strike or lock-out, the above procedures are required to be complied with. The most important principles enshrined on the law include: *no surprise strike*; in the sense that the party initiating a strike or lock-out shall give ten days advance notice to the other party and the government indicating its reasons for taking the said action (Article 159(1).

No violent strike; in the sense that it is prohibited to conduct strike or lock-out accompanied by violence, threats of physical force or with any act which is illegal (Article 161(3).

Strike or lock-down should be a measure of last resort; in the sense that prior to initiating strike or lock-down both parties shall make every effort to solve and settle their labour dispute in a mutually amicable manner (Article 159(2).

Strike should not be the sole declaration trade union representatives; in the sense that the strike to be taken by the workers shall have to be supported by simple majority of the workers concerned in a meeting in which at least two-third of the members of the trade union were present (Article 159(3). It does not seem to require secret ballot.

No strike pending judicial proceeding; in the sense that a strike shall be unlawful if initiated after a dispute has been referred to a Board or court and 30 days have not elapsed before any order or decision is given by the Board or the prescribed period has elapsed before the Court has given decision (Article 161(1). Once these requirements are met, the trade union or the employer may undertake strike or lock-down respectively with a view to compelling the other party accept its terms and proposals.

No sympathy strike; for purposes of Ethiopian law, "strike" is defined as the slowdown of work by any number of workers in reducing their normal out- put on their normal rate of work or the temporary cessation of work by any number of *workers acting in concert in order to persuade their employer to accept certain labour conditions in connection with a labour dispute or to influence the outcome of the dispute* (emphasis added; Article 137). Based on this definition, strikers should have a labour dispute with their employers and they are engaging into such a concerted measure in order to persuade or compel the employer to accept their terms. Therefore, employers who do not have any labour dispute with anyone whosoever are not allowed to call on strike, thereby prohibiting sympathy strike.

A legitimate question, at this juncture, would be, since the law has listed out the so called "essential public service undertaking" whose services could not be interrupted through strike or lock-out what remedies, if any, are available to the employees who are not allowed to call on strike have. The Committee on Freedom of Association of the ILO is of the view that where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services.

As regards the nature of appropriate guarantees, it is stated that, in cases where restrictions are placed on the right to strike in essential services, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.

In the Ethiopian context, this issue will take us towards differentiating *permanent* and *ad-hoc* Labour Relations Boards. The Labour Proclamation has established these two boards with similar composition having their own distinct objectives to attain. The permanent Labour Relations Board, as it name implies, is permanently there to entertain, amicably settle and render decisions on collective labour disputes submitted to it, except on "*determination of issues of wage and other benefits*" (Article 148 (1). This implies Permanent Board has no power to determine issues of wage and other benefits because it is considered that such cases should not be judicially determined. It is believed that judges are not experts in determining bonuses and wage increments. These issues are more of economic and managerial items. It has been considered appropriate that enterprises other than those rendering essential services, whenever they encounter disputes pertaining determination of wages and other benefits, should compel their employers to accept their terms through strike.

The ad-hoc Labour Relations Board, for its part, is a temporary forum to be established for a specific purpose. This ad-hoc board is empowered to entertain issues pertaining to wages and other benefits with regard to enterprises rendering essential services (Article 148(2). Essential services (Article 137(2) are meant those "services whose interruption would endanger the life, personal safety or health of the whole or part of the population." As a result, they are denied from calling of strike or lock-out. In principle ILO is not against national laws prohibiting strike or lock-out in enterprises rendering essentials service, provided that they are narrowly defined and compensatory guarantee is offered. Therefore, it is with a view to providing them with compensatory guarantee that an Ad-hoc Labour Relations Board has been established in order to render decision on wage and other benefit in these enterprises.

To sum up, as far as the legal formulation is concerned, disputes pertaining to wages and other benefits is not to be determined by decision of the Labour Relations Board because such issues have economic implication to which judicial for a have no adequate knowledge. If at all dispute arises on those issues, it should be through industrial action (i.e. strike or lock-out) that one of the parties would compel the other to accept its terms. That is why the permanent Labour Relations Board is denied from entertaining such disputes. However, for those enterprises rendering essential services, since they are not allowed to take industrial action, the Ad-hoc Labour Relations Board has been given the power to determine disputes relating to wages and other benefit with regard to these enterprises.

At this time in point there is an issue that deserve further clarification. As indicated above, permanent labour relations boards have been prohibited from rendering decisions on determination of wages and other benefits. The issue, however, is what does "determination of wages and other benefits" mean? In *Construction works and Coffee Technology Promotion Enterprise-Trade Union v. Construction works and Coffee Technology Promotion Enterprise*; File No. 49152: Vol.10 case, the trade union and the enterprise negotiated and signed a collective agreement which was duly registered. The collective agreement in question had provisions on the conditions as to when and what amount of bonuses shall be given to the employees. An attainment of a certain profit threshold in a budget year was set for bonuses to be payable to the labour force. The trade union claimed that the enterprise registered a gross profit of 78,000,000 (seventy eight million) in the 2000 budget year and hence one month salary increment and half month salary in the form of bonus should be awarded to the labour force as per Article 24(1) of the collective agreement. The case was submitted to Federal First Instance Court Labour Division for contract enforcement. The enterprise filed preliminary objection arguing that since the case is a collective labour dispute, the court has no jurisdiction to entertain it. The court accepted the contention of the defendant and closed the file.

The trade union brought fresh case to the Labour Relations Board for the enforcement of the provision of the collective agreement. The Board dismissed the case ruling that it has no jurisdiction in determining wages and other benefits. Although the case was referred to the Federal High Court on appeal, the Court affirmed the board's decision. Finally, the trade union submitted an application for cassation contending that the lower tribunal committed fundamental error of law. However, the Cassation Division upheld the decisions of the lower labour tribunals.

The Cassation Division reasoned that the terms of a collective agreement pertaining to "wage and other benefits" cannot be enforced before labour tribunals. According to the Cassation Division, it is rather for the party claiming the benefit (the trade union in the present case) to take industrial action in order to put pressure on the other party to comply with the terms of the collective agreement. It proposed that calling on a strike is the appropriate measure to resolve disputes pertaining to wages and other benefits prescribed in a collective agreement. It did not view the terms of a collective agreement on wages and other benefits as judicially enforceable provisions. With due respect to the Cassation Division's ruling, I am of the view that this is not the intention of the legislature.

It must be noted that Ethiopian labour law requires a collective agreement be made in writing and signed by the parties. Moreover, it needs to be registered before a governmental organ. Once these formalities are satisfied, it is expressly stated that it begins to produce legal effect from the date of signature (Article 134(2). It is on the face of these rigorous procedures and clear legal stipulation that the Cassation Division denied enforcement of its terms.

In my view, the legislature would not have prescribed this rigorous procedure for validity of a collective agreement had the position been that it would be enforced through private action. In fact, it could be said that one of the objectives of effective collective bargaining is to prevent or minimize the occurrence and frequency of industrial actions. Interestingly, the Cassation Division did not rule that a collective agreement in its entirety is not enforceable before labour tribunals. It is only for the terms of a collective agreement relating to wage and other benefits that it denied judicial enforcement. Of course, if the terms of the collective agreement were not sufficiently clear, it may be appropriate to deny enforcement until the bargaining parties come up with clear and enforceable terms. Otherwise, if it has sufficient clarity, it would be going contrary to the intention of the parties to enforce some of their terms and deny enforcement to other terms within the same instrument.

In my view, what the Permanent Labour Relations Board has been prohibited is determination of wages and other benefits. Determination is meant fixing the amount of wages and the benefits payable to the employees. However, in the case at hand, the parties have already fixed when and what benefit is to be paid. The Board was merely requested to enforce what has already been determined by the parties. It seems with the intent of avoiding such a confusion that the current labour proclamation formulated the provision which imposed the prohibition in such a way that "issues of wages and other benefits which are not determined by work rules or collective agreements" (Article 143(1)(a);emphasis added) implying that if they have been already determined by work rules or collective agreements appropriate order or decisions may be handed down by the Board.

(Herein below is an extract from an article on the "ILO principles concerning the right to strike". It is hoped that it will provide readers with a better insight on the matter).

Bernard GERNIGON, Alberto ODERO and Horacio GUIDO, **'ILO principles concerning the right to strike"** *International Labour Review, Vol. 137(1998), No.4 (footnotes omitted)*

It may be surprising to find that the right to strike is not set out explicitly in ILO Conventions and Recommendations. It has been discussed on several occasions in the International Labour Conference during the course of preparatory work on instruments dealing with related topics, but for various reasons this has never given rise to international standards (Conventions or Recommendations) directly governing the right to strike. However, the absence of explicit ILO standards should not lead to the conclusion that the Organizations disregards the right to strike or abstains from providing a protective framework within which it may be exercised.

Two resolutions of the International Labour Conference itself –which provide guidelines for ILO policy –in one way or another emphasized recognition of the right to strike in members States. The "Resolution concerning the Abolition of Anti- Trade Union Legislation in the States members of the International Labour Organization" adopted in 1957, called for the adoption of "laws… ensuring the effective and unrestricted exercise of trade union rights, including the right to strike by the workers. Similarly, the "Resolution concerning Trade Union Rights and Their Relation to Civil Liberties", adopted in 1970, invited the Governing

Body to instruct the Director General to take action in a number of ways "with a view to considering further action to ensure full and universal respect for trade union rights in their broadest sense", with particular attention to be paid, *inter alia*, to the "right to strike". The right to strike has also been affirmed in various resolutions of the ILO's regional conferences and industrial committees, as well as by other international bodies.

Furthermore, though it does not explicitly mention the right to strike, the Freedom of Association and protection of the Right to Organize Convention, 1948(No.87), establishes the right of workers' and employers' organizations to "organize their administration and activities and to formulate their programmes" (Article 3), and the aims of such organizations as "furthering and defending the interests of workers or of employers" (Article 10). On the basis of these provisions, the two bodies set up to supervise the application of ILO standards, the Committee on Freedom of Association (since 1952) and the Committee of Experts on the Application of conventions and Recommendations(since 1959),have frequently stated that the right to strike is a fundamental right of workers and of their organizations, and have defined the limits within which it may be exercised laying down a body of principles in connection with the right to strike –giving rise to substantial "case law" in the broadest sense of the term – which renders more explicit the extent of the provisions mentioned above.

Of the remaining supervisory bodies of the ILO, the committees established under Article 24 of its Constitution do not deal, in principle, with matters relating to strike, since the Governing Body generally refers the corresponding complaints to the Committee on Freedom of Association. The few Commissions of Inquiry that have been set up in response to complaints under Article 26 of the ILO Constitution for non- observance of conventions relating to trade union rights refer in their conclusions to the principles of the Committee on Freedom of Association and of the Committee of Experts, and the same is true fact –finding and Conciliation Commission on freedom of Association.

Finally, the ILO Conferences Committee on the Application of Standards has noted that a broad consensus exists among its members regarding the principal of the right to strike, although the views of the Workers' Group, the Employers' Group and the Government delegates do not coincide. The Workers' Group fully supports the approach of the Committee of Experts regarding the right to strike, considering it to be inalienable from the right to freedom of association protected by Convention No.87 and by the principles embodied in the ILO Constitution. The Employers' Group considers that the right to carry out direct action –for workers the right to strike and for employers the right to lock-out – could perhaps be acknowledged as an integral part of international common law and, as such, it should not be totally banned or authorized only under excessively restrictive conditions. Nevertheless, the Employers' Group has emphasized that Conventions No.87 and No.98 do not contain specific provisions regarding the right to strike and, therefore, it does not accept that the Committee of Experts should deduce from the text of these Conventions a global, precise and detailed, absolute and unlimited rights. Several Government delegates on the Conference Committee on the Application of Standards, during the discussion of the General Survey of the Committee of Experts on Freedom of Association and Collective Bargaining, in 1994, stated their general agreement with the position of the Committee of Experts regarding strikes, while others expressed some doubts as regards particular considerations in the General Survey, or identified specific problems arising notably in connection with the public service; the majority of Government members made no comment. It should be borne in mind that, unlike the other supervisory bodies, the Conference Committee on the Application of Standards has a particularly large number of members (214 in 1998, excluding deputy members).

The purpose of this article is to elucidate the principles regarding the right to strike laid down by the Governing Body's Committee on Freedom of Association and by Committee of Experts on the Application of Conventions and Recommendations, which have evolved substantially over the last decade. It is interesting to note that these bodies take each other's reports into account: the

Committee of Experts frequently refers in its observation to the reports of the Committee on Freedom of Association in matters relating to respect for freedom of association in different countries, while the latter consults the Committee of Experts on the legal aspects of the cases it examines, or employs principles laid down by the Committee of Experts.

Taken up in turn are general issues, objectives of strikes, workers included or excluded, conditions for exercising the right to strike, strikes and collective bargaining, anti-union discrimination, abuses, legislative restrictions, summary of principles, and final observation.

General issues

The basic principles of the right to strike

From its very earliest days, during its second meeting, in 1952, the Committee on Freedom of Association declared strike action to be a right and laid down the basic principal underlying this right, from which all others to some extent derive, and which recognizes the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests. Over the years, in line with this principle, the Committee on Freedom of Association has recognized that strike action is a right and not simply a social act, and has also:

1. made it clear it is a right which workers and their organizations (trade unions, federations and confederations) are entitled to enjoy;

2. reduced the number of categories of workers who may be deprived of this right, as well as the legal restrictions on its exercise, which should not be excessive;

3. linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers (which criterion excludes strikes of a *purely* political nature from the scope of international

protection provided by the ILO, although the Committee makes no direct statement or indication regarding sympathy strikes other than that they cannot be banned outright; this matter will be examined subsequently);

4. stated that the legitimate exercise of the strike should not entail prejudicial penalties of any sort, which would imply acts of anti- union discrimination.

These views expressed by the Committee on Freedom of Association coincide in substance with those of the Committee of Experts.

Definition of the right to strike and various types of strike action

The principles of the ILO's supervisory bodies contain no definition of strike action which would permit definitive conclusions to be drawn regarding the legitimacy of different ways in which the right to strike may be exercised. However, some types of strike action (including occupation of the work place, go –slow or work-to-rule strikes), which are not merely typical work stoppages, have been accepted by the Committee on Freedom of Association provided that they are conducted in a peaceful manner. The Committee of Experts has stated that:

> When the right to strike is guaranteed by national legislation, a question that frequently arises is whether the action undertaken by the workers constitutes a strike under the law. Any work stoppage, however brief and limited, may generally be considered as a strike. This is more difficult to determine when there is no work stoppage as such but a slowdown in work (go-slow strike) or when work rules are applied to the letter (work-to-rule); these forms of strike action are often just as paralyzing as a total stoppage. Noting that national law and practice vary widely in this respect, the Committee is of the opinion that restrictions as to the forms of strike action can only be justified if the action ceases to be peaceful.

> The Committee considers …that restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful.

Objectives of strikes

This section examines the nature of claims pursued through strike action which are covered by the body of principles set down by the Committee on Freedom of Association and the Committee of Experts. In discussing this matter, reference should be made at the outset to Article 10 of Convention No. 87 which, for the purposes of the Convention, defines worker organizations as any organization established "for furthering and defending the interests of workers". This definition is clearly of fundamental importance not only in that it sets down guidelines for differentiating such organizations is for those other types, but also because it specifies the purpose of such organizations for "furthering and defending the interests of workers" thereby demarcating the boundaries within which the rights and guarantees recognized by the convention are applicable, and consequently protected in so far as they achieve or seek to achieve the stated objectives.

The nature of the demands pursued through strike action may be categorized as being occupational (seeking to guarantee or improve workers' working or living conditions), trade union (seeking to guarantee or develop the rights of trade union organization and their leaders), or political. The two former categories do not give rise to any particular problems as from the outset the Committee on Freedom of Association has made clear decisions stating that they are legitimate. However, within the three categories of demand specified, a distinction should be made as to whether or not they directly and immediately affect the workers who call the strike. It should at once be noted that the Committee on Freedom of Association and the Committee of Experts have rejected the notion that the right to strike should be confined to industrial disputes that are likely to be resolved through the signing of a collective agreement.

Political strikes

On the basis of the definition of “workers’ organization” contained in Article 10 of Convention No. 87, the Committee on Freedom of Association considers that “strikes of a purely political nature… do not fall within the scope of the principles of freedom of association.

However, although the Committee has expressly stated that “it is only in so far as trade union organizations do not allow their occupational demands to assume a purely political aspect that they can legitimately claim that there should be no interference in their activities”, it has also specified that it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character, and that these two notions overlap.

Hence, in a subsequent decision, the Committee concluded that the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions. Along the same lines, the Committee has stated that the workers and their organizations should be able to express their dissatisfaction regarding economic and social matters affecting workers’ interests in circumstances that extend beyond the industrial disputes that are likely to be resolved through the signing of a collective agreement. Nevertheless, workers action should consist merely in the expression of a protest and not be intended as a breach of peace. In this connection, the Committee on Freedom of Association has stated that “a declaration of the illegality of a national strike protesting against the social and labour consequences of the government’s economic policy and the banning of the strike constitute a serious violation of freedom of association”. That said, it should be added that the principles laid down cover both strikes at the local level, and general strikes, which by their nature have markedly political connotation. As regard the geographical scope of the strike:

The Committee [on freedom of association] has stated on many occasions that *strikes at the national level* are legitimate in so far as they have economic and social objectives and not purely political ones; the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population (ILO, 1996d,para. 492).

As regards the general strike, in its examination of one particular case, the Committee considered that "[a] 24- hour general strike seeking an increasing in the minimum wage, respect of collective agreements in force and a change in economic policy (to decrease prices and unemployment) is legitimate and within the normal field of activity of trade union organizations". Similarly, in connection with another case, the Committee concluded that "[a] general protest strike demanding that an end be put to the hundreds of murders of trade union leaders and unionists during the past few years is a legitimate trade union activity and its prohibition therefore constitutes a serious violation of freedom of association".

The Committee on Freedom of Association's attitude in cases where the demands pursed through strike action include some of an occupational or trade union nature and others of a political nature has been to recognize the legitimate of the strike when the occupational or trade union demands expressed did not seem merely a pretext disguising purely political objectives unconnected with the promotion and defence of workers' interests.

The Committee of Experts also has stated that strikes that are purely political in character do not fall within the scope of freedom of association. However, the difficulty arises from the fact that it is often impossible to distinguish in practice between the political and occupational aspects of a strike, since a policy adopted by a government frequently has immediate repercussions for workers or employers; this is the case, for example, of a general wage and price freeze.

In the view of the Committee, organizations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solutions posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living.

Sympathy Strikes

Where sympathy strikes are concerned, the crux of the issue is to decide whether workers may declare a strike for occupational, trade union or social and economic motives which do not affect them in a direct and immediate manner.

In its General Survey of 1983, the Committee of Experts defined sympathy strikes ("where workers come out in support of another strike") and determined that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided that the initial strike they are supporting is itself lawful. This principle was then taken up in 1987 by the Committee on Freedom of Association when it examined a decree which did not ban sympathy strikes but merely regulated them by limiting the possibilities of recourse to this type of action. In the Committee's opinion, although several provisions contained in the decree might be justified by the need to respect various procedures (notification of the strike to the labour authorities) or to guarantee security within the undertaking (the prevision of agitators and strike-breakers from entering the workplace) others, however, such as geographical or sectoral restrictions placed on sympathy strikes –which therefore exclude general strikes of this nature –or restrictions on their duration and frequently, constitute a serious obstacle to the calling of such strikes.

Similarly, the Committee of Experts has subsequently stated that:

> Sympathy strikes, which are recognized as lawful in some countries, are becoming increasingly frequent because of the move towards the

concentration of enterprises, the globalization of the economy and the delocalization of work centres. While pointing out that a number of distinction need to be drawn here (such as an exact definition of the concept of a sympathy strikes; a relationship justifying recourse to this type of strike etc.), the Committee considers that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.

Workers who enjoy the right to strike and those who are excluded

It should be noted, first and foremost, that Article 9 of Convention No. 87 states that "the extent to which the guarantees provided for in this convention shall apply to the armed forces and the police shall be determined by national laws or regulations". As a result, the Committee on Freedom of Association has refused to find an objection to legislations which deny the right to strike to such groups of workers. Since the Committee on Freedom of Association first laid down its earliest principals on the subject of strikes, and given that strike action is one of the fundamental means for rendering effective the right of workers' organizations "to organize their … activities" (Article 3 of Convention No. 87), the Committee has chosen to recognize a general right to strike, with the sole possible exceptions being those which may be imposed for public servants and workers in essential services in the strict sense of the term. Obviously, the Committee on Freedom of Association also accepts the prohibition of strikes in the event of an acute national emergency, as will be seen in a later section on this question. The Committee of Experts has in turn adopted this approach.

Public service

Both supervisory bodies were cognizant, where public servants are concerned, of the consensus reached during the preparatory discussions leading to the adoption of Convention No.87, to the effect that "the recognition of the right of association of public servants in no way prejudice the question of the right of such officials to strike". The Committee on Freedom of Association and the Committee of Experts both agree that when public servants are not granted the right to strike, they should enjoy sufficient guarantees to protect their interests, including appropriate, impartial and prompt conciliation and arbitration procedures to ensure that all parties may participate at all stages and in which arbitration decisions are binding on both parties and are fully and promptly applied. It should also be stressed that, while the provisions of Convention No. 151 and of Recommendation No. 159 on labour relations in the public service adopted in 1978 cover the settlement of disputes, among other things, no explicit mention is made of the right to strike for public servants.

That being said, it should be emphasized that on the question of the right to strike in the public service, the ILO's supervisory bodies' approach is based on the fact that the concept of public servant varies considerably from one country to another. It may be deduced from the statements of the Committee of Experts and of the Committee on Freedom of Association that the concept of the public servants, where their possible exclusion from the right to strike is concerned, relates to public servants who exercise authority in the name of the state. The implications of this approach are important in that the guidelines for determining those public servants who may be excluded no longer emanates from the application to them of the national law governing the public service, but from the nature of the functions that such public servants carry out. Thus, while the right to strike of officials in the employ of ministers and other comparable government bodies, as well as that of their assistants and of officials working in the administration of justice and staff in the judiciary, may be subject to major restrictions or even prohibition, the same does not apply, for instance, to persons employed by the state enterprise. To date, in response to complaints submitted to it, the Committee on Freedom of Association has stated that certain categories of public servants do not exercise authority in the name at the state, such as public servants in state owned commercial or industrial enterprise, in oil, banking and metropolitan transport undertakings or those employed in the education sector and, more generally, those who work in the state companies and enterprises.

Finally, it should be noted that, among the categories of public servants who do not exercise authority in the name of the state, those who carry out an essential service in the strict sense of the term may be excluded from having recourse to strike action. This concept will be examined in the following paragraphs.

The Committee of Experts shares the principles of the Committee on Freedom of Association regarding situations in which the right to strike is severely restricted or even prohibited. In this connection, the Committee of Experts has observed that "a too broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers". The Committee has pointed out that one of the main difficulties is due to the fact that the concept itself varies considerably from one legal system to another. For example, the terms *civil servant, fonctionnaire* and *funcionario* are so far from having the same coverage; furthermore, an identical term used in the same language does not always mean the same thing in different countries; lastly, some systems classify public servants in different categories, with different status, obligations and rights, while such distinctions do not exist in other systems or do not have the same consequences.

The Committee has considered that although it cannot overlook the special characteristics and legal and social traditions of each country, it must endeavour to establish fairly uniform criteria in order to examine the compatibility of legislation with the provisions of Convention No. 87. For this reason, it has judged it futile to try to draw up exhaustive and universally applicable list of categories of the public servant who should enjoy the right to strike or be denied such a right given that they exercise authority in the name of the state the Committee is aware of the fact that except for the group falling clearly into one category or another, the matter will frequently be one of degree. For this reason, in borderline cases, it has suggested one solution might be "not to impose a total prohibition of strikes, but rather to provide for the maintaining by a defined and limited category of staff of a negotiated minimum service when a total and prolonged stoppage might result in serious consequences for the public".

Essential services in the strict sense of the term

Over-time, the supervisory bodies of the ILO have brought greater precision to the concept of essential services in the strict sense of the term (for which strike action may be prohibition). In 1983, the Committee of Experts defined such services as those "the interruption of which would endanger the life, personal safety or health of the whole or part of the population". This definition was adopted by the Committee on Freedom of Association shortly afterwards.

Clearly, what is meant by essential services in the strict sense of the term "depends to a large extent on the particular circumstances prevailing in a country"; likewise, there can be no doubt that "a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of whole or part of the population". The Committee on Freedom of Association has nonetheless given its opinion in a general manner on the essential or non-essential nature of a series of specific services.

Thus, the Committee has considered to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be: the hospital sector; electrical services; water supply services; the telephone service; air traffic control.

In contrast, the Committee has considered that, in general, the following do not constitute essential services in the strict sense of the term, and therefore the prohibition to strike does not pertain.

- Radio and television;
- the petroleum sector;
- ports (loading and unloading);
- banking;
- agricultural activities;
- pleasure parks;
- the metal sector;
- the mining sector;
- transport generally;
- refrigeration enterprise;

- the supply and distribution of foodstuffs;
- computer services for the collection of Excise duties and taxies;
- aircraft repairs;
- department stores;
- automobile manufacturing;
- construction;
- hotel services;
- postal services;
- metropolitan transport;
- the education sector;
- the state alcohol, salt and tobacco monopolies;
- the government printing services;
- the mint;

These few examples do not represent and exhaustive list of essential services. The Committee has not mentioned more services because its opinion is dependent on the nature of the specific situations and on the context which it has to examine and because complaints are rarely submitted regarding the prohibition of strikes in essential services.

Obviously, the Committee on Freedom of Association's list of non-essential services is not exhaustive. Attention should in all events be drawn to the fact that, in examining a compliant which did not involve an essential service, the Committee maintained that the possible long-term serious consequences for the national economy of a strike did not justify its prohibition.

Furthermore, pursuant to its examination of particular national legislations, the Committee on Freedom of Association has recommended that amendments should be introduced in order to prohibit only strikes in the essential services in the strict sense of the term, particularly when the authorities have held discretionary powers to extend the list of essential services.

The Committee of Experts, for its part, has stated the following:

> Numerous countries have provisions prohibiting or limiting strikes in essential services, a concept which varies from one national legislation

to another. They may range from merely a relatively short limitative enumeration to a long list which is included in the law itself. Sometimes the law includes definitions, from the most restrictive to the most general kind, covering all activities which the government may consider appropriate to include all strikes which it deems detrimental to public order, the general interest or economic development. In extreme cases, the legislation provides that a mere statement to this effect by the authorities suffices to justify the essential nature of the service. The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services into broad a manner. As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population. Furthermore, it is of the opinion that it would not be desirable –or even possible –to attempt to draw up a complete and fixed list of services which can be considered as essential.

While recalling the fundamental importance which it attaches to the universal nature of standards, the Committee considers that account must be taken of the special circumstances existing in the various member states, since the interruption of certain services which in some countries might at worst cause economic hardship could prove disastrous in other countries and rapidly lead to conditions which might endanger the life, personal safety and health of the populations. A strike in the port or maritime transport services, for example, might more rapidly cause serious disruptions for an island which is heavily dependent on such services to provide basic supplies to its population than it would for the country on a continent. Furthermore, a non-essential service in the strict sense of the term may become essential if the strike affecting it exceeds a certain duration or extent so that the life, personal safety or health of the population are endangering (for example, in household refuse collection services). In order to avoid damages which are irreversible or out of all proportion to the occupational interests of the parties to the dispute, as well as damages to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in other services which are of public utility ("services d'utilité publique") rather than impose an outright ban on strikes, which should be limited to essential services in the strict sense of the term.

Terminological clarification regarding the concept of essential service and minimum service

Before proceeding further, it would be useful to clarify particular terminological points, since a full understanding of the supervisory bodies' principles regarding the so called essential services may otherwise not be assured. In some countries, the concept of essential services is used in legislation to refer to services in which strikes are not prohibited but where a minimum operational service may be required: in other countries, the idea of essential services is used to justify substantial restrictions, and even prohibition of strike action. When formulating their principles, the ILO supervisory bodies define the expression "essential services" in the latter sense. They also employ an intermediate concept, between essential services (where strikes may be prohibited) and non-essential services (where they may not be prohibited), which is services of "fundamental importance" (Committee of Expert terminology) or of "public utility" (Committee of Expert terminology), where the ILO supervisory body consider that strikes may not be banned but a system of minimum service may be imposed for the operation of the undertaking or institution in question. In this regard, the Committee of Experts has stated that because of diversity of terms used in national legislation and texts on the subject, some confusion has sometimes arisen between the concepts of minimum service and essential services; they must therefore be defined very clearly.

When the Committee of Experts uses the expression" essential services" it refers only to essential services in the strict sense of the term (i.e. those the interruption of which endanger the life, personal safety or health of the whole or part of the population), in which restrictions or even a prohibition may be justified, accompanied, however, by compensatory guarantees. Nevertheless, a "minimum service" "would be appropriate in situations in which a substantial restriction or total of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met and that facilities operate safely or without interruption". Specially, the Committee considers this type of minimum service might be established in services of public utility. In deed, "nothing prevents authorities, if they consider that such a solution is more appropriate to national conditions, from establishing only minimum service sectors considered as "essential" by the supervisory bodies according to the criteria set forth above, which justify wider restrictions to or even a prohibition of strikes". Situations in which the supervisory authorities consider a minimum service may be imposed are described below.

Compensatory guarantees for workers deprived of the right to strike

When a country's legislation deprives public servants who exercise authority in the name of the State or workers in essential services of the right to strike, the Committee on Freedom of association has stated that the workers who thus lose an essential means of defending their interests should be afforded appropriate guarantees to compensate for this restriction. In this connection, the Committee has stated that a prohibition to strike in such circumstances should be "accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented. The Committee on Freedom of Association has stated that it is essential that" all the members of the bodies entrusted with such functions should not only be strictly impartial but, if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned".

The Committee of Experts has adopted a similar approach in stating that:

> If the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned. It is essential that the latter be able to participate in determining and implementing the procedure, which should furthermore provide sufficient guarantees of impartiality and rapidity; arbitration awards should be binding on both parties and once issued should be implemented rapidly and complete.

Conditions for the exercising the right to strike

In most cases, the law lays down a series of conditions or requirements that must be met in order to render a strike lawful. The Committee on Freedom of association has specified that such conditions "should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations". The large number of Committee decisions in this connection may be attributed to the fact that some 15 percent of the cases submitted to it concern the exercise of the right to strike.

The Committee on Freedom of Association has accepted the following prerequisites:

1. the obligation to give prior notice;

2. the obligation to have recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage;
3. the obligation to observe a certain quorum and to obtain the agreement of a specified majority;
4. the obligation to take strike decisions by secret ballot;
5. the adoption of measures to comply with safety requirements and for the prevention of accidents;
6. the establishment of a minimum service in particular cases; and
7. the guarantee of freedom to work for non-strikers.

Some of these prerequisites merit further study since, over the years, the Committee on Freedom of association and the Committee of experts has adopted principles which restrict their scope, such as recourse to conciliation. Mediation and arbitration; the necessary quorum and majority required to permit an assembly to declare a strike, and the establishment of a minimum service.

Conciliation, mediation and voluntary arbitration

As stated previously, the Committee on Freedom of Association accepts that provision may be made for recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes before a strike may be called, provided that they are adequate, impartial and speedy and that the parties involved can take part at every stage.

The Committee of Experts has emphasized that:

> In a large number of countries legislation stipulates that the conciliation and mediation procedures must be exhausted before a strike may be called. The spirit of these provisions is incompatible with Article 4 of Convention No. 98, which encourages the full development and utilization of machinery for the voluntary negotiation of collective

> agreements. Such machinery must, however, have the sole purpose of facilitating bargaining: it should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness.

It should here be mentioned that Voluntary Conciliation and arbitration Recommendation, 1951(No.92), advocates that if a dispute has been submitted to conciliation procedure or arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstain from strike and lockouts while the conciliation procedure or arbitration is in progress and, in the latter case, to accept the arbitration award.

Compulsory arbitration

The Committee on Freedom of Association' position regarding compulsory arbitration is clear: it is only acceptable in cases of strikes in essential services in the strict sense of the term, in a case of acute national crisis, or in the public service:

Compulsory arbitration to end a collective labour disputes and a strike is acceptable *if it is at the request of both parties* involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the *public service* involving public servants exercising authority in the name of the state or in *essential services* in the strict sense of the term, namely those services whose interruption would endanger life, personal safety or health of the whole or part of the population.

Generally, the Committee is opposed to the substitution by legislative means of binding arbitration, at the initiative of the authorities or one party, for the right to strike as a means of resolving labour disputes. Apart from cases in which compulsory arbitration is acceptable, "it would be contrary to the right of workers' organizations to organize their activities and formulate their programmes, as laid down in Article 3 of Convention No. 87".

Two observations should be made regarding the Committee's position on arbitration. Firstly, according to these principles, compulsory arbitration is acceptable as long as it is provided for in the collective agreement as a means of settling disputes, or that it is approved by the parties during bargaining carried out regarding the problems which gave rise to the industrial dispute in question. Secondly, since the Committee's principles are couched in general terms, they are applicable at all stages of a dispute.

In other words, legislation cannot impose compulsory binding arbitration as a replacement for strike action, either at the outset or during the course of an industrial dispute, except in the case of an essential service, or when a non-essential service is interrupted for so long that it endangers the life, safety or health of the whole or part of the population (and that the non-essential service thereby becomes essential), or- as recently pointed out by the Committee, invoking the view of the Committee of Experts- when, after protracted and fruitless negotiations, it is obvious that the deadlock in bargaining will not be broken without some initiative on the part of the authority.

The Committee of Experts has stated that some confusion arises at times as to the exact meaning of the term "compulsory arbitration". If that term refers to the compulsory effects of an arbitration procedure resorted to voluntarily by both parties, this does not raise difficulties in the Committee's opinion since parties should normally be deemed to accept to be bound by the decision the arbitrator or arbitration board they have freely chosen. The real issue arises in practice in the case of compulsory arbitration which authorities may impose in an interest dispute at the request of one party, or at their initiative.

As regards arbitration imposed by the authorities at the request of one party, the Committee considers that it is generally contrary to the principle of the voluntary negotiation of collective agreements established in Convention No. 98, and thus the autonomy of bargaining partners. An exception might, however, be made in the case of provisions which, for instance, allow workers' organizations to initiate such a procedure on their own, for the conclusion of a first collective agreement.

As experience shows that first collective agreements is often one of the most difficult steps in establishing a sound bargaining relationship, these types of provisions may be said to be in the spirit of machinery and procedures which facilitate collective bargaining.

As regards arbitration imposed by the authorities at their own initiative, the Committee considers that it is difficult to reconcile such interventions with the principle of the voluntary nature of negotiation established in Article 4 of Convention No. 98. However, it has to recognize that there comes a time in bargaining where, after protracted and fruitless negotiations, the authorities might be justified to step in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part. In view of the wide variety of legal frameworks (completed through national case law and practice) established in the various member states to address what constitutes one of the most difficult problems of industrial relations, the Committee would only give some general guidance in this respect and suggest a few principles that could be implemented through "measures adapted to national conditions", as contemplated in Article 4 of the Convention.

In the Committee's opinion, it would be highly advisable that the parties be given *every* opportunity to bargain collectively, during a sufficient period with the help of independent facilitators (mediator, conciliator, etc.) and machinery and procedures designed with the foremost objective of facilitating collective bargaining. Based on the premise that a negotiated agreement, however unsatisfactory, is to be preferred to an imposed solution, the parties should always retain the option of returning voluntarily to the bargaining table, which implies that whatever disputes settlement mechanism is adopted should incorporate the possibility of suspending the compulsory arbitration process, if the parties want to resume negotiations.

Quorum and majority for declaring strikes

Regarding the quorum and requisite majority for taking strike decisions, the Committee on Freedom of Association has adopted criteria in response to the complaints submitted to it: it has indicated, for example, that the observance of "a quorum of two- thirds of the members may be difficult to reach, in particular where trade unions have large numbers of members covering a large area". With regard to the number of votes required for the calling of the strike, the Committee has pointed out that the prerequisite of two-third of the total number of members of the union or branch concerned constitutes an infringement of Article 3 of Convention No. 87. In contrast, the Committee has considered to be in conformity with the principles of freedom of association a situation where the decision to call a strike in the local branches of a trade union organizations may be taken by the general assembly of the local branches, when the reason for the strikes is of a local nature and where, in the higher level trade union organizations, the decision to call a strike may be taken by the executive committee of these organizations by an absolute majority of all the members of the committee. Obviously, these principles were formulated in connection with specific legislation and are mentioned here by the way of example, without detriment to the legitimacy of other systems of the quorum and majority.

More recent decisions by the Committee reflect a more general approach:

The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibilities of carrying out a strike, particularly in large enterprises.

The requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a large number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike.

The Committee of Experts has confirmed that:

> In many countries legislation subordinates the exercise of the right to strike to prior approval by a certain percentage of workers. Although this requirement does not, in principle, raise problems of compatibility with the Convention, the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice. The conditions established in the legislation of different countries vary considerably and their compatibility with the Convention may also depend on factual element such as the scattering or geographical isolation of work centres or the structure of collective bargaining (by enterprise or industry), all of which require an examination on a case-by-case basis. If a member state deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level.

Freedom to work for non-strikers

The Committee on Freedom of Association recognizes the principle of the freedom to work of non-strikers; the Committee of Experts appears to accept this principle when, in connection with strike picketing, it emphasizes that such action should be peaceful and should not lead to acts of violence against persons.

Situations in which a minimum service may be imposed

The Committee on Freedom of Association holds that a "minimum safety service" may be imposed in all cases of strike action in order to ensure the safety of persons, the prevention of accidents and the safety of machinery and equipment (ILO, 1996d, Paras. 554 and 555). Where "minimum operational services" are concerned, that is, those intended to maintain a certain level of production or services of the company or institution in which the strikes takes place, the Committee on Freedom of Association has stated that:

The establishment of minimum services in the case of strike should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (*essential services in the strict sense of the term*); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an *acute national crisis* endangering the normal living conditions of the population; and (3) *public services of fundamental importance (ibid., Para. 556).*

For example, the Committee has stated that minimum operational services may be established, for example, for ferry services on islands; the services provided by the National Ports Enterprise; the underground transport service; the transportation service of passengers and commercial goods; rail transport service; postal services; banking; the oil sector and the national Mint (some of these examples appear in ibid., paras. 563 to 568)

As regards the determination of minimum services to be maintained and the minimum number of workers providing them, the Committee on Freedom of Association has considered that this should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that the strike has come to nothing because of over-generous and unilaterally fixed minimum services. The Committee has pointed out that it is important for provisions regarding the minimum service to be maintained… to be established clearly to be applied strictly and made known to those concerned in due time.

In the event of a strike in public services, if there is any disagreement between the parties as to the number and duties of the workers concerned in a minimum service, the Committee is of the opinion that "the legislation should provide for any such disagreement to be settled by an independent body and not by the ministry of labour, or the ministry of public enterprises concerned”.

In connection with consideration after a strike of whether the minimum services were excessive because they went beyond what was indispensable, the Committee has stated that “a definitive ruling made in full knowledge of the facts-can be pronounced only by the judicial authorities, in so far as it depends, in particular, upon a thorough knowledge of the structure and function of the enterprises and establishments concerned and of the real impact of the strike action”.

The Committee of Experts’ position regarding a minimum operational service (which it accepts in essential services in the strict sense of the term- when legislation does not ban strike action but imposes a minimum service- and, in all events, in all companies and institutions which provide “services of public utility”) features in the final part of the section in this article on terminological clarifications concerning essential services. This is developed in the following paragraph:

In the view of the Committee, such a service should meet at least two requirements. Firstly, and this aspect is paramount, it must genuinely and exclusively be a *minimum* service, that is, one which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear. Secondly, since this system restricts one of the essential means of pressure available to workers to defend their economic and social interests, their organizations should be able, if they wish, to participate in defending such a service, along with employers and the public authorities. It would be highly desirable for negotiations on the definition of the organization of the minimum service not to be held during a labour dispute, so that all parties can examine the matter with the necessary objectivity and detachment. The parties might also envisage the establishment of a joint or independent body responsible for examining rapidly and without formalities the difficulties raised by the definition and application of such a minimum service and empowered to issue enforceable decisions.

Declaration of the illegality of a strike for failure to comply with legal requirements

Upon its examination of allegations regarding the declaration of illegality of a strike, the Committee on Freedom of Association has emphasized that responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties to the dispute. As regards an official circular concerning the illegality of any strike in the public sector, the Committee has considered that "such matters are not within the competence of the administrative authority".

Strikes, collective bargaining and "social peace"

In practice, strikes may or may not be linked to a bargaining process intended to lead to a collective agreement. In connection with strikes for which collective bargaining is the point of reference, the Committee on Freedom of Association has stated that "*strikes decided systematically long before negotiations take place do not fall within the scope of* the principals of the freedom of associations". Moreover, as regards strikes concerning the level at which negotiations are conducted, the Committee has stated that:

> *Provisions which prohibit strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer are contrary to the principles of freedom of association on the right to strike; workers and their organizations should be able to call for industrial action in support of multi-employer contracts.*

Workers and their organizations should be able to call for industrial action (strikes) in support of multi-employer contracts (collective agreements).

On the other hand, the Committee has also considered acceptable a temporary restriction on strikes under "provisions prohibiting strike action in breach of collective agreements". It has also considered that, since the solution to a legal conflict as a result of a difference in interpretation of a legal text should be left to the competent courts, the prohibition of strikes in such a situation does not constitute a breach of freedom of association.

None the less, as stated previously, the Committee on Freedom of Association considers the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement: "workers and their organizations should be able to express in a border context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests". Likewise, the Committee on Freedom of Association has stated that "a ban on strike action not linked to a collective dispute to which the employee or union is party is contrary to the principals of freedom of association". The Committee of Experts' approach is similar, as was apparent in the sections dealing with political strikes and sympathy strikes.

The Committee of Experts has dealt in greater detail that the Committee on Freedom of Association with the matters raised by collective bargaining systems which provide for social peace while the collective agreement, or guidelines established by judicial decisions or arbitration awards:

The legislation in many countries does not establish any restrictions on the time when a strike may be initiated, stipulating only that the advance notice established by the law must be observed. Other industrial relations systems are based on a radically different philosophy in which collective agreements are seen as a social peace treaty of fixed duration during which strikes and lockouts are prohibited under the law itself, with workers and employers being afforded arbitration machinery in exchange. Recourse to strike action is generally possible under these systems only as a means of pressure for the adoption of an initial agreement or its renewal. The Committee considers that both these options are compatible with the Convention and that the choice should be left to the law and practice of each state. In both types of systems, however, workers' organizations should not be prevented from striking against the social and economic policy of the government, in particular where the protest is not only against that policy but also against its effects on some provisions of collective agreements (for instance, the impact of a wage control policy imposed by the government on monetary clauses in the agreement). If legislation prohibits strikes during the term of collective agreements, this major restriction on the basic right of workers' organizations must be compensated by the right to have recourse to impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreements. Such a procedure not only allows the inevitable difficulties of application and interpretation to be settled during the term of an agreement, but has the advantage of clearing the ground for subsequent bargaining rounds by identifying the problems which have arisen during the term of the agreement.

Protection against acts of anti-union Discrimination in connection with strikes

When a conflict of interests between employers and workers is not resolved through bargaining or arbitration, the conflict between the parties may lead to collective action in efforts to ensure that their respective interests prevail. At this point, the conflict enters a phase of entrenchment during which reprisals may occur and the rules of play be broken, going so far as to include violations of the law.

In connection with complaints submitted to it, the Committee on Freedom of Associations has frequently examined allegations of reprisals against strikes in the form of dismissals of trade union officials, members or workers or other types of detrimental acts at work, for organizing or simply participating in legitimate strikes.

The Committee of Experts has emphasized that "the protection afforded to workers and trade union officials against acts of anti-union discrimination constitutes an essential aspect of freedom of association, since such acts may result in practice in denial of the guarantees laid down in Convention No. 87". The following paragraphs will examine the ILO standards which protect against anti-union discrimination and the principles laid down by the supervisory bodies regarding the persons who should enjoy protection against such forms of discrimination, the different acts of discrimination and the requisite features of compensation mechanisms.

International labour standards regarding anti-union discrimination

Although no specific provisions exist to protect against acts of discrimination in connection with strikes, protection against any act of discrimination which undermines freedom of associations in respect of employment is guaranteed primarily under the Right to Organize and Collective Bargaining Convention, 1949(No. 98), together with the workers' representatives Convention, 1971 (No.135), and the labour relations (public service) Convention, 1978 (No. 151).

Article 1, paragraph 1, of Convention No. 98 states, in general terms, that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment";

Article 1, of Convention No. 135 states that:

> Workers' representative in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements.

Article 4 of Convention No. 151 states that:

1. public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment
2. such protection shall apply more particularly in respect of acts calculated to

(a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of a public employees' organization;

(b) cause the dismissal or otherwise prejudice a public employee by reason of member-ship of a public employees' organization or because of participation in the normal activities of such an organization;

Other Conventions and Recommendations also contain provisions relating to anti-union discrimination in employment and the carrying out of union activities; these provisions basically re-state those laid down in the Conventions on freedom of association, adapted to specific situations and workers. Furthermore, Article 1, subparagraph (d), of the Abolition of Forced Labour Convention, 1957 (N. 105), prohibits any form of forced or compulsory labour "as a punishment for having participated in strikes".

The Committee of Experts has emphasized the differences existing in legislation in ILO member states regarding guarantees against anti-union discrimination. It has stated, specifically, that in several countries, workers covered by general labour law are protected against acts of anti-union discrimination, but that in others legislation provides no general protection in this respect or denies it directly or indirectly to certain categories of workers. Some legislation grants special protection to certain persons, for example, to the members of a trade union which has applied for registration or which is in the process of being established, or to trade union officers and leaders.

On the specific question of the right to strike, the Committee of Experts has observed that: "since the maintaining of the employment relationship is the normal consequence of recognition of the right to strike, its exercise [legal exercise, be it understood] should not result in workers being dismissed or discriminated against".

Persons protected and types of act of anti-union discrimination in strikes contexts

The principles upheld by the Committee on Freedom of Association consider illegitimate any discrimination act against union leaders for organizing legitimate strikes; such protection also covers trade union members and workers who participate in strikes. Specifically, the Committee supports the general principle that "no person shall be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities whether past or present".

In practice, the Committee has maintained that:

- No one should be penalized for carrying out or attempting to carry out a legitimate strike;
- The dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment is contrary to Convention No. 98;
- When trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against;
- Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically, it should be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or penalize the exercise of the right to strike;
- The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ that, implies a serious risk of abuse and constitutes a violation of freedom of association;

- No one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizations or participating in a peaceful strike.

The Committee of Experts has also affirmed the protection of workers and union officials against acts of anti-union discrimination and has confirmed that most national legislation contains general or detailed provisions which protect workers against acts of discrimination, although the level of protection may vary. The Committee emphasizes that this protection "constitutes an essential aspect of freedom of association" and, in its opinion, "is particularly desirable for trade union officers and representatives, because in order to be able to perform their trade union duties in full independence they must have the guarantee that they will not be prejudiced on account of their trade union office". This opinion coincides with that of the Committee on Freedom of Association.

As stated previously, regarding the right to strike, the Committee of Experts has emphasized that the maintaining of the employment relationship is a normal legal consequence of recognition of the right to strike and that dismissals against strikers should not ensure from the exercise of this right. The Committee recalls that:

[…] in some countries with the common-law system strikes are regarded as having the effect of terminating the employment contract, leaving employers free to replace may dismiss strikers with new recruits. In other countries, when a strike takes place employers may dismiss strikers or replace them temporarily or for an indeterminate period. Furthermore, sanctions or redress measures are frequently inadequate when strikers are singled out through some measures taken by the employer (disciplinary action, transfer, demotion, dismissal); this raises a particularly serious issue in the case of dismissal, if workers may only obtain damages and not their reinstatement. In the Committee's view, legislation should provide for genuine protection in this respect, otherwise the right to strike may be devoid of content.

The Committee on Freedom of Association has stated its concern with regard to legislation in particular countries which permits dismissal without an indication of motive:

It would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker if the true reason is the worker's trade union membership or activities.

The Committee of Experts has expressed a similar view in referring to appropriate protection that should be enjoyed by workers against acts of anti-union discrimination in general, according to Article 1 of Convention No. 98. Similarly, when considering the possibility that trade union leaders could be dismissed without an indication of the motive, the Committee on Freedom of Association, in its consideration of the case, requested the government to take steps "with a view to punishing acts of anti-union discrimination and making appeal procedures available to the victims of such acts".

From the complaints submitted to it, the Committee on Freedom of Association has identified acts of anti-union discrimination due to legitimate strike action, including dismissal, the practice of blacklisting of persons who have participated in strikes (particularly with a view to refusing to hire them), the transfer of trade union officials, the need for "certificates of loyalty" if workers are to be engaged or retained in service, demotion, compulsory early retirement, penal sanctions and other acts.

Protection machinery

In the view of the Committee on Freedom of Association, "as long as protection against anti-union discrimination is in fact ensured, the methods adopted to safeguard workers against such practices *may vary from one state to another*". Similarly, the Committee of Experts has stated that protection against acts of anti-union discrimination may "take various forms adapted to national legislation and practice, provided that they prevent or effectively redress anti-union discrimination, and allow union representatives to be reinstated in their posts and continue to hold their trade union office according to their constitutes' wishes".

The Committee of Experts has noted, by way of example, that in order to guarantee the protection of trade union officials in some cases legislation establishes preventive machinery by requiring that certain measures taken against trade union representatives or officials must first be authorized by an independent body or public authority (labour inspectorate or industrial tribunals), a trade union body or workers' council. In most legislation, however, the emphasis is laid on compensation for the prejudice suffered. The Committee on Freedom of Association has pointed out that "one way to ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for certain period thereafter except, of course, for serious misconduct".

The Committee of Experts has stressed that anti-union dismissal cannot be treated in the same way as other kinds of dismissal, because freedom of association is a fundamental right. In the view of the Committee, this means that certain distinctions must be made, for example as regards conditions as to proof, sanctions and remedies.

In this regard, the Committee on Freedom of Association has pointed out that:

> The existence of basic legislative provisions prohibiting acts of anti-union discrimination is not sufficient if these provisions are not accompanied by effective procedures ensuring their application in practice. Thus, for example, it would often be difficult, if not impossible, for a worker to furnish proof an act of anti-union discrimination of which has been the victim. This shows the full importance of Article 3 of Convention No. 98, which provides that machinery appropriate to

the national condition shall be established where necessary, to ensure respect for the right to organize.

The supervisory bodies have also frequently and in a decisive manner demonstrated their concern regarding situations in which the measures taken to eliminate or prevent acts of anti-union discrimination have proved to be ineffectual or insufficient persuasive or where the examination of complaints in this regard has been insufficiently expeditious. In this connection, the Committee on Freedom of Association has stated that:

- Respect for the principals of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to *means of redress* which are *expeditious, inexpensive* and fully impartial.
- Legislation must make express provisions for *appeals* and established *sufficiently dissuasive sanctions* against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98.

Furthermore, in the light of excessive slowness- sometimes years- by the legal system in dealing with disciplinary sanctions against trade unions, the Committee on Freedom of Association has stated that:

Cases concerning anti-union discrimination contrary to Convention No.98 should be *examined rapidly*, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and particularly a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned.

The Committee of Experts has in its turn stressed that “the existence of general legal provisions prohibiting acts of anti-union discrimination is not enough if they are not accompanied be effective and rapid procedures to ensure their application in practice".

Whether the machinery is based on prevention or compensation, experience has shown that similar problems arise in practice and concern in particular the slowness of the proceedings, the difficulties relating to the burden of proof and the possibility for the employer to acquit himself by paying compensation which bears no proportion to the seriousness of the prejudice suffered by the worker. The Committee therefore emphasizes the necessity of providing expeditious, inexpensive and impartial means of preventing acts of anti-union discrimination or resolving them as quickly as possible.

Legislative provisions are insufficient if they are not accompanied by sufficiently dissuasive sanctions to ensure their practical application. Similarly, the Committee of Experts considers that "the reinstatement of the dismissed worker, including retroactive compensation, [is] the most appropriate remedy in such cases of anti-union discrimination". The Committee on Freedom of Association has also stated that job reinstatement should be available to those who were victims of anti-union discrimination.

Abuses in exercising the right to strike

The right to strike, which is held by the ILO supervisory bodies to be fundamental, is not an absolute right and its exercise should be in line with the other fundamental right of citizens and employers. Consequently, the principles of the supervisory bodies cover only legal strikes, that is, strikes which are carried out in compliance with national legislation where this does not undermine the basic guarantee of the right to strike as have been described in the preceding sections on the principles of freedom of association in connection with strikes. Indeed, as the Committee on Freedom Association has stated, "the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations."

Abuses in the exercise of the right to strike may take different forms, ranging from its exercise by groups of workers who may be excluded from this right, or failure to comply with reasonable requirement in declaring a strike to damaging or destroying premises or property of the company and physical violence against persons. National legislation generally provided for sanctions for such abuse which ranging from such abuses, from dismissal or financial or criminal sanctions of different types. For instance, in recent case re-examined by the Committee of Freedom of Association in connection with strike of air traffic controller, which gave rise to dismissal and criminal proceedings, the Committee considers that the government could not be asked to comply with the request for a return to work of the dismissed workers as demanded by the compliment, given that during the strike the passwords of the radar system has been changed, thereby endangering the security of the population. In more general terms, in examining situations involving abuses in the exercise of the right to strike, the Committee on Freedom of Association has decided as follows:

The principles of freedom of association do no protect abuses consisting of criminal acts while exercising the right to strike. Penal sanctions should only be imposed as regards strikes where there are violations of strike prohibitions which are themselves in conformity with the principle of freedom of association. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike.

The Committee considered that some of the temporary measures taken by the authorities as a result of a strike in an essential service (prohibition of the trade union activities, cessation of the check-off of the trade union dues, etc) were contrary to the guarantees provided for in Article 3 of Convention No.87. The Committee drew the Government's attention to the fact that the measures taken by the authorities to ensure the performance of essential services should not be out of proportion to the ends pursued or lead to excesses.

In case of peaceful strikes, the Committee has stated that" the authorities should not resort to arrests and imprisonment in connection with the organization of or participation in peaceful strike: such measures entail serious risks of abuse and are a grave threat to freedom of association"; "no one should be deprived of their freedom or be subject to penal sanctions for the mere act of organizing or participating in peaceful strike."

Most legislation restricting or prohibiting the right to strike also contains clauses providing for sanctions against workers and trade unions that infringe these provisions. In some countries, striking illegally is a penal offence punishable by a fine or term of imprisonment. Elsewhere, engaging in unlawful strike may be considered as an unfair labour practice and entail civil liability and disciplinary sanctions.

The Committee of Experts considers that:

…. sanctions for strike action should be possible *only* where the prohibitions in question are in conformity with the principles of freedom of association. Even in such cases, both excessive recourse to the courts in labour relations and existence of heavy sanctions for strike action may well create more problems than they resolve. Since the application of disproportionate penal sanctions does not favour the development of harmonious and stable industrial relations, if measures of imprisonment are to be imposed at all, they should be justified by the seriousness of the offences committed. In any case, a right of appeal should exist in this respect.

In addition, certain prohibitions of, or restrictions to, the right to strike which are in conformity with the principles of freedom of association sometimes provide for civil or penal sanctions against strikers and trade unions which violate these provisions. In the view of the Committee, such sanctions should not be disproportionate in the seriousness of the violation.

Other principles involved

Hiring of workers to replace strikers

The Committee on Freedom of Association only considers the replacement of strikers to be justified: (a) in the event of a strike in an essential service in which strikes are forbidden by law, and (b) when a situation of acute national crisis arises. The Committee of Experts has considered that:

> A special problem arises when legislation or practice allows enterprises to recruit workers to replace their own employees on *legal* strike. The difficulty is even more serious if, under legislative provisions or case law, strikers do not, as of right, find their job waiting for them at the end of the dispute. The Committee considers that this type of provision or practice seriously impairs that right to strike and affects the free exercise of trade union rights.

Compulsory closing down, intervention of the police, and access by management to the enterprise

The Committee on Freedom of Association has concluded that for providing in national legislation the closing down of the enterprise, establishment or business in the event of strikes is an infringement of “the freedom of work of persons not participating in a strike and disregards the basic needs of the enterprise (maintenance of equipment, prevention of accidents and the right and the right of employers and managerial staff to enter the installations of the enterprise and to exercise their activities).”

As regards the intervention of the police during a strike, the Committee on Freedom of Association has stated the opinion that, while workers and their organizations have an obligation to respect the law of the land, the intervention by security forces in strike situations should be limited strictly to the maintenance of public order and only if there is a serious threat to law and order. Similarly, in the view of the Committee, “the authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions that might undermine public order. The intervention of the police should be limited to the proportion of the threat to public order and governments should take measures to ensure that the competent authorities receive adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order".

Furthermore, the Committee on Freedom of Association has concluded that requesting police assistance in order to allow access by members of management to the enterprise when occupied by strikers does not represent a violation of the principles of freedom of association. As has just been explained in connection with the compulsory closing down of the enterprise during a strike, the Committee has established the right of employers and managerial staff to enter the installations of the enterprise and to exercise their activities during a strike.

Wage deduction for days of strike action

On the subject of wage deduction for days of strike, the Committee on Freedom of Association has stated that this practice gives rise to "no objection from the point of view of freedom of association principles". None the less as to that matter of possible payment of wages to strikers, for instance, under an agreement between the parties in a recent case, the Committee asked a Government to confirm that the payment of wages to workers for the period when they have gone on strike "is neither required nor prohibited" and, after receiving this confirmation from the government against which the complaint had been lodged, the Committee did not pursue its examination of the matter. Likewise, in another case in which deductions of pay were higher than the amount corresponding to the period of the strike, the Committee recalled that the imposition of sanctions for strike action was not conductive to harmonious labour relations.

The Committee of Experts has refrained from criticizing the legislation of member states which provide for wage deductions in the event of strike action and has indicated that, as regards strike pay, "in general the parties should be free to determine the scope of negotiable issues".

Body of principles on the right to strike

As a summary of the preceding sections, there follows a synthesis of the principals and minimum rules of conduct established by the Committee on Freedom of Association as regards the right to strike.

A. Consideration of the right to strike as a fundamental right to be enjoyed by workers and their organizations (trade unions, federations and confederations), which is protected at international level, provided that the right is exercised in a peaceful manner.

B. General recognition of the right to strike for workers in the public and private sectors, with the sole possible exceptions being members of the armed and police forces, public servants who exercise authority in the name of the state and workers employed in essential services in the strict sense of the term (the interruption of which could endanger the life, safety or health of the whole or part of the population), or in situations of acute national crisis.

C. The principals of freedom of association do not cover strikes of a purely political nature, although they do not cover those which seek a solution to major issues in economic and social policy.

D. A blanket ban on sympathy strikes could lead to abuse. Workers should be able to enjoy the right to take such action when the initial strike they are supporting is itself lawful.

E. A minimum safety service may be imposed in all cases of strike action when such minimum services are intended to ensure the safety of persons, the prevention of accidents and the safety of machinery and equipment.

F. A minimum operational service may be established (in the undertaking or institution in question) in the case of strikes in public utility services and in public services of fundamental importance; employers' and workers' organizations and the public authorities should be able to participate in determining this minimum service.

G. The obligation to give prior notice, the obligation to engage in conciliation, have recourse to voluntary arbitration, comply with a given quorum and obtain the agreement of a given majority where this does not cause the strike to become very difficult or even impossible in practice and the secret ballot method to decide strike action are all acceptable conditions for the exercise of the right to strike.

H. The hiring of workers to replace strikers seriously impairs the right to strike and is acceptable only in strikes in an essential service or in situations of acute national crisis.

I. Legal provisions regarding wage deductions for days of strike give rise to no obligation.

J. Appropriate protection should be afforded to trade union officials and workers against dismissal and other detrimental acts at work for organizing or participating in a legitimate strike, in particular through prompt, efficient and impartial procedures, accompanied by sufficiently dissuasive remedies and sanctions.

K. The protection of freedom of association does not cover abuses in the exercise of the right to strike involving failure to comply with reasonable requirements regarding lawfulness, or consisting of acts of a criminal nature; any sanctions imposed in the event of abuse should not be disproportionate to the seriousness of the violations.

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Problem for discussion:

1. *How do you assess the Ethiopian law of strike in light of the ILO principles on the right to strike elaborated herein above? Identify possible inconsistencies, if any, between Ethiopian law of strike and the international standard in this regard?*

2. *Ethiopian law of strike classified enterprises into two (i.e. essential service providers and other than them). The essential service providers have been prohibited from calling on strike while the others are allowed. Under the ILO jurisprudence there is a third category so-called "minimum service requirement" in which enterprises under this category are in principle allowed to call on strike but they will be required to provide a minimum service in a day or a week. The main reason for such an arrangement is the concern that a non-essential service may become essential if the service is withheld for longer duration. Do you feel the importance of incorporating the "minimum service requirement" principle into the Ethiopian law of strike? Please list out enterprises that may fall under this category?*

8.4. Employment Dispute Settlement under the Civil Service Regime

Herein above we have discussed the organs, their jurisdictions and modalities of dispute settlement within the framework of the labour law. Under this section, we will elaborate the organs and modalities of employment dispute settlement pertaining to the civil service employment regime.

It must be clear from the outset that unlike the labour employment regime where we have individual and collective employment disputes, we do not have a collective employment dispute within the civil service employment sector. The reason for this outcome is the absence of freedom of association in the civil service as a result of which civil servants in Ethiopia do not have an organized and collective voice. In the absence of employees' organizations/associations, there are no collective employment disputes in the civil service sector. Thus, for the civil service sector, we are limited to resolving individual employment disputes.

The other point to note is, though labour law is within federal jurisdiction, civil service employment regime is both a federal and regional subject matter in the sense that federal civil servants are regulated by the Federal Civil Servants' Proclamation while the civil servants in the various regions are to be governed by legal instruments within their respective regions. Hence, for the purpose of this text, we are to rely on the provisions of the Federal Civil Servants' Proclamation No. 1064/2017. All the same, many of the regional instruments in this regard are almost verbatim reproductions of the federal instrument. Thus, it is hoped that regional instruments will be indirectly addressed as well.

As stipulated in the Civil Servants' Proclamation No. 1064/2017, the relevant organs of employment dispute settlement in the civil service sector are: Disciplinary Committee; Grievance Handling Committee; Administrative Tribunal; Federal First Instance Court Federal Supreme Court and Federal Supreme Court Cassation Division. Their roles and responsibilities have been spelt out thereunder.

Article 71(1) provides that any government institution shall establish a disciplinary Committee which shall conduct formal disciplinary investigation and thereby submit recommendation to the head of the government institution. This organ is relevant in cases where a civil servant is suspected of committing serious misbehaviour that needs further investigation to determine the truthfulness of the allegation or otherwise. Pending an investigation, a civil servant may be suspended from duty and salary. However, there should be convincing reasons to suspend. Towards this end, Article 72 of the Federal civil Servants Proclamation provides the following:

1) *Any civil servant may be suspended from duty if it is presumed that;*
   a) *He may obstruct the investigation by concealing, damaging or destroying evidence related to the alleged offence;*
   b) *He may commit additional offence on the property of the government institution;*
   c) *The alleged offence is so grave as to demoralize other civil servants or negatively affect the public trust towards civil servants; or*
   d) *The disciplinary offence may lead to dismissal.*
2) *A civil servant may be suspended from duty and payment of salary only for a maximum period of two months.*

If the suspension period of a civil servant from duty and payment of salary expires before his dismissal or reinstatement is determined the head of the government institution may extend the suspension for a period of up to one month. The extended period of suspension shall be with payment of half salary if the delay is caused by the complexity of the investigation of the disciplinary charge or without payment of salary if the cause of delay is attributable to the civil servant himself (Article 72(6). Unless a decision of dismissal is rendered against a suspended civil servant, the salary withheld during suspension shall be paid to him without interest (Article 72(4).

It is stipulated that disciplinary measure shall not be taken against a civil servant who has committed an offence which entails simple disciplinary penalty unless such measure is taken within six months (Article 73(1). However, this provision failed to address two outstanding issues. First, what is “simple disciplinary penalty”? Second, when does the six month period begins to count from the date the misdeed was committed or from the date the government institution became aware of the misdeed?

Simply disciplinary penalties has been listed as oral warning; written warning and a fine up to 15 days’ wage (Article 69(2) and hence misdeeds that entail one of these penalties would be categorized as simple. Nevertheless, with respect to the relevant time when the six months period of limitation begins to count, the civil service proclamation does not seem to offer solution. If it could be of some help to establish analogy, the Labour Proclamation has a provision in this regard. The right of an employer to terminate an employee on disciplinary grounds shall lapse after thirty working days <u>from the date the employer knew the existence of the ground of termination</u> (emphasis added: Article 27(3).

The Civil Servants' Proclamation has another category of misbehaviour the so – called "rigorous disciplinary penalty." Rigorous disciplinary penalties are fine up to three months' salary; down grading for the period of up to two years; and dismissal (Article 69(3). For this category of misbehaviour, no disciplinary charge shall be brought against a civil servant who has committed an offence entailing rigorous disciplinary penalty in addition to criminal liability, unless the disciplinary charge is brought within the time limit provided for in the Criminal Code for such criminal offence (Article 73(2). Thus in order to determine the period, there is a need to consult the Criminal Code. However, what happens if a certain rigorous disciplinary misbehaviour is not punishable under the Criminal Code? How its time limit should be assessed. For instance, unjustified and repeated absenteeism or neglect of duty by being alcoholic or drug addict has been categorized as rigorous disciplinary misbehaviour (Article 70(4) and (6). But they do not seem to have been criminalized by penal provisions. Thus there seems to exist a legal vacuum in this regard. Under the Criminal Code, limitation period for bringing a criminal action for the most serious one is twenty-five years; while for the least serious crime the period is three years (Article 217(1) Criminal Code).

Be that as it may, the Disciplinary Committee is not a decision-making organ in the sense that its power is limited to merely offering recommendations to the head of the government institution. It is up to the head of government institution to approve, amend or reverse the recommendation. Disciplinary measure is an in-house measure that is separate and independent of any court proceedings or decisions.

In disciplinary proceedings, it is the government institution which appears as a plaintiff before this Committee while the civil servant is a defendant. Members of the Committee are to be nominated by the administration. All government institutions are required to establish disciplinary committee. Under the labour law there is no express duty imposed by law for the establishment of a disciplinary committee. Whether to establish disciplinary committee or not is left for private ordering (work rules or collective agreements).

Article 76 of the Civil Servants' Proclamation introduces another organ which is entrusted to handle another specific task. It prescribes that "any government institution shall establish a Grievance Handling Committee that conducts grievance inquiry and submits recommendations to the head of the government institution". "Grievance" for this purpose is defined as "a complaint of a civil servant that could not be resolved through discussion conducted with the civil servant's immediate supervisor or with concerned officer and should be addressed through a formal review procedure" (Article 74). This committee is set up to entertain grievances submitted by civil servants against their employers (i.e. the government institution).

Similar to that of the Disciplinary Committee, the Grievance Handling Committee is an in-house dispute settling organ tasked to provide recommendation to the head of the government institution. Unlike the disciplinary committee where the government institution assumes the role of the plaintiff and brings the dispute to the attention of the Committee, the civil servant will be the one who submits her claim or grievance against the government institution to the Grievance Handling Committee. This is one of the modalities of implementing the constitutional stipulations which dictate that governmental measures need to be transparent and accountable.

Once the internal dispute settlement organs are tested, if there still exists grievance or dissatisfaction, there exists an appellate procedure within the executive organ. For this purpose, an Administrative Tribunal which entertains civil service employment disputes and render decision is established pursuant to

Article 79(1) of the Proclamation. It is named as "Civil Servants Administrative Tribunal". The Tribunal shall have chambers which examine and decide on appeal cases (Article 79(2). Each chamber shall have a chairperson and two members designated by the Civil Service Agency (Article 79(3). Orders and decisions of the Administrative Tribunal shall be considered as orders and decisions of any civil cases (Article 80(3). It is stated that any governmental institution up on receiving the decision of the Administrative Tribunal shall execute the decision within ten working days (Article 82(1). Where the decision is not executed within 30 days, the Administrative Tribunal shall refer the case to the Federal First Instance Court in order to enforce the execution of the decision (Article 82(2).

Although the decision of the Administrative Tribunal on question of facts is final, any party who claims that the decision of the Administrative Tribunal has an *error of law*, may appeal to the Federal Supreme Court within 60 days up on receiving the decision of the Administrative Tribunal (Article 81(5). Indeed, based on the constitutional stipulation, any final decision of court of law in which fundamental error of law has been observed can still be submitted to a cassation division as an additional procedural remedy.

Generally, the dispute settlement machinery in the civil service sector moves from simple to complex in the sense that internal remedy within the administrative unit is the first level which is local remedy; then moves to the Administrative Tribunal forum which is quasi-judicial administrative remedy; it is after exhausting the local and administrative remedies that the judicial remedy would be employed.

-----------------End of textbook-----------------

Reference Materials

a) Books and Other Publications

Abebe Teferi & Admit, Zerihun (2001) Ethiopian privatization programme: Rational, Performance and Impact on the labour market. W*orking Paper* (CETU: Addis Ababa).

Aberra, Jembere (2000) *An Introduction to the Legal History of Ethiopia (1434-1974*). (Munster: Lit Verlag).

Adam, Christopher, Cavendish, William and Mistry S. Percy (1992) *Adjusting Privatization: Case studies from developing countries.* (London: James Currey).

Adefolaju, Toyin (2012) 'Global Economic Challenges: Trade union growth implications in Nigeria' *The Journal of Pan African Studies*, Vol. 5, No.6, pp.92-107

Adejumobi, Saheed, A. (2007) *The History of Ethiopia*. (West Port: Greenwood Press).

Addis Garment Share Company (2008) 'Facility Policies and Procedures Manual'. [online] (*Available at:<http://www.augustagarment.com/Addis-Garment-Augusta-wrap-Policy*> accessed 25 October 2010).

Addis Ababa Tannery; <*http://www.addisababatannery.com*> (accessed 02 October, 2010)

Addis Zemen. (2008) Government owned *Daily Newspaper* in Amharic. 67th year No.236

Addison, Tony and Alemayehu Geda (2001) 'Ethiopia's New Financial Sector and its Regulation' *Working Paper Series; Paper No. 39* [online] (Available at: <http://www.sed.manchester.ac.uk/dpm/research/publications/archive/fd/fdwp39.pdf > accessed 25 July 2010)

Admit, Zerihun (2008) 'Industrialisation Policy and Industrial Development Strategy of Ethiopia', in Taye Assefa (ed.) *Digest of Ethiopia's National Policies, strategies and Programs* (Addis Ababa: Forum for Social Studies) pp. 239-283

African Development Bank Group (2000) '*Ethiopia: Structural Adjustment Programme*'; Project Performance Evaluation Report (PPER)

Alston, Philip(ed) (2005) *Labour rights as Human Rights*. (Oxford: Oxford University Press).

Alston, Philip (2004) 'Core Labour Standards and the Transformation of the International Labour Rights Regime' *European Journal of International Law,* Vol.15, No.3, pp.457-521

Altenburg, Tilman (2010) 'Industrial Policy in Ethiopia'. *Discussion Paper* (Bonn: German Development Institute)

Ananaba, Wogu (1979) *The Trade union movement in Africa*. (London: C. Hurst & Company).

Andargachew, Tiruneh (1993) *The Ethiopian Revolution 1974-1987: A Transformation from an aristocratic to a totalitarian autocracy.* (New York: Cambridge University Press).

Anyemedu, Kwasi (2000) 'Trade unions response to globalization: Case study on Ghana': *Discussion papers.* (Geneva: International Institute of Labour Studies)

Aregawi, Berhe (2008*) A Political History of the Tigray People's Liberation Front (1975-1991): Revolt, Ideology and Mobilization in Ethiopia* (PhD-thesis-Amsterdam)

Arthurs, Harry (2006) 'Who is afraid of globalization? Reflections on the future of labour law'. in John D.R. Craig and S. Michael Lynk (eds.), *Globalization and the future of labour law*, (New York: Cambridge University Press). pp.51-74

Arthurs, Harry (2002) 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation ', in J Conaghan, M Fischl and K Klare (eds*) Labour Law in the Era of Globalization* (Oxford: Oxford University Press)

Arthurs, Harry (2001) 'Reinventing Labour Law for the Global Economy: The Benjamin Aaron lecture'. *Berkeley Journal of Employment and Labour Law.* Vol.22, No.2 pp.272-291.

Assefa, Kassaye (2010) 'The impact of pluralism of labour unions in an enterprise'. (LL.B- Thesis: Addis Ababa), Faculty of Law Library.

Aslund, Anders (2007) *How capitalism was built: the Transformation of Central and Eastern Europe, Russia and Central Asia*. (Cambridge: Cambridge Printing Press).

Bahru, Zewdie (2008) *Society, State and History: Selected Essays*. (Addis Ababa: Addis Ababa University Press).

Bahru, Zewdie (2002) *A History of Modern Ethiopia*, Second edition, (Oxford: James Currey)

Banderet, M.E. (1986) 'Discipline at the workplace: A comparative study of law and practice (the sources and substance of disciplinary law)' *International Labour Review* Vol.125 No.3, pp.261-278

Banderet, M.E. (1986) 'Discipline at the workplace: A comparative study of law and practice (procedure)' *International Labour Review* Vol.125 No.4, pp.383-399

Banks, Kevin (2005) 'The Impact of Globalization on labour Standards: A second look at evidence': in John D.R. Craig and S. Michael Lynk (eds), *Globalization and the future of labour law*, (New York: Cambridge University Press) pp.77-107

Baudissin, V. George (1965) 'An Introduction to Labour Development in Ethiopia'. *Journal of Ethiopian law*, Vol. II, No.1, pp.101-110

Bean, Ron (1994) *Comparative Industrial Relations: An introduction to cross-national perspective* (second ed). (London/New York: Routledge)

Beaumont B. Philip and Harris D. Richard (1995) 'Union de-recognition and declining union density in Britain'. [online] *Industrial and Labour Relations Review*. Vol.48 No.3 pp.389-402. Stable URL: <http://www.jstor.org/stable/2524770> accessed 06 November 2010).

Bellace, R. Janice and Gospel, F. Howard (1983) 'Disclosure of information to trade Unions: A comparative perspective'. *International Labour Review* Vol.122, Issue 1, pp.57-73.

Beyene, Solomon. (2010) *Fighter for Democracy: the Saga of an Ethiopian Labour Leader.* (Baltimore: Publish America)

Birdsall, Nancy and Nellis, John (eds) (2003) 'Winners and Losers: Assessing the impact of Privatization'. *World Development*. Vol.31, No.10, pp.1617-1633 [online] available at: <http://www.elsevier.com/locate/worlddev> (accessed on 15 April 2009).

Blackett, Adelle (2001) 'Global Governance, Legal Pluralism and the Decentred state: A labour law critique of codes of corporate conduct', *8 Ind. J. Global Legal Stud. 401*, pp.1-32

Blowfield, Michael (2005) 'Corporate Social Responsibility: Reinventing the meaning of development?' *International Affairs* Vol.81, No.3. pp.515-524.

Blowfield, Michael and Frynas, Jedrzej George (2005) 'Setting new agendas: Critical perspective on Corporate Social Responsibility in the developing world'. *International Affairs* Vol.81, No. 3 pp. 499-513.

Boeri, Tito, Brugiavini, Agar and Calmfors, Lards (eds.) (2001) *The Role of Unions in the Twenty-First Century*. (New York: Oxford University Press).

Boiral, Olivier (2003) 'The Certification of Corporate Conduct: Issue and Prospects'. *International Labour Review*. Vol.142, No.3 pp.317-340

Bortolotti, Bernando and Siniscalo, Domenico.(2004) *The Challenges of Privatization: An International analysis.* (New York: Oxford University Press)

Brett, E.A. (1988) 'States, Markets and Private Power: Problems and Possibilities' in Paul Cook and Colin Kirkpatrick(eds.) *Privatisation in Less Developed Countries* (New York/London: Harvester Wheatsheaf) pp.47-67

Burda, Julien (2007) 'Chinese women after the accession to the World Trade Organization: A legal perspective on women's labour rights'. *Feminist Economics* 13, pp.259-285

Burkett, Brain (2005) 'The International Labour Dimension: an introduction', in John D.R. Craig and S. Michael Lynk (eds), *Globalization and the future of labour law*, (New York: Cambridge University Press), pp.15-55

Cazes, Sandrine and Nesporova, Alena (2003). *Labour markets in transition: Balancing Flexibility and Security in Central and Eastern Europe*. (Geneva: ILO).

Chen, Yi and Ishac, Diwan. (2000) 'When the Bureaucrat move out of Business: A cost benefit assessment of labour entrenchment in China'. *Policy Research Working Paper* 235. (Washington, D.C.: World Bank)

Clapham, Christopher (1987) 'Revolutionary Socialist Development in Ethiopia'. *African Affairs,* Vol. 86, No. 343. pp.151-165. [online] (Stable URL: <http://www.jstor.org/stable/722468 >accessed 12 April 2009

Commission on Industrial Relations (CIR). (1974) *Worker Participation and Collective Bargaining in Europe.* (London: her Majesty's Stationery Office)

Compa, Lance A. (2006) *Trade Liberalisation and Labour Law* [electronic version]. Paper presented at the XVIII World Congress, International Society for Labour & Social Security Law, Paris; Available at: <http://digitalcommons.ilr.cornell.edu/conference/6/>

Confederation of Ethiopian Trade Union (CETU). (1991) 'Workers' Movement in Ethiopia (Part-I)'. (Amharic–unpublished) CETU library: Addis Ababa.

Cook, Paul and Kirkpatrick, Colin (2003) 'Assessment the impact of privatization in developing countries' in David Parker and David Saal (eds.) *International Handbook on Privatization.* (Cheltenham/Northampton: Edward Elgar) pp.209-219

Cook, Paul and Kirkpatrick, Colin. (1998) 'Privatization, Employment and Social Protection in Developing Countries,' in Cook, Paul, Kirkpatrick, Colin and Nixson, Frederick (eds.) *Privatization, Enterprise Development and Economic Reform: Experiences of developing and Transition Economies*. (Cheltenham: Edward Elgar:), pp.251-264

Corodova, Eften (1978) 'A Comparative View of Collective Bargaining in industrialized countries.' *International Labour Review.* Vol.117, No.4, pp.423-439

Cox, Archibald (1958) 'The Duty to Bargain in Good Faith' *Harvard Law Review.* Vol.71, No.8, pp.1401-1442

Dahan, Yossi, Lerner Hanna and Sivan Faina Milman (2011) 'Global Justice, Labor Standards and responsibility'. *Theoretical Inquiries in Law*, Vol.12, Number 2 Article 3 pp. 439-464 [online] <http://www.bepress.com/til/default/vol12/iss2/art3> visited 13 January 2012.

Daniel, Haile (1986) 'Workers' Participation in Management under Ethiopian Law'. *Journal of Ethiopian Law*, Vol. XIII, pp.123-138

Davies, A.C.L. (2008) 'One step forward, two steps back? The Viking and Laval cases in the ECJ'*. Industrial Law Journal*, Vol.37, No.2. pp.126-148.

Davies, Anne C.L. (2004) *Perspective on Labour Law*. (Cambridge/New York/Madrid: Cambridge University Press).

Davies, Paul and Freedland, Mark (1993) *Labour Legislation and Public Policy*. (Oxford: Clarendon Press).

Deakin, Simon and Morris, S. Gillian (2009) *Labour Law 5th ed*. (Oxford /Portland: Hart Publishing)

Deakin, Simon (2008) 'Time is everything: Industrialization, Legal Origin and the Evolution of the Contract of Employment in Britain and Continental Europe,' in Bercussion, Brian and Estlund, Cynthia (eds.), *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions.* (Portland: Hart Publishing), pp. 67-88

Deakin, Simon (2005) 'Social Rights in a Globalized Economy,' in Alston, Philip(ed) *Labour rights as Human Rights*. (Oxford: Oxford University Press) pp.24-60

De Gobbi, S. Maria (2006) Labour Market Flexibility and Employment and Income Security in Ethiopia: Alternative Considerations, *Employment Strategy Papers* (Geneva: ILO)

Dunning, Harold (1998) 'The Origin of Convention No.87 on Freedom of Association and the Right to Organize'. *International Labour Review*. Vol. 137, No.2 pp.149-167

Egorov, Vladislav (1996) 'Privatization and labour relations in the countries of Central and Eastern Europe'. *Industrial Relations Journal* 27:1 pp. 89-100

Engle, Eric (2010) 'A Viking we will go! Neo-corporatism and Social Europe'. *German Law Journal, V*ol.11, No.6 pp.633-652.

Ericsson, Barbara. (2009) Post-Privatization Impact Assessment. (Draft-unpublished) Addis Ababa: Ethiopia.

Ewing, K.D. and QC, John Hendy (2010) 'The Dramatic Implications of Demir and Baykara' *Industrial Law Journal*, Vol.39, No.1, pp.2-51

Fairey, B. David (2009) 'Exclusion of Unionized Workers from Employment Standards Law' *Industrial Relations* Vol.64, No.1, pp.112-133

Fashoyin, Tayo (2010) 'Collective bargaining and employment relations in Kenya' *Working Paper No.13* (Geneva: ILO)

Fashiyon, Tayo (2008) 'Policy Reforms and Employment Relations in Zambia' *Issues Paper No.29* (Harare: ILO Sub-Regional Office for Southern Africa).

Fashoyin, Tayo (2004) 'Tripartite Cooperation, Social Dialogue and National Development'. *International Labour Review*. Vol.143, No.4, pp.340-371

Faundez, Julio (2010) 'Rule of law or Washington Consensus: The Evolution of the World Bank's approach to legal and judicial Reform' in Amanda Perry-Kesaris (ed) *Law in Pursuit of Development*. Warwick School of Law Legal Studies Research Paper Series (London: Routledge), pp.1-21

Feller, E. David (1973) 'A General Theory of the Collective Bargaining Agreement '*California Law Review,* Vol.61, No.3*,* pp.663-857.

Fenwick Colin, Kalula Evans and Landau Ingrid (2010) 'Labour law: A Southern African perspective'. In Tzehainesh Tekle(ed) *Labour law and worker protection in developing countries.* (Oxford and Portland: Hart publishing) pp.175-224

Flanders, A. (1968) 'Collective Bargaining: A Theoretical Analysis'. *6 British Journal of Industrial Relations*. pp. 1-27

Filipovic, Adnan (2005) 'Impact of Privatisation on Economic Growth'*. Issues in Political Economy,* Vol. 14 pp.1-22 [online] (<http:// www. org.elon.edu./ipe/Adi final.pdf> accessed on 27 May 2010)

Freeman *et al*, (2010) *Stakeholders Theory: The State of the Art.* (Cambridge/New York: Cambridge University Press).

Galal, Ahmed, Jones, Leroy, Tandon, Pankaj and Vogelsang, Ingo (1994) *Welfare Consequences of Selling Public Enterprises: An Empirical analysis*. (New York: Oxford University Press)

Gebre-amlak, Yaebiyo (2019) "Introducing Statutory minimum wage in to the Ethiopian Private Sector." In Mehari Redae (ed.) *Ethiopian Civil and Commercial Law Series*, Vol. IX

Gernigon Bernand, Oredo Alberto and Guido Horacio (1998) "ILO Principles concerning the Right to Strike." *International Labour Review*, Vol.137, No.4, pp.441-481

Gernigon Bernand, Oredo Alberto and Guido Horacio (2000) "ILO Principles concerning Collective Bargaining." *International Labour Review*. Vol.139, No.1, pp.33-55

Getachew, Yoseph (1994) 'Public Enterprise reform and privatization: A review of experiences', in Abdulhamid Bedri Kello (ed) *Privatization and Public enterprise reform in Ethiopia.* (Addis Ababa: Ethiopian Economic Association), pp.67-84

Girma, Kebede (1987) 'State Capitalism and Development: The case of Ethiopia'. *The Journal of Developing Areas*, Vol.22, No.1 pp.1-24[online] (Stable URL:<http://www.jstor.org/stable/419615> (accessed: 12 April 2009)

Gladstone, Alan and Ozaki, Muneto (1975) 'Trade Union Recognition for Collective Bargaining Purposes'. *International Labour Review*. Vol.112, Nos.2-3, pp. 163-189

Glinavos, Ioannis (2010) 'Transition or development? Reassessing priorities for law reform' *Progress in Development Studies*. Vol.10, No.1, pp.59-74.

Gomez, Rafael (1998) 'Globalization and Labour Standards: Multilateral worker protection in an era of 'footloose' capital'. *Working paper* 1998-4. (Center for Industrial Relations: University of Toronto).

Gong, Yundan, Gorg, Holger and Maioli, Sara (2006) 'Employment effects of privatization and foreign acquisition of Chinese state-owned enterprises. *Discussion Paper No.2453*. (Institute for the Study of Labour (IZA): Bonn).

Government of Ethiopia (GOE) (1975) 'Declaration of Economic Policy of Socialist Ethiopia.' (Addis Ababa: Ethiopia)

Government of Federal Democratic Republic of Ethiopia (2002) *Industrial Development Strategy.* Ministry of Information (Amharic); (Addis Ababa: Ethiopia).

Guadagni, Marco (1972) *Ethiopian Labour Law Handbook*, (Ilpoligrafico plc. University of Asmara; Ethiopia)

Gunter G. Bernand and Hoeven, Van Der Rolph (2004) 'The Social Dimension of Globalization: a Review of the Literature'. *International Labour Review* Vol.143, No. 1-2, pp.7-43

Hall, John G. (2003) *Ethiopia in the Modern World* (Philadelphia: Chelsea House Publishers)

Hameed, M.A. Syed (1970) 'A Theory of Collective Bargaining' *Industrial Relations*, Vol.25, No.3, pp.531-551

Harrison, Anne and Scorse, Jason (2003) 'The Impact of Globalization on Compliance with Labour Standards' [with Comments and Discussions [online] available at: <http:// www.jstor.org/stable/25063180> (accessed 20/03/2009) pp.45-96.

Hasselbalch, Ole, Neal, C. Alan, and Victorian Anders (1982) *A Perspective on labour law.* (Stockholm: Almqvist and Wiksell International).

Hayter, Susan (2009) 'A fair Globalization: the role of collective bargaining in stemming the rising tide of inequality in earnings and income.' *International Journal of Labour Research,* Vol.1, Issue.2, pp.27-42

Henze B. Paul (1989) 'Ethiopia's Economic Prospects for the 1990s' The RAND Publication Series. (RAND: USA)

Hepple, Bob (2008) 'The WTO as a mechanism for Labour Regulation'. In: Bercussion, Brian and Estlund, Cynthia (eds.), *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions.* (Portland: Hart Publishing), pp. 161-178

Hepple, Bob (2005) *Labour Laws and Global Trade,* (Oregon: Hart Publishing)

Hepple, Bob (ed) (2002) *Social and labour rights in a global context: International and comparative perspective.* (Cambridge: Cambridge University Press).

Hiatti, P. Jonathan and Greenfield, Deborah (2005) 'The Importance of Core Labour Rights in World Development'. *Michigan Journal of International Law*. Vol.26, No.39, pp.39-62

Hishe Hailu. (2005) 'An Assessment of the process of Privatization in Ethiopia'. M.A. thesis [online] <http://hdl.handle.net/123456789/795> (visited on 07 June 2009)

Hoeven, Rolph Van der and Sziraczki, Gyorgy (1997) *Lessons from privatization: labour issues in developing and transitional countries*. (Geneva: ILO).

Hossain, Moazzem and Malbon, Justin (eds). (1998) "*Who benefits from privatization?* (London/New York: Routledge)

Hunter, Laurence (1980) "Some economic aspects of Industrial Democracy" *Industrial Relations Journal.* Vol. 11, issue-3, pp.35-45

International Confederation of Free Trade Unions (ICFTU) (2004) *A Trade Union Guide to Globalization.* 2nd edition [online] available at; <http://www.icftu.org/pubs/globalization > (visited on 21 May 2009)

International Labour Organization (ILO) (1994) General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No.87),1948 and the right to Organize and Collective Bargaining Convention (No.98), 1949 (81st Conference Session Geneva)

International Labour Organization (ILO). (1996) *Freedom of Association,* Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (4th revised ed: Geneva)

International Labour Organization (ILO) (1998) *Declaration on Fundamental Principles and Rights at Work and its follow up*. International Labour Conference, 86th Session, Geneva, and June 1998 [online] available at: <http://www.ilo.org/public/english/standards/decl/declaration/index.htm>

International Labour Organization (ILO) (2000) *International Labour Standards: A global approach*, First edition (Geneva: ILO).

International Labour Organization (ILO) (2004) "The Social Dimension of globalization: a review of the Literature." *Working Paper No.24*. (Geneva: ILO)

International Labour Organisation (ILO) Decent Work Country Programme-Ethiopia (2009-2012) Available at: <http://www.ilo.org/public/english/bureau/program/dwcp/download/ethiopia.pdf>

International Labour Organisation (ILO) (2008) General survey on the Fundamental Conventions concerning the right at work in light of the ILO Declaration on Social Justice for a fair globalization, Report of the Committee of Experts on the Application of Conventions and recommendations (Articles 19, 22 and 35 of the Constitution), Report III (Part 1B) (Geneva: ILO).

International Labour Organisation (ILO) (2009) 'Technical Memorandum: Ethiopia Labour Inspection Audit' Labour Administration and Inspection Programme (Geneva: ILO)

International Monetary Fund (1999a) Privatization, Social impacts and Safety Nets. IMF *Working Paper*, WP/99/68 (Washington, D.C.: International Monetary Fund).

International Monetary Fund (1999b) 'Ethiopia: Recent Economic Developments'. *IMF Staff Country Report No.99/98* (Washington, D.C.: International Monetary Fund).

Ishikawa, Juniko (2003) *Key Features of National Social Dialogue: a Social Dialogue Resource Book* (Geneva: ILO)

Jenkins, Rhys. (2005) 'Globalization, Corporate Social Responsibility and Poverty'. *International Affairs*. Vol.81, No.3, pp.525-540.

Jonge, D. Alice (2004) 'Global Economic Forces and Individual labour rights: An Uneasy Coexistence'. *Human Rights and Human Welfare,* Vol.4, pp.107-118

Kale-Kristos, Abay (2005) *the 1960 Attempted Coup: The Historical and Political Transformation of Ethiopia (1916-1974)* (in Amharic) (Addis Ababa: Berhannena Selam Printing Press).

Katz, C. Harry (1993) 'The Decentralization of Collective bargaining: A literature review and comparative analysis.' *Industrial and Labor Relations Review*, Vol.47, Issue 1, pp.3-22

Katz, C. Harry and Kochan, A. Thomas. (1992) *An Introduction to Collective Bargaining and Industrial Relations*. (New York: McGraw-Hill Inc.)

Kaufmann, Christine (2007) *Globalization and Labour Rights: the conflict between core labour rights and international economic law* (Oxford: Hart Publishing)

Kaufman, E. Bruce (2004) *The global evolutions of industrial relations* (Geneva: ILO)

Kikeri, Sunita. (1997) 'Privatization and Labour: What happens to workers when Governments Divest?' *World Bank Technical Paper, 396.* (Washington DC: The World Bank)

Kikeri, Sunita, Nellis, John and Shirley, Mary (1992) *Privatization: The lessons of experience*. (Washington, D.C.: World Bank)

Kikeri, Sunita and Nellis, John. (2004) 'An Assessment of Privatization'. *The World Bank Research Observer*. Vol.19, No.1. pp. 87-118

Kikeri, Sunita, Nellis, John and Shirley, Mary (1994) 'Privatization: Lessons from Market Economies'. *The World Bank Research Observer,* Vol.9, No.2. Pp.241-272. [online] (Stable URL:< http://www.jstor.org/stable/3986326>. (accessed 29 September 2009)

Kelly, John and Williman, Paul (eds.) (2004) *Union Organization and Activity*. (London / New York: Routledge)

Kornai, Janos (2001) 'Hardening the Budget constraint: the experience of post socialist countries'. *European Economic Review 45*, pp.1573-1599 [online] (available at: <http://www.elsevier.com/locate/econbase> (accessed on 25 Jan 2009)

Kosar, R.G. and Hayter, S. (2011) Comparative Study of labour relations in African countries'. *Working paper 116* (Amsterdam: University of Amsterdam)

K.S., Jomo.(2008) 'A Critical Review of the Evolving Privatization Debate'. In: Ronald Gerard(ed). *Privatization*: *Successes and Failures*. (New York: Colombia University Press), pp. 199-211

Kubi, A. Kojo (2001) 'State-owned Enterprises and Privatization in Ghana'. T*he Journal of Modern African Studies. Vol.39 No.2,* pp.197-229

Law S. David (2008) 'Globalization and the Future of Constitutional Rights', *Northwestern University Law Review,* Vol.102, No.3, pp.1278-1343

Lee, Eddy (1997) 'Globalization and Labour Standards' *International Labour Review*, Vol.136, No.2, pp.173-189

Lee, Eddy and Vivarelli, Marco (2006) 'The Social impact of Globalization in the Developing Countries'. *International Labour Review* Vol.145 No.3, pp.167-184

Locke, Richard, Qin, Fei and Brause, Alberto. (2007) 'Does monitoring improve labour standards? : Lessons from Nike', *Industrial and Labor Relations Review*, Vol.61, Issue1; pp.3-31[online] (available at: <heinonline.org.pugwash.lib.warwick.ac.uk/HOL/page?handle=hein.journals/ialrr61&div=4&collection=journals & set> (accessed 15 May 2009)

Macklem, Patrick (2005) 'the Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right? In: Alston, Philip(ed). *Labour rights as Human Rights* (Oxford: Oxford University Press) pp. 61-84

Mahteme -Selassie, Wolde-Meskel (1949) *Zekre-Neger*. (in Amharic). (Addis Ababa: Artistic Printing Press)

Masondo, Themba (2010) 'Worker participation in workplace restructuring in the automotive industry: A comparative study of German and South-African Volkswagen plants (1970-2009)' (MA-thesis- Johannesburg).

Mcgowan, Francis (1994) 'Internationalization of Privatization' In: Thomas Clarke(ed). *International Privatization: Practices and Strategies*. (Berlin/New York: Walter de Gruyter), pp.25-42.

McMillan, H. Carl (1996) 'Foreign Direct Investment in Eastern Europe: Harnessing FDI to the Transition from Plan to Market': in Steve Chan (ed.) *Foreign direct Investment in a Changing Global Political Economy.* (Macmillan: International Political Economy*)* pp.127-149

Megginson L. William, Nash C. Robert and Van Randenborgh Matthias (1994) 'The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis' *The Journal of Finance,* Vol. XLIX, No.2, pp.403-452.

Megginson L. Williams and Netter M. Jeffery (2001) 'From State to Market: A Survey of Empirical Studies on Privatization' *Journal of Economic Literature*, Vol. XXXIX pp.321-389

Meknassi, Rachid Filali (2010) 'the effectiveness of labour law and decent work aspirations in the developing countries: a framework for analysis' in Tzehainesh Tekle(ed) *Labour law and worker protection in developing countries.* (Oxford/ Portland: Hart publishing), pp.51-91.

Millward, Robert (2005) *Private and Public Enterprise*. (Cambridge: Cambridge: Printing Press)

Ministerio de Trabajo y Asuntos Sociales (Spain) (2004) *Collective Bargaining in Europe*. [online] available at: <http://www.empleo.gob.es/es/sec_trabajo/ccncc/descargas/CollectiveBargainingInEurope.pdf> (accessed on 24 April 2012).

Ministry of Information (MOI) (2004) *Facts about Ethiopia*. (Press and Audio-Visual Department; Addis Ababa)

Ministry of Labour and Social Affairs (MOLSA) (2009) National Employment Policy and Strategy of Ethiopia, *Policy Report* (Addis Ababa: MOLSA)

Ministry of Labour and Social Affairs (MOLSA) (2003) 'A study on redundant employees due to structural adjustment and privatisation' unpublished-Amharic (Addis Ababa: Ethiopia).

Ministry of Labour and Social Affairs (MOLSA) (1983) 'The Ethiopian Working class: Yesterday and Today' (in Amharic). *Meskerem, Vol.2, No.13.*

Morehous, G. Lynn. (1970) 'Ethiopian Labour Relations: Attitudes, Practice and Law'. *Journal of Ethiopian law.* Vol. VII, No.1, pp.241-287.

Morgan, R. David and England, E. Robert. (1988) 'The Two Faces of Privatization'. *Public Administration Review*. Vol.48, No.6, pp.979-987[online] (Stable URL: <http://www.jstor.org/stable/976994.> (accessed on 29 September/2009)

Morin, Marie-Laure (2005) 'Labour law and new form of corporate organization' *International Labour Review*, Vol.144, No.1. pp.5-30.

Musa, Ali, El-Khider (1994) 'Privatization of Public enterprises in less developed countries' In: Thomas Clarke(ed). *International Privatization: Practices and Strategies*. (Berlin/New York: Walter de Gruyter) pp.354-379.

Neal, C.Alan (1988) 'The Collective Agreement as a Public Law Instrument' in E.K. BANAKAS(ed) *United Kingdom Law in the 1980s* (London: 1988)

Neal, C.Alan (2008) 'Corporate Social Responsibility: Governance Gain or Laissez-Fair Figleaf? '*Comparative Labor Law and Policy Journal,* Vol.29, Number 4, pp.459-474

Nellis, J (2008) 'Privatization in Africa: What has happened? What is to be done?' in Gerard Roland (ed.). *Privatization: Successes and Failures*, (New York: Colombia Printing Press), pp.109-135

Nellis, J (2007) 'Privatization: A Summary Assessment'. *SAIS Review Vol. XXVII,* No. 2, pp.3-29

Neumayer, Eric and Soysa, Indra de. (2007) 'Globalization, Women's Economic Rights and Forced Labour'. *The World Economy*; pp.1510-1535.

Nigatu Abera (2019) "*the Impact of triangular relationship on workers' rights in Ethiopia*" (LL.M thesis: unpublished; Law of School and Governance Studies: AAU).

Njola, Wanjiru (2007) *Property in Work: The Employment Relationship in the Anglo-American firm.* (Aldershot: Ashgate)

Nola, Suzanne and Rueda, Marleen (1998) Privatisation, Labour Law and Labour Relations: A Comparative Report. *Working paper IPPRED-18* Labour Law and labour Relations Branch (Geneva: ILO)

Novitz, Tonia (2010) 'Core Labour Standards and Conditionalities: A means by which to achieve sustainable development?' in Faundez and Tan (eds.) *International Economic Law, Globalization and Developing Countries* (Cheltenham/Northampton: Edward Elgar), pp.234-251.

Palley, I. Thomas. (2004) 'The Economic Case for International Labour Standards'. *Cambridge Journal of Economics*, 29. pp.21-36

Paliwala, A. (2001) 'Privatization in Developing Countries: The Governance Issue' *Law, Social Justice and Global Development (LGD).* <http://www2.warwick.ac.uk/fac/soc/law/elj/2001_1/paliwala/ >)

Pamacheeche, Fudzai and Koma Baboucarr (2007) 'Privatization in sub-Saharan Africa: an essential route to poverty alleviation' *African Integration Review* Vol.1 No.2 pp.1-22

Pankrust, Richard (1971) *Italian and 'native' labour during the Italian fascist occupation of Ethiopia (1935-41)* (Addis Ababa: Hailselassie I University)

Paul, C.N. James and Clapham, Christopher (1967) *Ethiopian Constitutional Development: A Source Book*. (Vol. I) Addis Ababa: Haileselassie I University (Faculty of Law)

Paulos, Tesfagiorgis (1972) 'Collective Bargaining and Collective Agreement with special emphasis on employees covered by collective agreement'. (LLB-. thesis: Addis Ababa), Faculty of law.

Posusney, Marsha Pripstein and Cook, Linda J(eds) (2002) *Privatization and Labour*: *Responses and Consequences in Global perspective*. (Cheltenham: Edward Elgar)

PPESA News. (2007). 'An Overview of the Privatization Process'. Vol. I No.2; A biannual and bilingual news magazine published by the information and public relations service of Privatization and Public Enterprises Supervising Agency, pp.21-34

Price, Catherine (1994) 'Privatisation in less developed countries' in Peter M. Jackson and Catherine M. Price (eds.) *Privatisation and Regulation: a review of issues*. (London/New York: Longman) pp.237-254

Rahel, Abebe (2007) 'Challenges and Opportunities in AGOA: The Case of Ethiopian Textile Sub-Sector.'[online] Available at: <http://www.afdb.org/fileadmin/uploads/afdb/documents/Knowledge/25068298-FR- PAPER-RAHEL-ABEBE.PDF> (accessed 16 June 2010).

Rama, Martin (2001) 'The Gender implications of public sector downsizing: The reform programme of Vietnam'. *Policy Research Paper.2573.* (Washington, D.C.: World Bank)

Ramamurti, Ravi (1992) Why are Developing Countries Privatizing? *Journal of International Business Studies*. Vol.23, No.2. pp.225-249. Stable URL: <http://www.jstor.org/stable/154899> (accessed: 29/08/2009)

Ramanadham, V.V. (ed.) (1993b) *Constraints and impacts of privatization*. (London / New York: Routledge)

Randriamaro, Zo (2006) Gender and Trade Bridge Development- Gender Overview Report, Institute of Development Studies, Brighton. (Available at: http://www.bridge.ids.ac.uk/reports/CEPTrade-OR.pdf).

Redden, R. Kenneth (1968) *The Legal System of Ethiopia. (*Charlottesville: The Michie Company law publishers)

Renn, Ortwin (2008) *Risk Governance: Coping with Uncertainty in a Complex World*. (London: Earthscan Publishing)

Rodgers, Gerry (2005) 'The Pattern of Globalization and some implications for the pursuit of social goals'. *Working Paper No.55.* (Geneva: ILO)

Ronald, Gerard(ed) (2008) Privatization*: Successes and Failures,* (New York: Columbia University Press)

Sader, Frank (1995) Privatizing Public Enterprises and Foreign Investment in Developing Countries, 1988-93. (Washington, D.C.: The World Bank)

Santos, Alvaro (2006) ''The World Bank's uses of the 'Rule of Law' promise in Economic Development'' in Trubek, D.M. and Santos, A (eds.) *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press) pp.253-300

Scherer, Christoph. (2007) 'International Workers' Rights and Competitiveness'. *Labour, Capital and Society* 40:1&2 pp.135-159

Schillinger, Rene Hubert (2005) 'Trade Unions in Africa: Weak but Feared' *Occasional papers: International Development Cooperation* (Bonn: Friedrich-Ebert-Stiftung).

Schregle, Johannes, (1993) 'Collective Bargaining and Workers' Participation: The Position of the ILO'. *Comparative Labour Law Journal*, Vol.14, Issue.4, pp.431-444.

Schregle, Johannes (1976) 'Workers' Participation in decisions within undertakings'. *International Labour Review*, Vol.113, No.1, p.1-15.

Selvam, Jesiah (2008) 'Impact of Privatization on Management Issues: empirical Evidences from Ethiopia' *Journal of Management Research,* Vol.8, No.1, pp.112-120

Selvam, Jesiah and Meenakshi Iyappan, T (2005) 'Privatisation and Capital Accumulation: Empirical evidence from Ethiopia.' *African Journal of Economic Policy*, Vol.12, No.1 (available at: http://ssrn.com/abstract=984381)

Sen, Amartya (1999) *Development as Freedom*. (New York: Oxford University Press)

Sen, Ratna (2012) 'Employee participation in India' *Working Paper No.40* (Geneva: ILO)

Seyoum, Gebreegziabher (1969) *The Development of Some Institutions Concerned with Labour Relations in Ethiopia*. (Addis Ababa: Haileselassie I University)

Sheehan, Peter (2008) 'Beyond Industrialization: New Approaches to Development Strategy Based on the Service Sector. *Research Paper No.2008/60*. (United Nations University: World Institute for Development Economics Research), pp.1-18

Shutt, Harry (2010) *Beyond the Profits System: possibilities for a post-capitalist era.* (London/ New York: Zed Books).

Singer, Norman J. (1970): 'Modernization of Law in Ethiopia: A Study in Process and Personal Values' *Harvard International Law Journal,* Vol. 11, p. 73-125.

Slomp, Hans (1996) *Between bargaining and politics; an introduction to European labour relations. (*Westport/ London; Praeger)

Sommer, Monika M, (2003) 'National Labour Law Profile: Federal Democratic Republic of Ethiopia'[online] Available at: http://www.ilo.org/public/english/dialogue/ifpdial/info/national/eth.htm Sonebe, Tetsushi, Akoten, E, John and Otsuka, Keijiro. (2007) 'Development of Industrial Culsters in Ethiopia: How different from East Asian Experience?' Available at; <http://www.fasid.or.jp/daigakuin/fa_gr/kyojyu/pdf/discussion/2009-04-001.pdf>

Standing, Guy (2010) 'Global Monitor: The International Labour Organization' *New Political Economy.* Vol.15, No.2, pp.307-318

Stiglitz, Joseph (2002) *Globalization and its discontents.* (London: Penguin Books).

Stone, V. Katherine (2008) 'Flexibilization, Globalization and Privatization: three Challenges to labour rights in our time', in Bercussion, Brian and Estlund, Cynthia (eds.), *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions.* (Portland: Hart Publishing), pp.115-137

Stone, V. Katherine (1999) 'To the Yukon and Beyond: Local Labourers in a Global Labour Market'. *3 J of Small and Emerging Business Law 93,* pp.1-37

Stutz, Robert (1962) *'The Developing Industrial Relations System in Ethiopia'.* (Addis Ababa: Institute of Ethiopian Studies)

Tadele *et al* (2007) The impact of the COMESA and EPA trade liberalization on workers of Textiles and Leather industries in Ethiopia, A study prepared for the Confederation of the Ethiopian Trade Union (Addis Ababa: Ethiopia).

Tamiru, Wondimagegn, Yohannes, Heruy and Yehenew, Tsegaye (2005) *Ethiopian Labour Legislation (ELL) (*The Netherlands: Kluwer Law International)

Tatahi, Motasam (2006). *Privatization Performance in major European Countries since 1980*. (New York: Pal grave Macmillan)

Teffera, Haileselassie (2007) *Industrial and Civil Service Administration and Development in Ethiopia* (in Amharic). (Addis Ababa: Forum for Social Studies)

Tekle, Tzehainesh (2010) 'Labour law and worker protection in the South: An evolving tension between models and reality.' in Tzehainesh Tekle(ed) *Labour law and worker protection in developing countries.* (Oxford/ Portland: Hart publishing), pp. 3-47

Thirkell, J.E.M, Petkov, K. and Vickerstaff, S.A. (1998). *The Transformation of Labour Relations: Restructuring and privatization in Eastern Europe and Russia*. (Oxford/New York: Oxford University Press)

Theron, Jan *et al*. (2007) Globalization, the impact of trade liberalization, and labour law: the case of South Africa, *Discussion paper series No.178*, (Geneva: Institute of Labour Studies)

Thomas, Albert. (1996) 'The International Labour Organization: its origins, developments and future'. *International Labour Review*. Vol.135, No.3-4, pp.261-276

Transitional Government of Ethiopia (TGE) (1991) The Economic Policy of the Transitional Government (Addis Ababa: Ethiopia)

Twining, William (2009) General Jurisprudence: Understanding of law from global perspective (Cambridge: Cambridge University Press)

United Nations Conference on Trade and Development (UNCTAD) (2011) 'Report on the implementation of the investment policy review: Ethiopia'. [online] available at: <www.unctad.org/en/docs/diaepcb201007_en.pdf> (accessed on 13 July 2012).

Vanderlinden, J. (1966) 'Civil and Common law influences on the developing law of Ethiopia' *Buffalo Law Review,* Vol.16, Issue, 1, pp.250-266

Vestal, Theodore G. (2003) *Ethiopia: A Post-Cold War State* (Westport/London: Praeger)

Visser, Jelle (2006) 'Union membership statistics in 24 countries' *Monthly Labor Review*, January, pp. 38-49

Voice of Labour. (1970) 'The Ethiopian Labour Movement: the Aftermath of Birth'. (Special Issue) (Addis Ababa: Institute of Ethiopian Studies)

Wedderburn, Lord (2003) 'Freedom of Association or Right to Organize?' *Industrial Relation Journal.* Pp244-254

Weiss, Manfred (1995) *Labour Law and Industrial Relations in Germany*. (Deventer: Kluwer Law and Taxation Publishers)

Wellis, Don. (2007) 'Corporate Code of Conduct, Non-Governmental Organizations and Regulation of International Labour Standards'. *Global Social Policy*. Vol.7 (1), pp.51-74

Wendesen, Birhanu. (2008) 'Anbessa within the prospect of export': In a Special Issue Magazine published by Anbessa Share Company in commemoration of the Ethiopian Millennium in 2008, pp.32-33.

Wheeler Jeff and Goddard Keith (2013) 'Assessment of Ethiopia's Labour Inspection System' (Bureau of International Labour Affairs: U.S. Department of Labor)

Williamson, J. (2000) 'What should the World Bank think about the Washington Consensus?' *The World Bank Research Observer*, Vol. 15, No.2, pp.251-264.

World Bank (2000) *Reforming Business-Related Laws to Promote Private Sector Development: The World Bank Experience in Africa* (Washington D.C.: World Bank)

World Bank (1987) *Ethiopia: Recent Economic Developments and Prospects for Recovery and Growth.* Report No.5829ET (Washington D.C.: World Bank)

World Commission on the Social Dimension of Globalization (2004) *A fair Globalization: Creating opportunity for all.* (Geneva; ILO)

Zhou, Mei-Xiang and Cheng, Kou-Tai (2007) 'Ownership, Competition, Management and Labour in Public Enterprises Transition: Literature Review'. *Public Administration and Policy*, No.44, pp.129-180

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Foreign Cases

Wilson, National Union of Journalists and others v the United Kingdom (Application Nos. 30668/96, 30671/96 and 30678/96 (ECtHR) (Judgment of 2July 2002).

Demir and Bayraka v Turkey (Application No.34503/97 (ECJ) (Judgment of 12 November 2008).

International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti (Case C-438/05 (ECJ) (Judgment of 11 December 2007).

Laval un Partneri Ltd v Svenka Byggna dsarbetareforbundet and others (Case C-341/05 (ECJ) (Judgment of 18 December 2007).

Federal Supreme Court Cassation Division decisions

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Nib Transport Share Company *v.* Tegenu Meshehsa; File No.18307: Vol.2

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Elias Bar and Restaurant *v.* Mirtnesh Atnafu et al; File No.126667: Vol.22

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Civil Code of Ethiopia of 1960, Proclamation No. 165/1960, *Negarit Gazeta 19th year No. 2.*

Commercial Code of the Empire of Ethiopia, Proclamation No.166/1960, *extraordinary issue Negarit Gazeta 19th year No. 3.*

A Proclamation to provide for Labour Proclamation No. 210/1963, *Negarit Gazeta*, 23rd *year, No. 3*

A Proclamation to provide for Labour Proclamation No. 64/1975, *Negarit Gazeta*, 35th *year, No. 11.*

Trade Unions Organization Proclamation No. 222 / 1982, Negarit *Gazeta, 41th year No.6*

Transitional Period Charter of Ethiopia, *Negarit Gazeta* 22 July 1991, Addis Ababa.

A Proclamation to Provide for the Establishment of the Public Enterprises' Proclamation No. 25/1992, *Negarit Gazeta* 51st year, No. 21

A Proclamation to provide for Labour Proclamation No. 42/1993, *Negarit Gazeta*, 52nd *year, No. 27*

A Proclamation to Provide for the Establishment of the Privatization Agency Proclamation No. 87/1994, *Negarit Gazeta*, 53rd year, *No. 67.*

The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta, 1st year, No.1*

A Proclamation to Provide for the Establishment of the Privatization Agency (amendment) Proclamation No. 182/1999, *Federal Negarit Gazeta*, 6th year, *No. 4.*

Income Tax Proclamation No.286/2002, *Federal Negarit Gazeta, 8th year, No.34*

A Proclamation to provide for Labour Proclamation No. 377/2003, *Federal Negarit Gazeta*, *10th year, No. 12*

A Proclamation to Provide for the Establishment of the Privatization and Public Enterprises Supervising Authority Proclamation No. 412/2004, *Federal Negarit Gazeta, 10th year No.57*

Federal Civil Servants Proclamation No.1064/2017, *Federal Negarit Gazeta, 10th year No.12*

Labour Proclamation No.1156/2019, *Federal Negarit Gazeta, 25th year No.89*

Textile and Apparel Industry Institute Establishment Council of Ministers Regulation No. 118/2005, *Federal Negarit Gazeta 11th year No.47.*

Council of Ministers Regulation to establish Textile and Leather Industry Development Center No.125/2006, *Federal Negarit Gazeta 12th year No.27.*

Council of Ministers Regulation No. 5/1992, *Negarit Gazeta*, 52nd year, No.9

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