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Labour Law

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Introduction.....1
UNIT- ONE.....2
Introductory Remarks on Employment and Labour Law.....2
INTRODUCTION.....2
1.1 The meaning of Employment and Labor Law.....2
1.2 The Raison Detore and Historical Background of Labour Law 4
1.2.1 The slave owing society.....4
1.2.2. Feudalism.....5
1.2.3. Capitalism.....5
1.2.4 Marxist Ideology.....7
1.3 The Emergence and Development of Employment Law in Ethiopia 9
1.4. Sources of labour Law.....10
1.4.1. Public Acts as sources of law.....11
1.4.2 Private Instruments as Sources of Law.....12
1.4.3 The Sources of International Labor Law.....14

UNIT – TWO.....28
SCOPE OF APPLICATION OF THE LABOUR PROCLAMATION.28
INTRODUCTION.....28
2.1. EMPLOYER – WORKER RELATIONSHIPS.....29
2.1.1 Definition of a worker.....29
2.1.2 Distinction between a Worker and Other Similar Terms30
2.1.3. The Meaning of an Employer.....31
2.2. EXCLUSIONS.....32
2.2.1. Exclusion in historical context.....33
2.2.2. Exclusion under the 2003 Labour Proclamation.....34
UNIT THRREE.....45
CONTRACT OF EMPLOYMENT.....45
INTRODUCTION.....45
3.1. FORMATION OF A CONTRACT OF EMPLOYMENT.....45
3.2. DURATION OF CONTRACT OF EMPLOYMENT50
3.3. OBLIGATIONS OF THE PARTIES.....54
3.3.1 Obligations of the Employer.....54
3.3.2 Obligations of the Worker.....57
3.4. Variation and Suspension of a Contract of Employment…59

3.5 Termination of Contract of Employment.....64
3.6 Entitlements of Lawful Termination of a Contract of Employment 77
3.7. Unlawful Termination of a Contract of Employment.....81
UNIT – FOUR.....86
LEGALLY STIPULATED MINIMUM LABOUR CONDITIONS.....86
INTRODUCTION.....86
4.1. General Background.....87
4.2. Hours of Work, Rest Period and Leaves.....87
4.3 Safety Working Conditions.....91
4.4 Special Categories of Workers.....98
4.4.1. Apprentice Workers.....98
4.4. 2. Young workers.....101
4.4.3 Female workers.....103
4.4.4. Foreigners (working in Ethiopia).....103
UNIT – FIVE.....105
COLLECTIVE LABOUR RELATIONS.....105
Introduction.....105
5.1. Trade Unions and Employers' Organizations.....105
5.1.1. The Right to form Organization.....105

5.1.2 Trade Unions and the rights of workers.....108
5.1.3. Functions of Trade Unions and Employers' Organizations 110
5.2. COLLECTIVE BARGAINING and COLLECTIVE AGREEMENTS 111
5.2.1 COLLECTIVE BARGAINING.....111
5.2.2 COLLECTIVE AGREEMENTS.....114
UNIT- SIX.....118
LABOUR DISPUTES AND INDUSTRIAL ACTIONS.....118
INTRODUCTION.....118
6.1. LABOUR DISPUTES.....118
6.1.1. Definition and Classification of Labour Disputes.....119
6.2 INDESTRIAL ACTIONS.....120
UNIT – SEVEN.....127
DISPUTE RESOLUTION MECHANISMS.....127
Introduction.....127
7.1 THE AMICABLE DISPUTE SETTLEMENT MECHANISMS128
7.1.1 Conciliation / Mediation.....128
7.1.2 Arbitration.....131
7.2 THE JUDICIAL SETTLEM

ENT MECHANISMS 132
7.2.1 Labour Relations Board.....133
7.2.2. Labour courts.....136

Introduction

Though the controversy as to when and where was exactly the emergence of law as a means of stabilizing human life in history remains in vacuum, there is no why for it today. For man has discovered the virtues of law and thereby exploited its fruits since time immemorial. Obviously, law, as an instrument used to regulate human relationships for the existences as well as sustainability of a peaceful and organized community, is every where else in the world today. Hence, it is of no great point to spend much on the legal discourse held to boost the paramount importance of the various legal regimes in general and Employment and Labour law in particular. With no doubt, labour is creator of wealth, and hence the effort to wards economic prosperity and social justice in any society is greatly dependent upon the formulation of a sound labour relations policy in that society. To this end, the primary step to be taken by any country is to come up with separate regime of laws regulating the different aspect of relationships between the workingmen (the laborer) and the employer (the capitalist) in various sectors.

Employment and/or Labour law is commonly known for dealing with such relationships in many countries .The course on employment and labour law is thus designed mainly to introduce the students with the basic rules and principles enshrined under our Civil

Service and Labour proclamations as well as their positions in light of the accepted international standards and principles in the area.

Employment Law and Labour Law are not terms strictly referring to two different regimes of laws having their own distinct features, nor are they terms that can be used interchangeably. This is to mean that it is hard to draw the distinction between Employment Law and Labour Law. However, in the lips of academics Employment Law refers to a vast area of laws regulating all sorts of employment relationships, where as Labour law refers to an area of law regulating employment relationships only within specific sectors. Hence, Employment Law is inclusive of Labour Law, and the former is wider only in terms of scope than the later. In short, using the words of Mathematics Labour Law can be taken as the sub-set of Employment Law. As the terms Employment and Labour law refer to vast area of laws aimed at regulating too many aspect of relationships in the employment arena, it is hardly possible to fully cover all the issues in the area with this single course limited by time and number of pages. Thus much of the discussion in this course /module/will focus on the most important issues to be raised in the law of Employment in general and Labour law in particular.

UNIT- ONE

Introductory Remarks on Employment and Labour Law

INTRODUCTION

Dear distance learner, welcome to the course on employment and labour law!

This unit will try to give you the introductory remarks for the course in general. Accordingly, you will be given highlights that enable you grasp the analysis made in the

rest of the units of this material. As definition is fundamental for understanding a certain concept, the first section of the unit is devoted to defining the terms “employment law” and “labour law”. From that discussion you will see that employment law is a wider concept inclusive of labour law. Furthermore, under the second section of this unit you will take a closer look at the history of labour law world wide and in the Ethiopian context. Such discussion too, would be relevant to you so as to understand the concepts of employment law and labour law. On top of that the section will also touch the reasons that triggered states to come up with employment and labour laws to govern employment relationships: and this will have a role to play while you try to analyze the messages and justifications behind some of the provisions of the Labour Proclamation and the Federal Civil Servants Proclamation. Under the last section of the first unit of this course which is entitled as “sources of labour law” those private as well as public legal instruments that have impact on employment relationships are examined. Here, you will see that labour law is not only an issue of the Labour proclamation or the Civil Servants Proclamation. Rather, there are also some other domestic as well as international legal instruments that regulate employment relationships, including the FDERE Constitution, employment contracts, instruments of the International Labour Organization(ILO) and the like.

Learning Objectives of the Unit

Having completed this unit, you will be able to:

- Define the terms employment law and labour law.
- Narrate the historical development of labour law in Ethiopia.
- Explain the justifications of employment law and the roles it is believed to play.
- Discuss the reasons to limit freedom of contract principles on employment relationships of the employer and the employee.
- Enumerate the different kinds of sources of employment law

1.1 The meaning of Employment and Labor Law

Just like many other regime of laws aimed at regulating various social and economic interactions, employment law regulates certain aspects of relationships between persons. However, as the name itself implies, not every relationship rather only employment relation ships are subjects of employment law. Thus, if employment law can be defined as an area of law that regulates employment relationships; one needs to get the clear meaning of the term employment relationship for the sake of giving a comprehensive definition of this regime of law. Accordingly, employment relationship is deemed to exist between persons where one agrees directly or indirectly to perform work for and under the authority of an employer for a definite or indefinite period or piece work in return for wage. Employment relationship includes all such relationships

as defined above irrespective of the sector of employment or the identity of the persons (be it government or private) involved in the relationship.

Though employment relationship is as such a very broad term there are obvious separate legislations/ laws/ that are specifically aimed at regulating certain aspects of employment relationships. In other words, taking into account various factors such as the sector of employment, different legislations (laws) aimed at regulating specific employment relationships can be enacted. For instance, there is the "civil servants proclamation" that regulates employment relationships mainly between government institutions and its civil servants, there is also “the labor proclamation “that regulates employment relationships in the industrial sector, and so on. Employment law is, therefore a very broad name that refers to all those areas of laws which are made to regulate the different aspects of employment relationships.

Dear distance learner, have you clearly understood the meaning of employment law?
Perhaps things will get clearer later on when you read the discussion that will be made on the scope of employment and labor law in the next unit.

In general terms, "employment law” is an umbrella term that represents vast area of laws which are made to regulate any aspect of employment relationships. In this context, there is no as such a single or unified legislation (law) named employment law.

When we come to labor law, it refers to an area of law that governs certain employment relationships. As compared to employment law which is interested in all employment relationships; labor law is narrow in scope. This is because employment relations that are the subjects of labor law are only those which are found mainly in the industrial sector. Of course, that is why labor law is also known as “the law of Industrial Relations". Therefore, unlike employment law, labor law is not interested in all employment relationships, as so many of such relationships are outside the ambit of this law. Labor law is, thus, concerned with employment relationships that arise mainly within the industrial sector. Such relationships, in other words, can be named as labor relationships.

Industry for the purpose defining labor relationships doesn't solely refer to the manufacturing sector. It rather denotes the profit making sectors of the economy such as tourism, banks, insurance, hotels, etc in addition to the manufacturing sector. So, broader meaning it has.

Dear distance learner, among the aforementioned two areas of employer- employee relationships, which one is broader in scope? Perhaps, you have said that employment relationships are wider and inclusive of labor relationships. That is true. In deed, that is the reason why labor is regarded as an element (instance) of employment law. For that matter, as these and other related issues will be discussed in unit two, you will have a clear understanding of it. Any how, try to answer the following question before you proceed to the next topic.

What are the employment relationships that would fall under the ambit of employment law, but outside of labor law? Give some examples of such relationships and the reasons for excluding them on the space provided below.

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1.2 The Raison Detore and Historical Background of Labour Law

Under this section of the first chapter of this material, the primary factors that triggered states to come up with domestic labour laws, and the long journeys and historical incidents they went through up to that stage will be examined. Plus to that, a detailed discussion of the primary causes and Such understanding of the general background of this area of law is believed to have a paramount importance in order to appreciate the policy justifications behind our labour law and these would in turn render us with an invaluable tool when ever we try to evaluate the legal provisions thereof.

As it is clearly pointed out at the commencement of the first section of this chapter, laws are there to govern social relationships, and the purpose behind labour laws is not a different one. The primary question that could be raised at this juncture would therefore, be as to who these stake holders are whenever we talk about employment contracts. Unlike so many other relationships that are established by the conclusion of a valid contract such as contracts of sale, agency etc where states role is limited to the

enforcement of the provisions of the contract, we observe states significant concern at various stage in employment relationships. The three important stakeholders in employment relationships are therefore the state and in fact the employer and the employee.

During the conclusion of the contract, the employee who is going to render his physical or intellectual service during their terms of engagement comes with his/her labour and the employer who seeks such service comes with his money which, obviously, is going to be paid for the employee in the form of wage or salary. This, in other words, means on the supply side of such labour market one observes labour and it is capital (income) that stands on the demand side.

Thus, for employment relationship to exist free labour, labour which is entitled to enter into a free contractual agreement, should be there. This makes our discussions of the history of employment relationships and the necessary regulatory machinery for such relationships mandatory because employment law revolves around the evolution of free labour. Besides, for labour law is a law of industrial relations our understanding of the history enables us to appreciate the evolution of the industries themselves. The following

few paragraphs would therefore be devoted to the closer look at the emergence of free labour and industries.

In history, there were different social relationships in the past: the slave owning society, feudalism, capitalism and the socialist society.

1.2.1 The slave owing society

In this society we have slaves and slave owners. Their relationship was governed by the system in such a manner that slaves are slaves by status and slave owners are given a higher rank. As slaves are deemed as properties, in fact as speaking properties, of their masters one can't think of free labour in that society. Slaves were not even subjects of the law as they were not deemed as persons in the eyes of the law. They were rather objects of transitions as any kind of item such as cattle, and were subjects of sale exchange and rent.

Since there was no free labour that bargains with capital, one can't imagine employment relations to exist in that society. Therefore, in the slave owning society there was no

employment law and even no need of having such a law, as there is nothing to be regulated by it.

1.2.2. Feudalism

During the feudalist society instead of owning human beings, men started to own land. As the slave is no more subject to transactions of sale or exchange, one can say that a qualitative change has occurred during this society. Since the slave had upgraded its status to be the drams of a “person; he became the subject of the law as a tenant, and the principal actors on the scene became the tenant and his land-lord.

Though there was a relatively better situation in terms of the livelihood of the tenant, unfortunately, he was not lucky enough to decide on his labour; as the system obliges him to render various services either for his land lord or for the various state and religious institutions. For example,

- The tenant was supposed to deliver part of his produce to the land lord,
- He was also obliged to be directly engaged in some domestic activities of the tenant. For instance the tenant may be ordered to construct the fences of his lord or to serve as a shepherded;
- If and whenever a need arises to wage war, it was the tenant that is obliged to shoulder such military duties,
- Beyond all these, the tenant was duty bound to give part of his produce to the church.

In the then society, let alone freely bargaining with his labour, the tenant was not in a position even to choose his master. As a resultant effect of all these it was unthinkable to get an employment relationship that is an outcome of freedom of contract. Hence, there was no employment law.

Dear distance learner, are you clear with the foregoing discussions? Good. If you think that you have caught the core ideas of our discussion, attempt the following self assessment question.

Activity: - 1. What are the main features that assimilate feudalism to the slave owning society?

2. Which advancements make the living conditions of the tenant better and as compared to those of the slaves?

3. What are the primary factors that were attributable to absence of employment relations and employment laws in these societies?

1.2.3. Capitalism

Under the womb of feudalism, capitalism seeds started to grow. The capitalism ideology which is mainly characterized by liberal democracy principles has recognized so many principles for its fellow citizens, to mention, freedom of expression, freedom of movement, freedom of contract principles the market economy principles and so on.

As a corollary to such developments there happened transformation in various sectors of the economy which started to become profit making as opposed to the previous ones that were characterized by making for subsistence consumption and very minimal profit.

In the agricultural sector there was mechanization of farming which required vast land. This land was obtained by evicting the peasants (tenants) from their lands; and these people once evicted remained with nothing but their labour.

In the manufacturing sector, as an outcome of the then upraised free market economy dogma as every one can reasonably expect, there were losers and winners of the competition among handicrafts. Just like the situations that happened to their peasant counterparts those who could not survive the change were left only with their inborn asset, i.e. their labour.

The scenario in the business sector was not a different one. Business men who end up as losers of the unregulated race had lost their capital and remained with their labour.

Dear learner, do you see how free labour and industries which are the sole inputs of employment relations evolved?

Having these points in mind I guess you are becoming eager to know how these inputs had come together and started to undertake contractual engagements.

Therefore, in the upcoming discussions we will talk about those factors that triggered capital owners and laborers to negotiate and enter in to contracts of employment.

Though agriculture took the mechanized form, we can't think of it to be hundred percent mechanized, hence, on the part of capital there was still a need to employ labour. In the manufacturing and business sectors on the other hand when capital owners begun to expand their undertakings and their business enterprises by the accumulation of profits, family members labour was found to be inadequate to respond to the change. There also arose a need to employ extra labour.

Besides such need for employment of extra labour, as it was already said previously, we had a large free labor which had no option but to sell its labor. So, capital and labour became keen to bargain and establish employment relationships. Employment no longer is a status as in the slave owning and feudal society. It's rather a contract. The employee can choose his employer and successfully terminate his contract since he has something that can move with him freely i.e. labour.

As a capitalist principle, under this relationship the working conditions (see its meaning from Article -2(6) of the proclamation) were to be freely agreed in the contact. These include:

- The wage of labour,
- Working hours per day,
- Duration of employment and
- Safe working conditions.

Besides, every aspect of their relation is to be established based on their agreement in the contract. For such labour and capital mixture is an economic affair, the state can't interfere in such relationship. It is there only to enforce the contract, if and when a dispute arises.

Though this was the then assumption, freedom of contract principle has brought so many problems. During that period, capital owners were few in number compared to the huge number of labour. Labour had as its aim eating for today, it was also bargaining individually. All these gave labour no option to bargain, and made it weak in this bargaining. In effect, labour was made to freely adhere to the terms the capital owner stipulates in the contract. The employer usually proposes for the worker for minimum wage, for the employment contract to last so long as they agree, for longer hours per day and for voluntary assumption of employment risk i.e. whenever the employee sustains

employment injury the possible risk to be considered as had been foreseen by the employee. The employee agrees to these terms with no hesitation.

Ultimately, low wage started to subject the employee to longer working hours per day to earn more, and this led the employee to over exhaustion and finally to employment injury. But, the employee had no remedy even to get benefits for the injury he sustains at work due to his prior agreement for voluntary assumption of risk. There was also a severe problem with regard employment security since termination by will is there in their agreement.

The cumulative effect of all these was demonstrated by the excessive accumulation of wealth of the capital owner/ employer at the expense of the employee. The wage that should have been paid to the employee went to capital; and lack of governing employment injury also played its own role in the boom of the wealth of the capital owner. This brought polarization of living standard: few become richer and richer and the majority becomes poorer and poorer. The resultant effect of freedom of contract which led the employee to lower living and working conditions triggered anger and dissatisfaction on the part of the working class.

Employees then started to express their anger and dissatisfaction in various ways, such as by destroying the means of production and showing down production. But, these ways of struggle was not effective as such, since it was held in a disorganized manner. Instead, as it was easily detectable, it led the employees to employment insecurity.

However, employees did not yet frustrate. They took lessons from their mistakes and continued their struggle by raising economic questions: increase in wage, limitation is working hours per day, employment security and safely working conditions.

Dear learner, bear in mind, these demands are directly the reflections of the outcomes of the problems due to freedom of contract. These were the relatively organized demands of the working class. In some countries they managed to get some concessions. For instance, regarding the demand for better wage, capital accepted some margin of increment of wage. But, the increase was included in the price of every commodity. In effect, the increase in wage of the employees didn’t change the working nor living condition of the employees. So, no much development in this respect; net outcome became almost zero if not negative.

1.2.4 Marxist Ideology

Following the working classes anger and dissatisfaction, which culminated in the demand for betterment in terms of employment conditions as well as in the life of the employees, there came out the Marxist Ideology which went further and came up with an extreme thought. This ideology agitated the working class not only for better life conditions but for the seizure of power to the proletariat. Accordingly, economic reforms are only provisional to deal away with such problems once and for all. Hence, economic measures, according to this thought are only means to the mandatory end of the worker's seizure of political power.

Tuned by this assumption, struggles were held in various parts of the world especially in Eastern Europe, though no satisfactory results were obtained until 1917 G.C. In this regard, the October 1917 Russian Revolution was the successful one to be taken as a turning point in the history of the evolution of employment laws.

This revolution declared the dictatorship of the proletariat in Russia. So as to protect the interests of the working class, so many radical measures were taken: the most important transformation being the nationalization of the means of production. Capital, they said, is

an accumulation of unpaid wage that should have gone to the to the employee; so decided all the means of production to be handed to the working class who is the legitimate owner of “capital”, hence, nationalization.

This unexpected occurrence in Russia posed fear and frustration in the west. They thought their respective workers would take a lesson from outside and revolt against the system. Therefore, they had to look for a possible solution to avert such likely disaster. As a way-out, they conspired to take two measures of primary and secondary importance; if possible to crush the Russian Revolution; if not at least to hold it there within the territory of Russia. Later on, as the west come to know that the first solution is infeasible, they preferred to adhere to the alternative containment policy and to resolve the problem through various measures. These measures, which were aiming at containing the revolution as it is and where it is, as one can reasonably expect, were measures that tried to give a better protections to the employees so that the workers do not at least raise the issue of assumption of political power.

Hence, immediately after two years of the Russian Revolution in 1919 the International Labour Organization (ILO) was founded, and begun to take care through its slogan of “Distributing Justice in Equitable Manner”. Formerly, share of capital was lions share and

that of labour was less. So to distributing capital the way was giving concessions, which could be achieved by the intervention of the state in the contractual terms of the employer and the employee.

Upon its establishment the ILO took the primary mission of providing guidelines that member states employ as inputs for measures they take in order to avert the problem of the free market economy brought. Don’t forget! In the labour market which is an interaction of labour and capital we had no equal market powers i.e. demand and supply factors that determine the different working conditions such as level of wage. But for such market to operate well we should have an equal bargaining power on the supply and demand sides of the transaction. Under this market we were not fortunate to observe labour appropriately dealing, with capital. And this ways an indicator of the fact that the free market principle was not operating well. This triggered a need for the intervention of state in the contract between the employer and the employee.

Accordingly, ILO member states came to enact separate laws that deal with employment relations so as to limit the freedom of the parties in view of industrial peace and welfare by backing the weaker party i.e Labour. These domestic laws called labour laws incorporated minimum working conditions that the employee must be entitled to, on the

basis of ILOs guidelines that are usually developed in the form of conventions and recommendations. So, it was after all these ups and downs that labour law emerged.

Dear distance learner, have you clearly understood the forgoing discussion?
Well, if you feel that you have grasped the core points regarding the evolution of labour law, let me pose you one question that may enable you summarize those discussions.
Is labor law a fruit of the workers' struggle, or is it simply a law that is given by the blessing of the rulers of the various ILO member states?

1.3 The Emergence and Development of Employment Law in Ethiopia

Dear learner, in the - - - section of this chapter, we have seen how the labour law attained its present features at the international arena. From that discussion, you can understand that labour law has developed with the development of industries and free labour. How about in Ethiopia? Would the emergence and development of labour law be different? In this particular section, you are going to see how labour law has evolved to acquire its present picture in Ethiopia.

In Ethiopia around 1923, there was an attempt to minimize slavery and the proclamation issued to this effect gave all slaves who wished to be free the right to get emancipated by asserting their freedoms before a judge. This proclamation has some how positively contributed to labour relations. But, as it was not a determined one to emancipate all slaves but only those who need to be so, it was not that significant in its contribution to the emergence of free labour. Again, freedom from slavery was not a right to be acquired automatically, since there was a need to ask it from a government forum.

Before 1936, we had no industries as such to demand labour in Ethiopia. But, after the Italian occupation (1936-1941) despite all the insecurities we faced, there were some starts to establish industries and capitalist nations were started to be seen.

In 1941, after the coming to an end of the foreign occupation, the Emperor came up with a proclamation that clearly and wholly abolished slavery without any limitations. This had a huge impact on labour relations. Not only did we get the concept of it, and industries from the occupation, we had also free labour which could be employed.

Though we had labour relations of huge magnitude starting from this period a remarkable development of labour law in Ethiopia came only after the 1955 revised constitution. This

constitution had recognized and guaranteed various rights and freedoms of the citizens. For the first time in the history of Ethiopia, the constitution guaranteed freedom of associations and hence recognized the right to form associations.

> *Article 47:- Every Ethiopian subject has the right to engage in any occupation and to that end form an association.*

This constitution could be regarded as a turning point for labour relations, since it allowed workers to collectively pursue their rights which were considered as conspiracy (a criminal act) before then. However, there was no any detailed law or procedure as to how to benefit out of such principles and hence, the right remained unimplemented. For examples, there were no rules regulating the formation of trade unions, where to go for legalization and registration etc.

The issuance of the 1960 Civil Code of the Empire of Ethiopia opened the door for the implementation of this constitutional right by answering some of these questions. With respect to:

- The formation up to registration of associations see Articles 400 – 482,

- The minimum working conditions and standards of employment when one can take a look at Arts 2512-2609.

However, the Code has left unresolved regarding some of the crucial uncertainties in the employment relationships. For instance, the Code kept silent on how employees can collectively bargain with their employers. In other words, the Code does not provide for the procedures by which trade unions could exercise the primary objective they are standing for, which is collective bargaining. Generally, the Civil Code was employing on individual labour relations and it had no provision that deals with the collection aspects of labour relations?

Because of some of the uncertainties that were left by the Civil Code on individual as well as collective relations in the 1960s there were so many strikes in industries throughout the country. Under this emergency situation, the Emperor passed the 1962 decree on labour relations, which later became a proclamation, Proc No. 210/1963, in 1963. This proclamation provided provisions on different subjects, such as:

- The legalization and registration of trade unions and employers' associations.

With respect to individual labour relations, the Civil Code has invented various regulatory schemes on the most important labour conditions. The law has provided for limited working hours per day. As a result overtime payment was introduced. In fact, as the law was aimed at providing limitation on working hours simply imposing overtime payment was not a strict limitation as such. As regards employment security, the principle of "employment at will" gave its place to "termination with good-cause". On the question of employment injury, employers' liability was introduced as opposed to the prevailing "voluntary assumption of risk principle".

When we see the developments under proclamation no. 210/63 in light of the 1960's Civil Code provisions on employment relations, we can sort out that from this time on – labour law began to have its own independence. This is because it becomes free from its partners to the Civil law and has a also been subject of specialized dispute settlement mechanisms outside of ordinary courts.

Following the 1974 Revolution of Ethiopia, Proclamation No. 64/1975 was issued. It was a law issued with socialist orientation. The economic policy of the state was a commanded one; and the state started to nationalize the means of production for that reason. In the

economic affairs the state appeared as a major if not a single actor; because owners of capital were treated as enemies of the Revolution.

Due to these basic reasons the tendency of the Proclamation was that it gives undue emphasis for the contribution of labour to the economy. The assumption then was workers solely are sources of fortune instead of capital plus labour. Hence, the law tends to excessively protect labour at the expense of the employer.

1.4. Sources of labour Law

These are legal instruments that would have impact on regulating labour relations, and /or in resolving labour disputes of and when the latter arise. Dear learner, can you give some examples of legal instruments of this kind? Try to address this question in the space provided below before directly heading to our next discussion.

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The categorization of laws into two broader classes as private and public laws that you have learned in your first year class under the introduction to law course could also be analogized with the classification of sources of labour law. Hence, we have public acts (instruments) and private acts (instruments) that could be employed for the regulation of labour relations. However, by public acts, for the purpose we are referring to those legal instruments which are outcomes of public deliberation; the public being represented by the law maker. Private acts, on the other hand are legal instruments which evolve from both or either of the parties to the contract of employment; and we see no or minimum state intervention during the birth of such instruments.

1.4.1. Public Acts as sources of law

Public acts themselves could be further dichotomized as international public acts and municipal (national) public acts.

i. International public instruments – as their naming implies these are laws where in states' participation is involved at their stages of enactment. They are public because representatives of states i.e. the public are involved and are ratified by

public organs. The fact to make them internationals is the involvement of many states during the discussions that are held to give birth to such documents. Such international acts are in majority of cases the International Labour Organization's (ILO) instruments, which are conventions and' recommendations.

The ILO as a specialized agency of the United Nations regularly holds conferences and comes up with legal instruments, some of which with a binding effect upon member states. Unlike the sole governments' participation that is observed in the remaining special agencies of the UN under the ILO we have a unique representation: tripartite kind of representation.

Dear distance learner, from the important points that we have raised under the foregoing sections, can you guess as to who these three representatives could be? Well, the three important stake holders in labour relations; governments, trade unions, and employers associations are involved in the conference.

As per the ILO structure, conventions are binding on member states as soon as they are ratified. And, hence, they are called hard laws. Recommendations, on the other hand, are soft laws with no binding effect as they are mere norms of aspirations. Until adopted by

the ILO conference the two are of same status. Two third majority votes are required for their adoption.

Once adopted, if the legal instrument is a convention, the Director General of the ILO will refer it to member states; and ratification depending on the constitutional order of a state (for our case by the parliament) would automatically make it binding. This means, even if a delegate gives a positive vote during adoption, the ratifying organ may reject it. The material time is, there fore, the time of ratification not that of adoption. For recommendations, after adoption the certified copy is sent to member states by the director General for their consideration and to make use of it as guide line in their domestic legislations and not to ratify. But, recommendation is not useless as such; as tripartite delegation is there the party with interest would exert pressure on the government to domesticate the principles of the recommendation.

ii. National / Municipal Public Acts: These are Legal instrument that are handed down by the sovereign power of a certain state. These include constitution, proclamation, regulations, directives etc.

a. FDRE Constitution: At. 42 of the constitution which recognize the Right to Association, the right to strike, non-discrimination on employment and equal pay for female workers and minimum labour conditions has direct impact of labour relations.

Article 42

“ - - - “

b. Labour Proclamation No. 377/2003: is another source of law that provides for detailed provisions on the constitutional principles including those given under Art. 42 of the FDRE constitution. As the enactment of labour of laws is a federal competence pursuant to Art. 55(3)of the FDRE constitution, we don’t have regional labour laws. In fact, once labour issues these days are international issues, taking it down to the regional level would be absurd. Hence, the position adopted by our constitution seems valid. Moreover, because labour law has a huge impact on investment and to have a unified economic unity which the constitution is aiming at, having a horizontally applied labour law has still an invaluable purpose even for economic development.

Article 55 ( )

“ - - - “

c. Directives of the Ministry of Labour and Social Affairs- These directives are laws which are outlined by the executive staff for the proper implementation of the labour proclamation. The ministry is empowered to do so by Art. 170 of the labour proclamation.

Dear distance learner, have you grasped the points that were raised in the foregoing discussion? If you have encountered any problems please go back and try to revise the major issues.

Activity: Compare and Contrast international public acts and municipal public acts. You may jot down your points on the space provided below.

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1.4.2 Private Instruments as Sources of Law

These are to be made by private parties, i.e. non-state actors. Those private actors in the relationship are the employer and the workers individually or collectively. These instruments would therefore include contracts of employment, collective agreements and work rules.

I. Contracts of Employment:

For a contract of employment is a special contract, all the validly requirements that are enshrined under the Civil Code provisions must be fulfilled. Hence unless and otherwise the labour proclamation dictates its own special requirements for the validity of an employment contract, those issues of capacity, consent, object and form are to be addressed by the legal provisions on the law of obligation. The most pertinent special provisions, in addition to those which we are going to raise in the up coming discussions, and which have impact on the formation of a contract of employment are those that are provided under the second- Par, First Chapter of the Labour Proclamation beginning from Art-4 up to Art. 8.

Well, once an employment contract is formed in compliance with the requirements of the land what makes it a source of law or a law as such? As it is clearly provided under art. 1731 of the Civil Code of Ethiopia, once the contract is entered freely it serves as a law and becomes binding upon the contractant, though it originates from private parties. The state's role would therefore, be to give recognition and to implement if need be.

II. Collective Agreements:

Collective agreement is an agreement (contract) between workers collectively through their trade union and their employers. It is the end result of collective bargaining process. Collective bargaining is a process of negotiation between trade union and an employer on matters related to the employment relationships. When this process ends with agreement, it is called collective agreement. Once the collective agreement is concluded, it is binding upon both parties, and hence becomes a source of labour law.

Activity: Identify the features that assimilate collective agreements to employment contracts, and point out the distinguishing attributes of the two.

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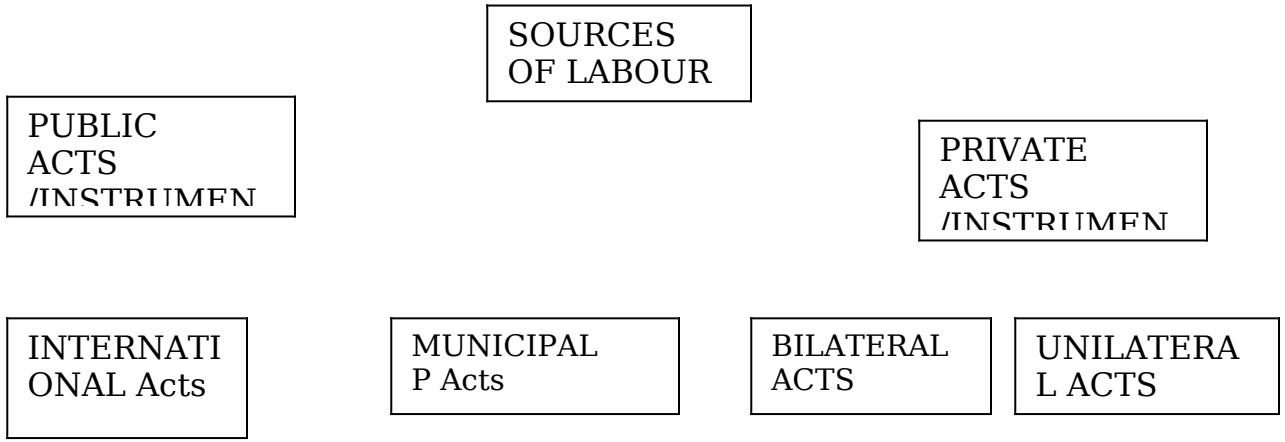
III. Work Rules:

These are instruments that usually emanate from the employer to manage the undertaking, like safety precautions, and regulatory rules to attain disciple at work place. Art. 2(5) of the labour proclamation defines work rules as

> "work rules" means, subject to the provisions of this proclamation and other relevant laws, an internal rules which govern working hours, rest period, payment of wages and the method's of measuring work done, maintenance of safety and the prevention of accidents, disciplinary measures and its implementation as well as other conditions of work"

They are private because they emanate from the employer and are sources of law as the proclamation obliges the worker to observe the provisions of the work rules land as they are consistent with the proclamation and other relevant laws. (Art 2(5) cum Art. 13(7) lab. Procl.) dear distance learner, from the accontrario reading of Article 13(7) of the

proclamation you may conclude that the worker is not with the duty to be governed by work rule's that are in contradiction with the labour proclamation or other relevant laws such as the constitution. But, there are controversies with this regard in so many foreign predictions and probable in our country as well. So, I invite you to read the part of this material that deal with this issue on page 88.



Contract of Employment

work

Collective rules

agreements

ILO ILO

Conventions recommendations constitution

Labour Procl.

No. 377/2003 Directives of

The MOLSA

- . Summary of the classification of sources of labour law.

Dear distance learner, so far we have been dealing with the major legal instruments that could be employed as sources of labor law. Regarding municipal public as well as private acts your back ground knowledge of the courses Constitutional Law, Introduction to Law, and Law of Contracts is of a great help to understand the nature of such sources of labor law. But for the sake of having a better understanding on sources of international labor law to which you are not familiar, you can read the next detailed note on the area.

1.4.3 The Sources of International Labor Law

The Sources of international labor law are mainly to be found in the Conventions and Recommendations adopted by the ILO, various instruments adopted by other organizations – such as the United Nations or several regional organizations – also deal with labor matters either as such or from the point of view of human rights. These various, instruments differ as regards their legal character, some, such as ILO Conventions, the UN Covenants on human rights, the European Social Charter, etc. are designed to create legal obligations for the states which ratify them /and the supra – national regulations of the European committees have even an immediate effect on member countries/ Other declarations of principle, recommendations etc – have no mandatory force but are essentially guides to national action. The distinction is, however, not absolute, as Conventions produce a substantial part of their practical effect as standard defining as well as obligation – creating instruments. Over the years an important case – law has also been progressively established by the bodies appointed to supervise the application of these standards. Finally, a very important number of bilateral treaties have been concluded to regulate the admission and conditions of nationals of each contracting country in the territory of the others.

1. ILO Sources

ILO Sources of international labor law can be found in the constitution itself of the Organization, in the numerous Conventions and Recommendations adopted by it, and in a number of less formal instruments. Apart from these sources, reference should be made to the interpretation of the ILO constitution and conventions and to what can be described as case – law. A final category comprises the instruments adopted by special Conferences convened by the ILO.

1.1 The Constitution of the ILO

While the Constitution of the ILO contains mainly provisions relating to the organs and the functioning of the Organization, it also lays down a number of general principles which have come to be regarded in certain respects as a direct source of law. Such principles are contained in the preamble to the constitution and in the declaration concerning the aims and purposes of the organization, adopted by the Conference in Philadelphia in 1944 and incorporated in the ILO Constitution in 1946. ILO bodies have frequently drawn legal consequences from them, particularly in the field of freedom of association in the field of racial discrimination /Apartheid/ and States Members of the ILO have been regarded as bound to some extent by these Constitutional principles.

1.2 Conventions and Recommendations

The ILO Conventions and Recommendations are, by far, the main source of international labor law this is due to their number /from 1919 to 1994, 175 Conventions and 182 Recommendations were adopted/ but also to their detailed character and the increasingly broad field which they cover.

Nature and Characteristics

International labor Conventions and Recommendations differ from the point of view of their legal character: Conventions are instruments designed to create international obligations from the States which ratify them, while Recommendations are not designed to create obligations but to provide guidelines for government action.

More particularly international labor Conventions have a number of specific features, which can be grouped under three main ideas. Firstly, they are adopted in an institutional framework. Thus the adoption of Conventions does not follow the type of diplomatic

negotiation which is usual in the case of treaties, but it is prepared by discussions in an assembly which has many points in common with parliamentary assemblies. This also partly explains the fact that unanimity is not necessary for the adoption of Conventions. The institutional character of these instruments also explains the rules relating to their signature and to the deposit of ratifications. For the same reason, the interpretation of conventions can not be given by the states parties to them but can be given only by the International court of Justice. Similarly, the revision of a Convention cannot be decided by the States parties to it, but by the General Conference, which is the legislative body of the Organization.

A second characteristic is that, as a consequence of the tripartite structure of the ILO the International Labor Conference, which adopts Conventions and Recommendations, is not constituted by representatives of governments only, but also of representatives of employers and workers, each delegate being entitled to vote individually. This is one of the reasons why ratification of a Convention cannot be made subject to reservations.

Thirdly, the desire to make Conventions particularly effective explains another service of characteristics, such as the rules – which were innovations in international law – which a two – thirds majority is sufficient for the adoption of Conventions and Recommendations

and that governments should submit conventions and recommendations to their competent authorities, i.e. as a rule to their parliaments. The obligation of states to supply reports- when requested to do so by the ILO – on Conventions which they have not ratified, as well as on Recommendations, the effects of ratification as regards the application of ratified Conventions to non-metropolitan territories /which went further than the classical colonial clause/ the practice of new Member States to confirm the obligations previously accepted on their behalf by the state responsible for their international relations, the provision of Article 1, paragraph 5 of the ILO Constitution according to which the withdrawal of a state from the ILO does not affect the validity of the obligations resulting from a ratified Convention, and the setting up, by specific provisions of the Constitution and by a series of decisions which followed, of a sophisticated system of supervision.

The various special features of international labor Conventions gave rise, in the early years of the introduction of this type of instrument, to a famous theoretical discussion about the real nature of these Conventions. Georges Scelle, in particular, maintained ILO Conventions were not of a contractual type, but amounted, in a way, to international laws, and that the international labor conference which adopted them was an international legislative body. According to this view convention were legislative instruments, requiring

only a conditional act namely ratification which could be analyzed as being simply an accession to pre –exist ting act –to acquire the force of an internal law. There is a large amount of truth in the views of Georges scelle. In fact international labor conventions represent a compromise between the notions of contract-making treaties and law –making treaties.

Thus, international labor convention have preserved certain features of tradition treaties despite the more radical proposals submitted in 1919 when the system was established by the peace conference a convention is binding on a state only if it has been ratified by it. Similarly the influence of the older notion of multilateral treaties can be found in the rule according to which the entry in to force of a convention requires a minimum number of ratifications, though usually not more than two. The same can be said about the rule established after detailed theoretical discussions around 1930 about the legal effects of the revision of international labor conventions: according to that rule when a convention is revised the former text continues to be binding on the states which ratified it in its original form until they have ratified it in its revised form.

The international labor code

While the international labor Conventions and Recommendations which were adopted over the years are separate legal instruments, they constitute, from a certain point of view, a comprehensive whole which has often been described as the International Labor Code. The term should not be taken literally, as the various Conventions of which the Code is composed may give rise to independent international obligations and as its content is in constant development and revision. It is, however, justified by the fact that the instruments which constitute the Code form a coherent whole and are, as has been said all cast to a larger extent, in the same mould, although the technique in drafting conventions has undergone considerable change over the years. The term International Labor Code has also been give to a methodical and systematic presentation of international labor standards compiled by the International Labor Office.

The procedure for the Adoption of conventions and Recommendations

A. The Inclusion of Items on the Agenda of the Conference

The decision to include the adoption of a Convention or a Recommendation as an item on the agenda of the International Labor Conference is taken, as a rule, by the Governing Body of the ILO in the light of proposals submitted by the Director – General of the International Lab our Office. In making such proposals the Director – General places

before the Governing Body a brief survey of the legislation in force in the various countries and of the main methods of its application, as regards the various questions among which a choice has to be made. The Conference may also decide itself by a majority of two – thirds to place an item on the agenda of the next session. In settling the agenda of the Conference, the Governing Body has also to consider suggestions made by governments or by representative organizations of employers and workers or by any public international organization. In Past years, some important Conventions were adopted as a result of requests addressed to the ILO by the Economic and Social Council of the United Nations. During the review of ILO standard in 1984 – 1987, the Working party appointed by the Governing Body felt that the following considerations, without being exhaustive, could provide useful guidance in reaching a decision concerning the agenda of the Conference 1. the number of workers affected 2. the importance of the subject for all parties of the world 3. the importance of the subject for workers at lower economic levels, as well as for unorganized and unprotected workers 4.the relative recency of existing instrument on the subject proposed 5. the degree of severity of the problem 6. the extent to which the topic would advance the basic rights of workers. It was also stressed that the scope of the new instrument should cover as many activities as possible and that standards relating to a particular sector or occupational category should be envisaged only in special cases. The governing body approved a list of possible subjects

for new standards superseding the one which had been adopted in the previous review of standards. In the first of these cases, the Council acted following a request from the World Federation of Trade Unions and the American Federation of labor. The government of any member state may object to the inclusion of any item in the agenda of the Conference, and the Conference itself must then decide, by a two – thirds majority, whether the item shall remain on the agenda.

In some cases, especially when questions are of a technical nature, the Governing Body refers a matter to a preparatory technical Conference, which normally is of tripartite composition. In the case of maritime questions, they are considered in the first place by a joint Maritime Commission /comprising representatives of ship-owners and seafarers/ and subsequently by a preparatory technical Conference /recently replaced by a tripartite meeting on standards/.

B. The Discussion and Adoption by the Conference

The procedure followed for the consideration of a draft Convention or Recommendation by the Conference is usually that described as double discussion: that the question is discussed at two successive annual sessions of the Conference. Under the

existing rules the International Lab our Office first prepares a preliminary report setting out the law and practice in the different countries on the question concerned, together with a questionnaire which is intended to obtain the views of governments as to the international standards which they regard as practicable or desirable. On the basis of the replies received from governments and the most representative employers and workers organizations at national level, the ILO draws a further report indicating which are the principal questions which appear to require consideration by the Conference. This report serves as a basis for the first discussion of the question by the Conference.

During the first discussion, the question is referred to a special technical committee appointed by the Conference for each of the items on items on its agenda and constituted on a tripartite basis. The Committee, and then the conference, decides whether the matter is suitable to form the subject of a convention or recommendation and adopt such conclusions (which in fact are first draft of the regulations). Finally, the conference decides whether the question shall be included in the agenda of its first session.

On the basis of this first discussion the international labor office then prepares a proposed draft of a convention or recommendation which it forwards to governments for their observations. In light of such observations a final report incorporating any necessary amendment of the texts is drawn up and sent to governments three months before the

session of the conference at which the second discussion is to be held. The question is then again considered in the first place by a technical committee and the texts adopted by the committee are submitted to the full conference which considers them article by article before deciding whether to adopt them as a whole. If approved the texts are referred to the drafting committee of the conference which prepares a final text to be submitted to the conference for final adoption.

In cases of special urgency or where other special circumstances exist the governing body may by a majority of three –fifths decide to refer a question to the conference for a single discussion. This procedure is simpler than the double discussion procedure, but it still entails the preparation of reports, questionnaires and draft texts by the international labor office and consultation of governments before the conference discussion. It is used but rarely and usually in the case of items that have already been considered by a preparatory technical conference

Whatever procedure is followed, a majority of two –thirds of the votes of the delegates attending the conference (governments, employers and workers) is required for the adoption of a convention or recommendation. When a convention or recommendation has been adopted by the conference two copies are singed by the president of the conference and the conference tow copies are singed by the president of the conference and by the director general of the ILO. Because of the institutional and tripartite structure of the ILO,

this formality replaces the practice of signature by the states which is usual in the case of traditional diplomatic treaties

The authentic texts of conventions and recommendations are English and French versions. An official text is established at the same time in Spanish a working language of the ILO. Arabic, Chinese and Russian translation is also prepared by the ILO, and German texts are established jointly by the German speaking state members of the organization, in co-operation with the ILO at translation conferences held after each session of the conference. In a number of other countries too, ILO conventions have been translated in to national language.

A Procedure similar to that for the adoption of convention and recommendations is flowed in the case of revision of these instruments. The government body decides whether it is desirable to place the question of the revision of a convention or recommendation in whole or in part on the agenda of the conference. It does on the basis of information supplied by the international labor office and following consultation with the governments. The governing body has to define exactly the question or questions which it places on the agenda of the conference in view of the partial or total revision of the instrument under consideration. The office then submits to the conference draft amendments drawn up in accordance with governing body. The examination of the draft revision by the conference follows a procedure analogous to that of the second discussion the case of double

discussion procedure. In 1965, the government body also adopted a simplified procedure for the technical revision of certain strictly limited provisions of a convention, but this procedure has not yet been used instead, a protocol to a convention fulfills similar purposes. This instrument was introduced in 1982.

The problems encountered in framing conventions and recommendation

In framing conventions and recommendations various problems of substance or form are encountered. They relate in particular to the diversity of national conditions for which the instrument should cater, which in turn raises the question as to whether universal standards are appropriate, what should be the level of the standards and what flexibility clauses should be incorporated in the conventions. They relate to the nature of the rights that may be the subject of international standard, to the choice between the form of a convention or a recommendation and to the adjustment of instruments to change, which raises the question of their revision.

The Diversity of National Conditions

Since international labor conventions and the recommendation are intended to produce effects and in the case of the former to create legal obligations in countries with very different economic social and political conditions, as well as different constitutional and

legal systems the diversity of the conditions prevailing in the world raise a number of questions.

Universal or regional standards

The first question would be whether it would not be more appropriate to formulate regional rather than universal standards, since, in spite of sometimes great difference which are to be found between more or less developed countries within the same region, the great regions of the world are, on the whole, more homogeneous than the world community taken as a whole. The idea of regional action in this field has also been encouraged by the very existence of regional organizations, some of which have endeavored, by such action, to emphasize the identity of the region concerned and to develop the organization itself. Regional standards undoubtedly have been very useful by supplementing universal standards or dealing with matters of specific interest for the region under consideration /as in the case of the Rhine boatmen or workers occupied in international transport in Europe/. However regional standards cannot replace universal standards altogether, as the coexistence of different sets of regional standards would tend to accentuate rather than to reduce existing discrepancies between the different parts of the world. It would also eliminate the spur for emulation and the factor of harmonization provided by universal standards. In the case of coexistence or regional with universal

standards, the danger would reside in their overlapping, as a multiplicity of standards would lead to divergences between them and to both the universal and the regional instruments being discredited. Reference is often made to the meeting in 1972 of the African Advisory Committee of the ILO, in the course of which it was underlined that any attempt to adopt standards on a regional basis would be a backward step and would produce anomalies and tensions between different regions and that sub-standards for sub-humans had no place in the ILO. When, in 1976, the Governing Body of the ILO considered the request of a wide in-depth review of international labor standards it concluded that Conventions should remain universal in character and that the special needs of countries should be taken into account through appropriate provisions in these instruments. The ILO has therefore approached the matter as one of framing universal standards capable of being applied in differing circumstances.

THE LEVEL OF THE STANDARDS

As Conventions and Recommendations are generally directed to countries with very different economic, social and political conditions, as well as different Constitutional and legal systems, they raise the problem of the appropriate level of the standards which they should set. The Constitution of the ILO already contained a general indication to that

effect when it provided that: in framing any Convention or Recommendation of general application, the Conference shall have due regard to those countries in which climate conditions, the imperfect development of industrial organization or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries. Guidelines were also provided in 1946 by a Conference Delegation on constitutional questions which pointed out that the international standard should not be an obviously impracticable one, or one which can be attained only by a very limited number of countries, as it will not then serve as an immediate target for national action in most countries, though it may come to be regarded as a distant or ultimate objective. On the other hand, it was stated, a standard which represents no substantial advance upon average existing practice is also of very limited utility, as the purpose of standards in not simply to harmonize legislation, but primarily to promote generalized progress. In 1963, the Director – General of the ILO also stressed, in the same connection, that the terms of Convention should, unless they deal exclusively with a simple issue of fundamental principle and contain no detail, be sufficiently flexible in character to be susceptible of application under widely varying national conditions that a convention should not contain rigid requirements in regard to matters in respect of which national practice may reasonably vary widely: in should not enter into too much administrative detail but that

this general approach should not, of course, be carried to the point at which a Convention ceases to be worth having ……. A measure of flexibility the result of which is that a large proportion of the Members of the Organization are not called upon to do more than they are already doing may deprive an international standard of much of its value as a stimulus to further action and achievement. The problem is not only to decide, in each case, what the appropriate level of standards should be it is, more generally, to avoid that the standard may concern only a more or less limited group of countries because of its level, whatever it may be. The aim therefore has increasingly been to frame standards which will be relevant to the greatest number of countries. To this end, various types of flexibility clauses have been devised and included in several Conventions.

THE FLEXIBILITY CLASUES

Some of the earlier Conventions, in particular four of the Conventions adopted in 1919, specified that certain named countries, because of the state of their development, might observe a standard lower than the general standard. This type of clause was soon abandoned and recourse was had to more refined and more diversified clauses of a general character. They can be grouped under various categories.

a) Options allowed to States as regards Obligations Undertaken

Certain types of flexibility clauses give states the possibility of choosing, at the time of ratification, by means of a formal declaration, the extent of the obligations which they decide to undertake. This is the case for some Conventions consisting of several parts of which ratifying states can accept only one or a minimum number. Naturally, States which make use of such a possibly may, at a later stage, extend their acceptance to other parts of the Convention, and this

Type of clause thus permits the progressive application of the Convention as a whole. A well – known illustration of this formula been the Social Security /Minimum Standards/ Convention, 1952 /No. 102/ which comprises nine parts, at least three of which must be accepted on ratification. A slightly different formula which is used in certain Conventions allows certain parts or articles of them or annexes to them to be excluded from the ratification. In a different case, a Convention comprises two parts, the one involving strict obligations and the other less strict ones, and States have the option to accept either of these parts at the time of ratification. Finally, another type of clause, which has been used in particular in some Conventions on minimum age and on holidays with pay allows

States to specify, at the time of ratification, the exact level of the standard which they undertake to observe and as a rule the standards thus specified by ratifying States may not be lower than a minimum laid down in the Convention.

b) Flexibility in the Formulation of the Standard

The drafting itself of the standard is often flexible enough to give governments a certain amount of latitude in its implementation.

FLEXIBILTY AS REGARDS THE SCOPE

Sometimes the flexibility resides in the way in which the scope of the Convention is defined, in particular as regards the persons to be covered or the regions in which the Convention must be made applicable. In some cases governments may decide for themselves, subject to some consultations, what the scope of the convention shall be, or they may permitted to exclude certain categories of persons or undertakings or again the definition of the persons covered may be based on a specified percentage of the wage earners or the population of the country concerned. Sometimes, exceptions are allowed for certain parts of the country which are sparsely populated or insufficiently developed.

In the case of a number of conventions which cover a particular branch of the economy such as industry it is provided that government may themselves define the line of division separating that branch from others.

Introduction, sources labor law

Flexibility as regards the content of the obligation

There are various cases where the formulation of the basic substantive rule itself makes provision for flexibility. This applies in particular to certain 'promotional' conventions which do not set a definitive objective to be attained immediately, but formulate a general policy in a given field to be followed by each country witty due regard to ties particularly circumstances. The most well-known cases in this connection are the conventions dealing with social policy (No117 of 1992) equal remuneration (No. 100 of 1951), equal opportunity and equality of treatment (No. 111 0f 1958)

This method is generally coupled with the device of including only the fundamental principles in the conventions and in adopting at the same time a supplementary recommendations – i.e. a non-binding instrument –containing more derailed suggestion for their implementation some sixty conventions are based on this method.

Flexibility may also be attained by the use of general terms such as appropriate measures adequate protection sufficient number or appropriate arrangements or by requiring certain measures to be taken only in so far as they may be necessary.

Conventions such as these might be used to provide loopholes for evasion if there \ application was not as we shall see (see infra pares 656 sis). Subject to a close system of supervision.

Convention also often allow for exceptions to the general rule which they establish. There have been various types of such exceptions. Apart from the exceptions for certain named countries which are no longer resorted to certain conventions authorize countries which do not yet have any regulations on the subject to ratify on the basis of a standard lower than the general standard. More recently many of the social security conventions permit countries whose economy medical facilities are insufficiently development to have recourse to specified temporary exceptions. Exceptions are also sometimes permitted on account of special circumstances (materials subject to repaid deterioration exceptional cases of pressure of work processes necessarily continuous in character etc) and adjustment of the standard in respect of night work to climatic conditions is also allowed. Moreover, special arrangements are permitted under certain conditions or the application of certain of certain conventions may by suspended in the event of war force majeure or if in the case of serious emergency the national interested demands it.

E.g. the 1946 medical examination (young persons) convention (No 77 and 78) and night work (young persons) convention (Non – industrial occupations) (No 79)

E.g. No102 of a952 and 121 of 1964

c) Flexibility as regards the methods of application

One of the devices which is most frequently used seeks flexibility as regards the methods of application of the standard. Originally many conventions provided that effect should be give to them through national legislation but this term has always been interpreted in a very broad sense. Generally, having regard to the fact the ILO convention provides in article 19, par 5(d), that a state which ratifies a convention shall take such action as may be necessary to make effective the provisions of such convention, custom administrative measures or in certain circumstances, collective agreements may in principle suffice to give effect to conventions. It is moreover expressly stated in some conventions that effect may be given to them by methods appropriate to national conditions and practice which can be national laws or regulations, collective agreements, arbitral awards. Clauses of this type appear in a number of conventions such as those mentioned above relating to equal remuneration (No 100 of 1951) and to discrimination in employment (No111 of 1968).

Some conventions have also been deliberately so drafted as permit their application by means of action by federal authority.

The drafting of the standard

Apart form the diversity of national conditions there are also other reasons which call for flexibility in the formulation of standards. These are the differences between legally

systems – in particular between common law and civil law countries or between constitutional systems federal and unitary so that it is necessary to avoid too strict and detailed drafting and to leave to states a certain choice.

Results of flexibility clauses

While there have been cases in which the effort to introduce the necessary flexibility in conversions has not been successful and consequently certain conventions still contain an element of excessive rigidity or on the contrary have been drafted too loose terms one may consider that the majority of ILO convention on the whole are neither too stringent to be beyond the reach of developing countries in general nor so flexible as to be devoid of interest for the more advanced ones. The average number of ratifications per country naturally is higher for the industrialized states. But it is significant in this connection that for instance in the ten-year period from 1974 to 1993 one third of the ratifications came form industrialized countries and two thirds from developing countries leaving aside ratifications representing the confirmation of obligations by states upon joining the ILO of the total number of ratifications in this period 45 per cent came from industrialized counters 55 percent from developing countries.

The nature of the rights which may be the subject of international standards

There is a wide difference in the national of the rights which may be the subject of international standards some of these rights lend themselves to immediate application to individuals (such as minimum age holidays with pay of a specified duration freedom of association) and they might be considered as self-executing in countries where the constituently system provides that ratified treats become automatically pare of the law of the land on the contrary other rights are more of a programmatic nature i.e. they consents of a general statement of the objectives aimed at and lay programmers of action, which require measures to be taken by governments, sometimes on a long – term basis, and do not create any direct individual claim for protected persons. This can be said for employment policy, social security, action against discrimination and equal remuneration /if one considers the terms of ILO Convention No, 100/ In his Report to the Convenience in 1984, devoted to the ILO s standard – setting activities, the Director – General pointed out that the so – called promotional Conventions can be a powerful stimulus to national action However – he warned – such Conventions have increasingly dealt with less clearly defined objectives, at times calling for action over wind areas of public policy, where it becomes difficult both for ratifying States to know what measures of implementation are required of them and for the ILO supervisory bodies to evaluate compliance with international commitments There is a credibility risk for ILO standard setting and he raises the question whether greater use should not be made of other non –

mandatory instruments, leaving Conventions for important issues capable of precise definition and action [2]

The Choice between a Convention and a Recommendation

At the time of the drafting and adoption of a new instrument, the question of whether it should take the form of a Convention or a Recommendation is often discussed in view of the differences existing between these two types of instruments from the point of view of view of their legal character and of their respective roles. The Convention certainly is the typical instrument of international labor legislation when the establishment of the present system of international labor standards was considered by the peace Conference in 1919, Conventions were the only type of instrument envisaged at the outset of the discussions. The idea of Recommendations was introduced later in the course of these discussions, with a view to meeting the difficulties and objections of the United States However, it was also realized at that time that Recommendations might serve to deal with certain matters about which the adoption of a Convention would not be possible or appropriate. Later, in 1946, when the ILO constitution was amended, it was specified in Article 19, Para. 1 that it would rest with the Conference to determine whether the proposals before it should take the form /a/ of an international Convene Convention, or /b/ of a Recommendation to

meet circumstances where the subject, or any aspect of it, dealt with is not considered suitable or appropriate at this time for a Convention.

In the light of the above principle the role of Recommendations has become clearer over the years, while still frequently disputed in particular cases. It has often happened that a Recommendation has been considered more appropriate when a subject has not yet been ripe for the adoption of a Convention. Thus, in a number of cases, the adoption of a Recommendation has paved the way for the adoption of a Convention on the same subject, several years later.

A second function of a Recommendation, which has become increasingly important, is to supplement a Convention. Now it is common practice followed in the case approximately 80 Conventions, to adopt, on the same subject, a Convention laying down the basic rules and a Recommendation containing more detailed provisions for their application which might furnish guidelines for movements without the Recommendations having the binding force of a Convention. In some cases, in particular in the field of social security, the supplementary Remediation sets a higher standard than the Convention.

This was the case, for instance, to some of the most important instruments, for the Conventions and the Recommendations on Minimum Wage – Fixing /Convention No. 26

and Recommendation No 30 of 1928/. Employment service /Convention No88 and Recommendation No. 83 of 1948/. Equal Remuneration /Convention No 100 and Recommendation No. 90 of 1951/ Discrimination in Employment /Convention and Recommendation No. 111 of 1958/ and Employment policy /Convention and Recommendation No. 122 of 1964/

A third function of Recommendations is to deal with matters concerning which the standards laid down have to be of so technical and detailed a character that they may call for frequent adjustment to the situation in different countries, or the nature of which is such that there are wide variations in circum – stances and practices from one country to another, Among such subjects reference can be made to industrial relations, training, workers housing, employment of women with family cases because strict international obligations could hardly be contemplated in the fields concerned.

Generally, however, the Recommendation, as a form of instrument, has often been objected to, generally by workers, especially when it is envisaged as the only instrument – and not as supplementary to Convention – to deal with a given subject. The objections are due to the fact that recommendations are weaker instruments than conventions. They can not be subject of international commitments, nor can their application be supervised as

strictly and regularly as that of Conventions. Recommendations have, therefore, frequently been considered as poor relations of Conventions. Nevertheless, they perform a useful function in cases where conventions would probably not have been adopted or, if adopted, would not have been widely ratified, and where the existence of international standards embodied in a recommendation may sometimes exercise a substantial influence on national law and practice. The position of the employers is that the importance of Recommendations as separate instruments should be increased. In his report to the Conference in 1994, the Director – General referred to this question in the following words: My predecessor was quite right, in his Report of 1984, to lament the fact that Recommendations are often seen as second – class instrument. Whenever a Convention can not be made ratifiable without first watering down the standards it sets, it would seem preferable to adopt instead a fully autonomous, clear, precise and detailed Recommendation, which might guide Member states along their path to fuller development. Eventually, it might pave the way for a Convention. The conference should give this question all attention it deserves and perhaps reconsider the practice of almost systematically adopting a convention and a Recommendation on the same subject.

D) The Adjustment to change. The Revision of Conventions and Recommendation. Protocols

Principles governing revision. The developments which may occur in social needs and conceptions or the difficulties which may be encountered in the implementation of certain standards make it sometimes necessary to revise international labor standards with a view to adjusting them to changing circumstances or to experience such revision raises, apart from the procedural questions already referred to above, a more general question of policy: that of deciding how closely revision should seek to adapt the international standard to changes in ideas and needs. Naturally, Labor legislation, whether international or national, cannot be a rigid and immutable code. It must be responsive to changing conceptions and even techniques. Therefore, the revision of Conventions should be made possible without having to face insuperable legal obstacles. On the other hand, however, the legal rules laid down by international labor standards must have a minimum of stability and provide a certain measure of security in international relations. They should not be amended too frequently of for considerations which are temporary in nature. In order to reconcile these requirements of change and of stability, the revision procedure has been made subject to time limits and formalities, which, without being excessive, are designed to prevent over – hasty decisions.

Clauses relating to Revision. The first ILO Conventions contained a clause providing that at least once in ten years the Governing Body of the ILO should present a report on

the working of the Convention and consider the desirability of placing on the Agenda of the Conference the question of its revision. This standard clause was modified in 1949 to provide for greater flexibility by enabling the Governing Body to present such reports only when it considered it necessary. Mean while, in 1928, when the first 10-year period for the consideration of the possible revision of the conventions adopted in 1919 was about to expire, the question of the procedure for revision and the effect of revision on the original Convention was the subject of extensive discussion and of wide differences of opinion in the Governing Body. Some employer members of the governing body were of the opinion that international labor conventions were not contracts between states, but 'conditional international law' and that the new Convention should accordingly replace the original one. The then Legal Adviser of the ILO /Jena Morel let/ took the opposite view on the ground that, in spite of their special character, international labor Conventions entailed legal obligations between the states parties to them, and that one Convention could not be automatically substituted for another when the first had been ratified and come into force.

Finally, the solution adopted was to include in the Conventions adopted after 1929 a clause providing:

a. That the adoption of a new revising Convention would not entail the abrogation of the original Convention:
b. That the original Convention should cease to be open to ratification as from the date when the new Convention came into force: and
c. That ratification by a Member state of the new Convention should automatically involve the denuncion by it of the original Convention.

A few years later, in 1933, this clause was refined to allow the International Labour Conference discretion to decide, when adopting a revised Convention that its entry into force should not have the effect of closing the original Convention to ratification and that its ratification by a state would not automatically entail the denunciation by that state of the original Convention. This latitude may sometimes be useful, especially to keep the earlier Convention open to ratification by states which have not yet reached a stage of development which would allow them to ratify the most recent standard. It has been used in certain cases.

See the Employment injury Benefits Convention, 1964 /No 121/. Article 28

Use made of revision procedures. In the light of the principles, rules and procedures described above, over forty Conventions have been formally revised by subsequent Conventions. A number of these revisions have been aimed at making the wording of the original Convention more flexible inorder to take account of the difficulties experienced and to facilitate ratification, as in the case of nigh work of women /apart from the more basic re – examination of whole principle, which took place in 1990/ In other cases, on the contrary, revision was designed to raise the earlier standard and provide for greater protection /as in the case of occupational diseases and of minimum age of admission to employment/ - Sometimes, these two types of operations were combined. Another reason which led to revision was the need to take account of technological changes /thus the revision of Conventions Nos. 28 and 32 on dock work/. Some Conventions have each undergone more than one revision in the course of years: there were two revisions of the Convention concerning night work by women and three revisions of the wages, hours of work and manning on board ship Convention.

Apart from formal revisions, there have also been cases of the adoption of conventions which, although not revisions in a technical sense, have supplemented earlier instrument, or dealt with the same subjects from a different angle or according to new

concepts of the social policy Conventions of the 1952 Social Security /Minimum Standards/ Convention /No. 102/ and the 1990 Nigh Work Convention /No.171/.

In the case of Recommendations, formal revision is not as frequent or as necessary as for Conventions, since they do not involve international obligations. However, it may sometimes be useful to state expressly that a new instrument supersedes an earlier one, in order to make it clear to governments that it is the new instrument which should guide their action. Such a course was followed in the case of vocational training recommendations. It may also be desirable where a recommendation is supplementary to a convention and the later is being revised, to proceed as well with the revision of the recommendation, as was done in the case of migrant workers.

During the review if international labor standard's carried out by the governing body between 1974 and 1979 the idea was launched of adopting a protocol to an existing convention the purpose was one of simplification because there would be no need to have two convention the original instrument and its revised version with very few differences. The protocol has the same effect as a revised convention, which does not close the original convention to further ratifications. It constitutes fact the revision of an existing convention and must be regarded as a form of convention coming within the provisions of the constitution relating to conventions. It must therefore be adopted by the conference by a

two thirds majority and must afterwards be communicated to member states for submission to their national competent authorities in accordance with article 19 of the constitution. This type of instrument was adopted for the first time in 1982 in connection with the plantations convention, 1985 /No 110/ and then again 1990 with regard to the Night work /women/ convention /revised/ 1948 /No 89/.

C. Less formal instruments

The ILO has laid down standards in cretin types of instruments which are less formal than conventions and recommendations. This is the case, in the first instance, of resolutions adopted by the international labor conference. Some of these resolutions are currently used by the various supervisory bodies of the ILO as guidelines and terms of reference for the appraisal of national situations and the recommendations addressed to governments. This applies in particular to the 1952 resolution concerning the independence of the trade union movement and to the 1970 resolution concerning trade union rights and their relation to civil liberties /which were referred to for instance by the commission of inquiry in the case of Greece in 1970 and by the fact –finding and conciliation commission in the case of chile in 1974/

Other types of standards are embodied in the resolutions and conclusions of technical committees of experts and of meeting or bodies set to deal with particular sectors /industrial committees etc/ or particular subject enterprise social security and

occupational health and safety multinational enterprises statistics etc of regional conferences and technical meeting.

These various types of texts vary considerably first as regards their subject matter some deal with basic principles while others are of a very practical technical nature. They also differ in respect of the weight they carry. None have the authority of conventions and recommendations but a resolution adopted by the conference carries more weight than the conclusion of a less comprehensive body. The value of such texts lies, mainly in the fact that they are adopted by bodies representative of the interest concerned. Resolutions adopted by the international labor conference have also been important in certain cases for the development of the programme of the ILO in certain fields. This was the case as regards lab our management relations workers education rural development and working conditions and environment

The ILO constriction provides /art 37/ that any question of dispute relating to the interpretation of the contention itself or of international labor conventions must be submitted to the International court of Justice /formerly the Permanent court of international justice /. This provision has been resorted to only a very few occasions during the early years of the existence of the organization. As indicated above the court was called upon on four occasions between 1922 and 1932 to give advisory opinions and the first three related exclusively to the question of the competence of the ILO. The fourth,

while having also an indirect bearing on that question, referred expressly to the meaning to be the scope of the night work (women) convention, 1919 (no.4). In this report to the conference in 1984 on international labor standards, the director –general deferred to the possibility of having recourse to this procedure in critical situations for persisting unresolved major issues concerning the interpretation in particular of fundamental convention.

In 1946 as a result of amendment made to the ILO constitution a second paragraph was added to article 37 with a view to giving greater flexibility to methods of interpretation by providing also for the possibility of appointing a tribunal for the expeditious determination of any dispute or question relating to in the interpretation of a convention. No recourse has so far been had to this provision. The Matters had come up several times lately during the discussions in the conference committee on the application of conventions and recommendations and the ILO is examining the questions relating to a possible implementation of this machinery.

Finally the director general of the ILO is frequently consulted by governments as the interpretation of conventions and the opinions which he gives with the proviso that he has no special competence in the matter are communicated to the governing body of the ILO, and published in the official bulletin and seem to be tacitly accepted. They provide

authoritative documentation on the subject and have acquired considerable weigh. A very large number of such opinions have been given by the ILO over the years.

Lastly, legal opinions on important matters were given in memoranda from the director general or the legal adviser of the ILO concerning questions connected with the constitutional framework of ILO conventions such as the nature of the competent authority contemplated by article 19 of the constitution of the ILO and the practice of reservations to multilateral conventions. In the latter case an ILO memorandum was submitted to the international court of justice in the genocide case and it set forth the reasons why international labor conventions cannot be ratified subject to reservation.

In the course of the years, the quasi-judicial bodies as will be explained later have been set up to supervise the implementation of international labor standards have often had to reach conclusions as to the precise scope and meaning of ILO conventions, as they were requested to assess the extent to which these conventions are implemented. A body of case law has thus been progressively built up.

This has been the case in particular of the committee of experts on the application of conventions and recommendations which, 1927 has examined every year the reports of governments on the application of conventions which they have ratified. The interpretive function of the committee is not based on any explicit authority, but it derives logically form its mandate and the nature of its task. As the committee itself put it the committee’s

terms of reference do not require it to give interpretation of conventions, competence to do so being vested in the international court of justice by article 37 of the constitution. Nevertheless in order to carry out its function of evaluating the implementation of conventions the committee has to consider and express its views on the meaning of certain provision of conventions. Such a function is all the more important as during the more recent period a number of international lab our conventions have in an effort to obtain greater flexibility been drafted deliberately in general terms so that the committee of experts has had to interpret and defend more precisely their meaning and scope. This has happened committee of experts has had to interpret and define more precisely their meaning and scope. This has happened in particular in the cases of the instruments dealing with forced labor, freedom of association and discrimination in employment.

Particular important also attaches to the case law established by the freedom of association committee which has dealt with some sixteen hundred cases since it was first set up in 1951. Faced with a wide variety of situations the committee while relying at the out set on the general standard laid down in the ILO conventions concerning freedom of association was gradually led to frame principles defining more closely and in some respects supplementing and even extending those expressly embodied in the conventions. The principles thus established by the committee refer in particular to the right to strike collective bargaining and the more general civil liberties on which the effective exercise of

the right of association depends. The most significant part of this case law has been published.

F Instruments adopted by special conferences under the Auspices or with the co-operation of the ILO

In a number of cases special governmental conferences have been convened by the ILO outside its national framework to deal with questions which concerned only a limited number of countries and therefore were not suitable for regulation by convention of a universal character. special conferences have also been convened by the ILO jointly with other international organizations in order to deal as a whole with a subject falling whishing the competence of several international Organizations.

Among the instrument adopted by special conferences of the first type reference can be made to the *Agreements concerning Rhine boatmen,* which were adopted in 1950 by an intergovernmental conference attended by Belgium, France, the federal republic of Germany, the Netherlands, Switzerland, the united kingdom the united kingdom and the united states. The conference was preceded in 1949 by a special tripartite conference comprising representatives of Rhine ship owner and boatmen. The central commission for Rhine navigation was associated with the various stages of the proceeding. The Governmental conference adopted two agreements, one concerning social security, and the other concerning conditions of employment including hours of work overtime rest

periods and holidays. These agreements were revised in 1961 and in 1954 and1993 respectively and came into force a few years after their adoption following their ratification by all the states.

UNIT – TWO

SCOPE OF APPLICATION OF THE LABOUR PROCLAMATION

INTRODUCTION

Dear distance learner, the previous unit has introduced you some general but important issues that you should know before indulging into the detailed rules and specific issues under labour law. Now here in unit two, you are going to see the most important preconditions that could serve as a spring board to clearly understand the rest part of labour law course. That is the scope of coverage of the labour proclamation no. 277/2003. This unit is aimed at helping you appreciate the kinds of employment relationships that labour law intends to govern.

The Proclamation doesn't apply to all employment relations. It only applies to employment relations between an employer and a worker. Therefore, our discussion on the scope of coverage of the law is more or less an examination of the principle that defines employer-

worker relationships and, then the identification of those relationships that fall under the principle part but are excluded by exclusion part of the law.

Such task in it self imposes further duties on us. The first duty is to define who a worker is. Under such discussion we will evaluate the definition given by the proclamation, and then we will try to make a clear distinction between a worker and other similar terms like agents and independent contractors. The next step to understand employer worker relations will be to identify the meaning of employer in the eyes of the law.

Accordingly this unit is outlined in the following manner.

Worker employer relationships minus excluded worker employer relationships = scope of coverage of the proclamation.

However, worker employer relationship = worker (definition: + distinction :) + employer (definition)

Therefore, [(worker (defn.+ distincn.)+ Employer (defn.)] Minus Excluded worker employer r/ships = scope of coverage of the procl.

To simplify

0

[(W + distincn) + E] – Exclusion = coverage of procl. 377/2003

Learning Objectives of the Unit

After completing this Unit, you will be able to:

- Explain the elements of an employment contract.
- Define a worker and an employer.
- Distinguish between a “worker” and an “agent” and “independent contractor”.
- Enumerate employment relationships that are excluded from the coverage of the Labour Proclamation: and explain the rationale thereof.

2.1. EMPLOYER – WORKER RELATIONSHIPS

2.1.1 Definition of a worker

In employment relationships there is always an employee and an employer. But, labour law does not regulate each and every employment relationships. It normally regulates employment relationships established between a worker and an employer. Other employment relationships are basically excluded from the ambit of labour law. It is if and only if the person who is an employee can be considered as a “worker” that the labour law will be applicable to him. Thus, in this section, our focus would be to understand the meaning of a worker, by looking at the definition as given by the proclamation and by making a distinction between a worker and other similar terms in accordance with Article 4 sub article 1 of the Labour Proclamation.

Pursuant to Article, 2(3) of the labour proclamation No. 377/2003, a worker is defined as a person who has an employment contract with an employer in accordance with article 4(1). The definition of Article 2 sub article 3 is a sort of incomplete definition as it cross refers us to Article 4, and hence we will see the meaning of an employment contract as enshrined in Article 4.

Activity:
Identify the elements of Article 4, and try to define a “worker” by your own words in the space provided below.

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One element of Article 4 sub-article 1 is a worker must be a person .From the reading of the elements of a contract of employment and the definition given to a “worker” from Articles4(1) and 2(3) respectively, a worker must be a natural or physical person. This can be inferred from the wording of the Amharic equivalent of Article 2(3) which especially says “ግለሰብ”. There fore, juridical persons can not be workers. In addition, to be a worker such physical person must be one who renders physical or intellectual services. More over, such service is to be rendered under the authority of the employer. That means the direction element must be fulfilled for a person to be deemed as a worker. If the manner of giving service of the person is not controlled by the other party who seeks such service, then this service provider is not considered as a worker in the eyes of the law. Finally, the person’s duration of contractual engagement must be concluded for a definite or indefinite

time. In fact, the parties are at liberty not to provide for their duration of engagement so long as the worker has consented to perform a piece work. Actually, such agreement for piece work may be regarded as an employment for indefinite period. However, as opposed to contractual engagements that are entered into for an indefinite period of time, in the strict sense of the term, payment of wages for piece work is to be calculated in piece rate, i.e. payment depending upon result irrespective of the time the completion of the work takes. Besides all these the person is regarded as a worker if and only if the wage element is satisfied. Hence, a contract of employment is not a voluntary engagement. It is done in return for wage which may be calculated per hour, per day, per weak, per month, per year or on piece rate.

Dear distance learner, we did not yet get a complete definition for the term “worker” from the foregoing discussions. It is actually very difficult to get a full-fledged definition from the cumulative reading of Article 4 and Article 2(3) of the Proclamation. This is because; to be deemed as a worker the person must be one who renders service for his employer. So, even if the previously discussed elements of the cited provisions are met, we can not be sure that such person is a worker unless his relationship is with an employer. Thus, so as to have a complete definition for the term “worker” we are also expected to have a

clear understanding of who an employer is. This issue will be raised immediately after we make a distinction between a worker , an agent, and an independent contractor.

2.1.2 Distinction between a Worker and Other Similar Terms

Dear distance learner, so far we have seen the meaning of a worker on the basis of the definition given by article 2 sub article 3 of the proclamation and the elements of a contract of employment as provided under article 4 sub article1 of same. Accordingly, a worker is defined as a physical person that renders service for an employer on the basis of an employment contract .However, there are some other persons that fulfill some or many of the elements of a worker without being workers, and that give service for another party. Therefore, How is an employee or a worker/ different from an agent, or a contractor because all render service for another party?

Worker v$_{s.}$ Agent

1. Source of Authority: According to Article 2179 of the Civil Code of Ethiopia, the source of authoring of the agent could be a law or contract, whereas the source of

employment relationship or the worker's source of authority is only a contract. Hence, we can not get an employment relationship or worker's authority that emanates from the law as it is clearly provided under Article 2 sub article 3 of the Labor Proclamation. Read Article 2179 (Civil Code).

2. Under whose name the service is rendered: this is the other parameter that distinguishes a worker from an agent. As you may remember from your course on Law of Agency, the agent renders service in the name of the employer i.e. the principal. For instance, if the agent is authorized to enter in to transactions by representing his principal, he signs the contract in the name of the principal. But such is not the case for the worker. Though the service he renders is in the interests of the employer, the worker always provides service in his own name.

3. Wage: As already said before, wage is an element of an employment relationship. So, we can not get a "worker" who serves for free. But, remuneration is not so essential in agent – principal relationship, as we don't find this element in the definition of Agency.

4. Whereas a worker is essentially a physical person, an agent could be a legal person or a physical person.

Worker v$_{s.}$ Contractor

Dear distance learner from the reading of Art. 2610 of the Civil Code of Ethiopia how is client – contractor relationship different from its worker- employer counterpart?

Just like the agent and the worker, an independent contractor renders service for another party called client. But there are so many features that distinguish the independent contractor from the worker or the agent.

The first yardstick we can employ so as to identify whether a relationship is a worker employer or client independent contractor is the direction element. The contractor assumes responsibility not under the direction of the client as the latter is interested only in the results. The contractor is less controlled when compared with the worker. For example, if you order a tailor to render you with a suit, you are only interested in the final product, not in his manner of work.

But those two relationships are similar in that their source of relationship emanates from contract and remuneration is an element for both. Hence, there is no volunteer engagement under both relationships as opposed to the situation in agent principal relation.

A contractor could be physical or legal person as the case may be. But a worker is always a physical person. This assimilates an agent with a contractor.

2.1.3. The Meaning of an Employer

Under the above sub-section of the first section of this unit, we have been trying to determine the relationships from the employee's side. For the sake of having an understanding of an employment relationship and to define a worker in a clearer manner, we should get the meaning of an employer from the provisions of the labour proclamation.

According to Article 2(1) of the Labour Proclamation, employer is a person or an undertaking that employs one or more persons in accordance with Article 4 of the

Proclamation. This definition of the law does not take in to consideration the number of persons a person or an undertaking should employ for it to be deemed as an employer and ultimately to be governed by our labour law. In other jurisdictions, as the protection labour law grants for the worker is often at the expense of the employer, the person's or the undertaking's employment of more than twenty or twenty five persons is required for labour law to apply. Therefore a person or an undertaking that hires ten or fifteen workers is not deemed as an "employer" for the purpose of those foreign laws. But, we don't get such a minimum requirement in our law.

Activity: Dear distance learner, do you think that it is fair to require a man or a relatively small undertaking employing 1 or 2 persons to be considered as an employer and requiring him to give the worker all the benefits the Proclamation provides? Give your opinions by evaluating the interests of both parties and the public at large in the space provided below.

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Undertaking is also defined under sub-articles 2 of Article -2 to mean

> Any *entity established under a unified management for the purpose of carrying on any commercial, industrial, agricultural, construction or any other lawful activity.*
>
> *Any branch carrying on the activities of an undertaking which is designated separately and which enjoys organizational or operational autonomy shall be deemed as a separate undertaking.*

Thus, an employer can be a physical/natural person or an entity such as Business Company, factory and the like. When we see the above provision's listing of activities that are to be performed by such entity they are economic in their nature; and some even tend to be profit making activities. But, what kinds of activities are those which fall under the category "any other lawful activity" for the purpose of defining a person or an undertaking

and then an employer? Is this expression referring to any activity /lawful/ with no need to have an economic nature or profit purpose? Concerning this issue there are two arguments forwarded by Ethiopian lawyers.

According to some lawyers, the phrase “any other lawful activity” should be construed to mean activities with nature similar to the prior listing of the law. So, on the basis of the illustrative listing, activities which are only economic in nature and profit oriented should be regarded as lawful activities for the purpose of defining an undertaking under Article 2(2).

Others, on the other hand, say so long as the activity performed by an entity is a lawful one, and unless it is excluded by the exclusion part of the Proclamation, such entity should be considered as an undertaking. Hence, in order to fall under Article 2(2) it is sufficient for the activity of an entity to be a lawful one, it does not matter whether such activity is of a profit nature or not. Supporters of the second argument also invoke Article 3 sub articles 2 and 3 which deal with the exclusion of some employment relations from the scope of the Labor Proclamation. When we examine some of the exclusions made by these provisions of the law, we get some excluded relationships wherein the employer is not involved in profit generating activities. There fore, as the exclusion under Article 3

mentions some non-profit activities; one can say that the definition has thought of all activities.

Dear learner, considering the historical back ground of labour law and the primary goals labour laws aim at which interpretation seems sound? As you remember from our discussions in the previous unit all the protection for workers were given some how to make equitable distribution of profit and the like; so if we think of those lawful activities to include non-profit areas, what is going to be regulated by the law unless there is profit behind the activities of the employer? Based on this you may conclude that an entity must be found to be involved in profit making activities for it to be defined as an undertaking in the sense of Article 2 sub article2.But,as has just been said the legislator has excluded some non-profit areas. Is such exclusion of the legislator only for emphasis purpose as some people say? You may respond to this question in the affirmative. But, there still remains one question on this. What if the law maker has set aside the past assumption of the law's profit distribution purpose and has taken a policy decision to widen the application area and provide protection for unregulated areas?

Dear distance learner, please make a discussion on the above issue and try to take your own persuasive stand on this controversial area.

2.2. EXCLUSIONS

Dear learner, in the previous sections of this unit, I hope you have got some issues related to the terms “worker” and “employer”. We have also said that in principle the Labour Proclamation is applicable to govern the employment relationship of a worker and an employer. This principle is clearly provided by Article 3 sub article 1 of the Proclamation. It reads,

> *“Without prejudice to Sub-article (2) of this Article this Proclamation shall be applicable to employment that exists between a worker and an employer.”*

Accordingly, once we establish that the person who renders service is a “worker” and the party receiving such a service is an “employer” based on the definitions given to the terms under Article 2 sub articles 1 and 2 and Article 4 sub article 1 of the Proclamation, in principle their employment relationship is governed by the Labour Proclamation pursuant to Article 3 sub article1 of same. But this does not

mean that all employment relationships of this kind fall under the ambit of the proclamation

As there are various employment relationships that are excluded from the application of labour law, we can safely conclude that employment law and labour are different in the Ethiopian Legal System. Employment relations are wider as the legislator excludes some sorts of labour relations from being governed by labour law. So, labour law /relation is only one segment of employment law / relation.

Under this section of the unit, therefore, you will be able to understand the scope of coverage of labour law by identifying the exclusions to which the labour law could have otherwise applied. This, with no doubt, is crucial for you in the sense that you can identify a person who is entitled to the various rights and benefits that are provided by the labour law. To this end, we are going to make a deliberation on the kinds of relations excluded and the justifications behind these policy decisions. Notable among the exclusions are, public servants, members of management staff, domestic servants and others.

2.2.1. Exclusion in historical context

a) Public Servant

The Civil Code of Ethiopia, the pioneer to provide regulatory rules for employment relations in the country, defines employment relationships and under Article 2513, it excludes some relationships.

This provision of the Civil Code has excluded public servants from the protective coverage of the Code's provisions. Dear distance learner, can you guess to whom the term "public servant" is applicable? Write down what you feel in the following few lines.

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In the latter proclamations, the traditional exclusion of public servants dating back to the civil Code of Ethiopia was/ is consistent and persistently regardless of the existence of worker definition elements. The 1975 proclamation, proclamation No. 42/93, and the

currently enforce proclamation have excluded the public servants from the laws' coverage.

b) The Management Staff

The management staff, the decision making staff at the top layers of the undertakings/ enterprises or branches thereof were not excluded by the Civil Code. Proclamation 64/75 excluded them from the ambit of labour law. Accordingly, manager and deputy managers of an enterprise or its branch and officials accountable, to either the manager or deputy manager were excluded.

Similarly, proclamation No. 42/93 under its Article 3(2) (e) has excluded the management staff. As this proclamation had excluded those contracts relating to persons holding managerial posts and engaged in major managerial functions from its coverage, we observe a deviation in its approach of defining the meaning of a "management staff". As opposed to proclamation 64/75, which provided assumption of post as a conclusive yardstick for the exclusion of workers, the latter law had included exercise of managerial functions as an additional requirement to do so. Therefore, unless a worker is entitled to exercise major managerial functions, his mere assumption of managerial post was not

adequate enough to consider him as a “management staff and, then for his exclusion from the scope of labour law.

Under the 2003 labour proclamation, the same Article and sub-article exclusion of the management staff is transplanted from the 1993 proclamation. But, the latter proclamation has come up with a new group to be excluded, a professional staff. These are people who recommend measures for managers on the basis of their expert knowledge. But previously, only the decision making organs were excluded as management staff.

c) **Domestic Servants**

Domestic servants were part of employment relation and were to be governed by the Civil Code. But, because of the special nature they possess they were given special provisions, starting from Article 2601-Article 2604 of the Civil Code.

The 1975 labour proclamation, however, had excluded domestic servants from its coverage. It was from that time on that domestic servants are excluded from being regulated by the Ethiopian labour law. Later, Proclamation 42/93 with different wording

excluded the same. Under the same sub-article and sub-article and by the same wording domestic servants are excluded under the current labour proclamation.

2.2.2. Exclusion under the 2003 Labour Proclamation

Dear distance learner, in the previous sub-section, you have seen successive exclusions of some of the categories of employment relations from the coverage of labour law in Ethiopia. Now we will turn our attention to the exclusions made by the 2003 labour Proclamation. as it is pointed out before, the 1943 Labour Proclamation (proclamation No. 42(1995) is now repealed by the currently enforce new Proclamation No. 277/2003.The 2003 Proclamation's exclusion, however, is not as such too much different from the exclusion made by its1993 predecessor.

This discussion under this topic will be held by dividing the exclusions of the proclamation in to two broad classes: as out right exclusions and conditional exclusions. The first class includes employment relations that are automatically excluded by the proclamation, and hence by no means can they be governed by the proclamation. In other words, such contracts are excluded from the scope of labour law with no need of waiting for the

occurrence or otherwise of any situation / condition. For the latter class of exclusions the exclusion applies upon the fulfillment of the attached conditions. Hence, until the specific condition the proclamation sets for their exclusion is satisfied, such employment relations are to be governed by the 2003 Labour Proclamation.

Dear distance learner, what is the policy reason to exclude some employment relations conditionally and others automatically? You can use the space provided below to attempt this question.

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Outright exclusions

The scope of application of the new proclamation is defined by Article 3. Under sub-article 1 of this Article, the law provides that the "proclamation shall be applicable to employment relations based on a contract of employment between a worker and an employer". But under its sub-article 2 of Article 3, the law excludes some lists of employment relationships from the coverage of the Proclamation. In the following manner;

This proclamation shall not be applicable to the following employment relations arising out of a contract of employment:

b. *"contracts for the purpose of upbringing, treatment, care or rehabilitation"*
c. *contracts for the purpose of educating or training other than apprentice:*
d. *managerial employee who is vested with the powers to lay down and execute management policies by law or by the delegation of the employer depending on the type of activities of the undertaking with or without the aforementioned powers an individual who is vested with the power to hire, transfer, suspend, layoff, assign or take*

disciplinary measures against employees and include professionals who recommend measures to be taken by the employer regarding managerial issues by using his independent judgment in the interest of the employer.

The above listed relationships are automatically excluded from the ambit of labour law. In other words, labour law does not regulate these relationships in any conditions. Now, let's proceed to the examination of these excluded relations one by one.

1. **contracts for the purpose of upbringing, treatment, care or rehabilitation**

Irrespective of the existence of employment contract between the service provider and the employer, labour law would not regulate their relationship. As the purpose of these relations is not tuned by profit motive of the employer, the law maker has opted for their unconditional exclusion. In fact when we talk about employment contracts a person undertakes to render service for his/her employer and all the remaining elements which are given under Article 4(1) are met. However, under these excluded relationships, the

parties' employment engagement is part of the upbringing treatment, care or rehabilitation of the person which is rendering the service.

As an illustration, we can take the relationship between a guardian/tutor and his/her minor/child. As part of the duty of upbringing, the guardian or tutor is expected to guide the minor spiritually, morally and the like. One way to this end, may be to teach the minor respect for elders and make him develop positive attitude towards work. With this view in mind the minor may, occasionally, be made render service for his/her guardian/tutor. Similarly, the rehabilitation scheme for prisoners in prison is there to mold the latter's criminal behaviour, and to make them good member to the society. The prisoners may, therefore, be made render certain services to the prison. When we look in to the purposes such relationships serve in comparison with the purpose of labour law, to regulate such kinds of employment relations by labour law might bring about undesirable consequences. For example, if we try to cover the employment contract of the prisoner and the employer prison by labour law, then we are giving prisoners all the protections of the law one among which is the right to strike. But such is not desired as it totally defeats the objectives behind the establishment of such employment relationships.

2. Contracts for the purpose of educating or training

According to Article 3(2) (b) of the proclamation, if an employment contract is concluded for the purpose of educating or training a person, the relationship between the educator or the trainer and the student or trainee is not to be governed by labour law, unless the engagement is one of apprenticeship. Here, we observe three categories of relations as provided by the law. There are students who are getting education in the school, trainees who are learning by doing or practicing and apprentices who undergo certain training while rendering service to an employer whose day to day activities are our side of training.

When we consider the case of students and trainees and their relations with schools and trainers, both students and trainees are there to acquire knowledge or skill. Hence, the service they render for the employer is only incidental. To put it differently, the end being the acquisition of knowledge and skill, the rendition of service is only a means to such end. For instance, students may sometimes undertake some projects which may in effect give some economic benefits to their education. But such service, if considered as part of the curriculum, can not be considered as one among the employment relationships which are to be regulated by labour law.

The same holds true fir services rendered by trainees. Trainees normally focus on the practical skills of the training program. They are learning by doing according to the guidance of their trainer. Hence trainers are likely to fetch certain economic benefits from the works of their trainees. But, in so far as this is part of the training programme, the services rendered by the trainees would not trigger the applicability of the labour law to govern the parties' employment relationships if any.

When it comes to the case of apprentices, the nature of the services they render are quite different from those of students and trainees. Apprentices are persons who undergo certain trainings while rendering services to their employers. The employer is duty bound not only to pay wages for the apprentices but also to enable them acquire the skills that the services require. As the purpose of the employer/undertaking is to do some other businesses rather than giving training, it also employs other workers who are there only to render service. Thus, labour law intends to regulate the relationships of the employer both with the apprentices and other workers. However, due to their special nature contracts of apprenticeship are governed by their own separate provisions of the Labour Proclamation, starting from Article 48 up to Article 52 of the proclamation.

Activity : what common features do employment contracts for the purpose of education and training, share with that of contracts of apprenticeship

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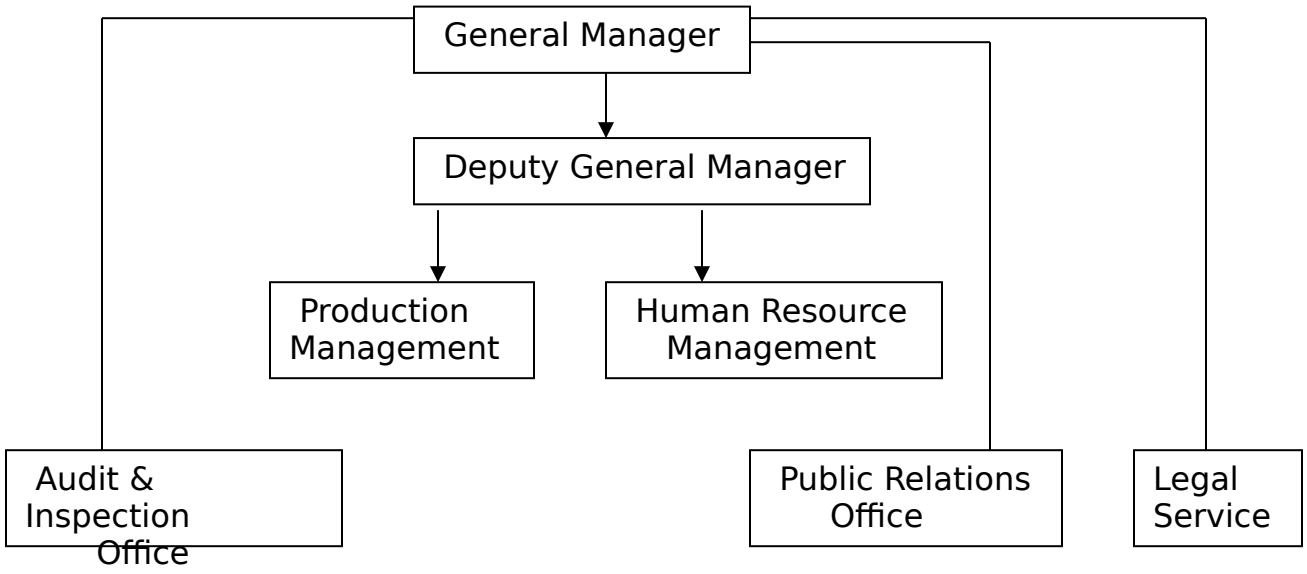
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3. Members of Management Staff

As you may remember from our discussion under the first sub-section of this section, in the Ethiopian legal system members of the management staff (decision making at the top layer of an undertaking) are excluded by all the labour laws dating back to the promulgation of the Civil Code of Ethiopia. The Civil Code and its successor proclamation No. 64/75 excluded workers who assumed certain posts as members to the management staff. Accordingly, general managers, deputy general managers, or assistant manager and

workers who are directly accountable to them were outside of the scope of the labour laws. Therefore, by simply looking at the structure of an undertaking or enterprise one can easily identity who the members of the management staff are. As an illustration, look at the following structure of an undertaking that especially shows members of the management staff.



Even though this structural approach is clear and simple to administer, it has some problems especially in the Ethiopian legal system. In a given undertaking you can, for instance, easily identify the general manager and his deputy. But as you go down from the top, things get complicated making it difficult to easily differentiate the rank and file from members of the management staff. More over, this problem gets aggravated in differentiating managers from ordinary workers due to the employers practice of indiscriminately using managerial title for their ordinary workers saying, for example, you are supervisor, director etc. Generally, to exclude some workers who are directly accountable to the general manager or deputy general without having any managerial function, with mere assumption of title /post was proved not to be incompliance with the purpose the exclusion is deemed to serve.

So as to avert such problem, the 1993 Labour Proclamation adopted the functional approach with the previously employed structural approach. During that period the structural approach, unless coupled with analysis of managerial function of an employee would not be of any help for exclusion. To put differently, to be deemed as a member of the management staff and hence to be excluded from the Proclamation's coverage, one has to:

- hold a managerial post/ title, and

- should also engage in managerial functions.

Unlike its previous counterparts that were used to give one's title or post a role to play in evaluating one's membership or otherwise to the management staff, the 2003 Labour Proclamation has come up with a purely functional approach for the identification of the management staff. Therefore, a worker's assumption of post / title would no more be a yardstick for the determination of the applicability or otherwise of the Labour Proclamation on the relationship between a worker and an employer on the basis of Article 3(2) (c) of same. Under its Article 3(2) (c) the Proclamation provides the inapplicability of the Labour proclamation for

> *managerial employee who is vested with powers to lay down and execute management policies by law or by the policies by law or by the delegation of the employer depending on the type of activities of the undertaking with or without the aforementioned powers an individual who is vested with the power to hire, transfer, suspend, layoff, assign or take disciplinary measures against employees and include professionals who recommend measures to be taken by the employer regarding managerial issues by using his independent judgment in the interest of the employer.*

This sub article is amended by Proclamation No. 492/2006: a Proclamation to provide for the amendment of the Labour Proclamation. As a result, the above cited 2003 Proclamation's provision on the exclusion of the management staff would no more be of use.

Article 2(1) of the Amendment defines a management staff in a different manner. Dear distance learner, you should read the provisions of this amendment attached at the end of this module.

Accordingly, for a person to be deemed as a manager he must have a managerial power given either by the law, or by delegation of the employer. Therefore, irrespective of actual exercise of managerial power, one's entitlement to exercise such power is sufficient to consider one as a member to the management staff. The law goes further and enumerates some activities that are deemed as managerial functions, for the purpose of defining the management staff and then for exclusion. Managerial function under Article 2(1) is defined to mean one's activity of:

i. laying down and executing management policies of the undertaking, and / of

ii. hiring transferring, suspending, laying off, assigning or taking disciplinary measures against workers.

With ward to the legal service head of an undertaking, managerial power consists of recommending measures to be taken by the employer regarding managerial issues using his independent judgment in the interest of the employer. It is if and only if the legal service head has such powers that he is deemed as a member to the management staff. Otherwise, he is simply not.

Dear learner, by comparing, Article 3(2-c) of the 2003 Proclamation and its latter amendment, what differences do you observe? Can we say that the structural approach is to some extent employed by the new exclusion of the management staff? Give your opinion:

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Under the foregoing discussions we have said that a person's assumption of post has a very limited role in identifying the management staff. Rather, what matters here is the exercise or otherwise of the power to exercise managerial functions. But, the above mentioned three perspectives of managerial exercise need due attention as they are subjective depending on the activities different undertakings perform. Moreover, some employees may have some of these powers and not some others. Under such circumstances we might encounter problems in identifying the management staff from the rank and file.

Generally, managerial employees have the power in policy making, in hiring and firing of employees, in taking disciplinary measures, in demoting or promoting employees and are involved in operational and strategic planning instead of routine activities. If some one is involved in all or many of these activities he would be said to have a managerial post, otherwise simply not. So not title, but content would be seen. It is the proclamation that laid the indicators. But, we could still face cases of doubt as one may exercise some of the functions only. Where the situation doesn't squarely fit to the exception i.e. the exclusion, the benefit of doubt should be for the worker, since exclusions are exceptions and in principles of interpretation exceptions should be interpreted restrictively (narrowly) not

liberally. So it would be better to consider this kind of relationship as covered by the Labour Proclamation.

Having an understanding of the major roles managers play in an undertaking, you can easily guess as to why such staff is excluded from the protective umbrella of Labour law. In almost all legal systems of the world, including the Ethiopian labour law legal regime, the exclusion of members of the management staff is closely tied with the notion of trade unionism in labour relations. Trade unions are associations (organizations) of workers which are established by workers so as to protect their collective rights and interests from encroachment by any one including the employer. The underlining principles of trade unionism, independence, autonomy and impartiality, are therefore reflections of the basic function of trade unions. Hence, trade unions must be independent and are supposed to pass decisions representing their members, with no interference by the employer.

To this end, trade union members must have a homogenous interest. For the interest of the management staff is closer to the interests of the employer and not to that of the workers, members of the management staff don’t have a homogenous interest with the rank and file. This heterogeneity of interest, in effect, is likely to defeat the underlying principles of trade unionism and beyond all it would pose a threat on the very birth of

trade unions. More over inmost cases in its day to day activities the management staff workers. This in turn is likely to make the function of trade unions impotent.

4. Domestic Servants

Domestic servants are workers who have an employment relationship with their employer in order to give services in a house-hold and not in business place. Bear in mind, it is not the nature of the service, it's rather the question to whom the worker renders service, that matters in defining their relationships. This is because, similar services like those given by the domestic worker can be given in other enterprises that are included under the coverage of labour law. As an illustration take the usual house hold chores of the domestic servant such as cooking food, washing the bed sheets of the employer and the like. These similar services may be given by another worker who is employed in a hotel. Though the nature of services performed by the two workers is identical, the house hold worker's employment relationship is excluded from the application of the labour proclamation. Whereas, the latter is still under the coverage of the law, for his employer is not a house hold.

5. Public Servants

As the naming tells, this category of employees is inclusive of all employees of the executive, legislative and the judicial tires of the government machinery. According to Article 3(2)(e) of the 2003 Labour Proclamation, these employees include:

- members of the Armed Force,
- members of the Police Force,
- members of judges of courts of law,
- prosecutors, and
- employees of state administration.

The reading of the provisions of this sub-article tells us that the ground for the exclusion of these employees is the existence of special laws governing the relationship of the employees and their employer. As the enumeration is illustrative in the future we might even get some other excluded relationships between the government and its employees pending the issuance of special laws. Dear distance learner, before directly proceeding into the identification of some government employees who deserve due attention, let us give you one question; which perhaps is ringing in your mind. Why these employees are

excluded from the coverage of labour law and are made subjects of special laws? Write down what you feel in the space provided below.

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Well, this question may be evaluated from historical as well as policy perspectives.

Historically, to be a public servant was a privilege instead of a disadvantage throughout a time. Instead of exploitation there was a privilege in this area. Public servants were not, in need of the protection of the labour law, which was there to back the weaker party (the worker) in labour relations. Hence, special laws they had.

From policy perspectives, the exclusion of the public servants could be justified by public interest concern and the purposes labour law is meant to render. To regulate the public service by the Labour Proclamation means to give the public servants all the rights the proclamation recognizes for each and every worker. Among such rights we get the right to

freely bargain and the right to strike of workers. But, this area is not an area where you can bargain. You can resign if you feel that you are at a disadvantage; since there is a huge policy concern behind the public service. It requires continuity by its very nature, and may not be an area of bargaining. Even if we allow bargaining in this area, the bargaining may not work well, because of the stronger bargaining position of not the employer, but the worker. As an example, we can take the Armed Force.

Due to all these reasons they have special laws, and hence, no need to give additional protection by the Labour Proclamation. So, almost in every nation labour law doesn't cover the public servants. But who are they? The identification of members of the armed force, the police force, judges of courts of law and public prosecutors is not that an headache. Who employees of state Administration are may, how ever, bring sort of problem when the state begin to involve in economic activities.

Employees of state include: employees of state administration and employees of state enterprises. The proclamation excludes only members of state administration, and employees of state enterprises are still subjects of labour law. But it does not clearly provide the difference between the two categories of employees in government owned institutions. It just provides that employees of state administration are excluded.

Therefore, in order to have a clear picture of the excluded employees, we are forced to focus on the identification of the difference between an “undertaking” and “state administration”, since employees of state undertakings are not parts of the exclusion. The difference between an “undertaking” and a “state administration” lies on their nature and the primary roles to be planed by these government institutions. Here are certain yardsticks to be employed for the differentiation of these two kind institutions. These are:

Powers of the Institution

State administration organs have normally supervision or regulatory powers, as opposed to state enterprises which are there with business purpose. Such regulatory power of state administration institutions is given to guide the activities and behaviours of third parties including private persons, associations of persons, schools, and business enterprises, as well as state enterprises. For example, the National Bank of Ethiopia, as a state administration institution has so many regulatory powers including the power to give license to commercial banks, and to suspend licenses if need be. There are sort of executive powers, and some are even quasi-judicial powers in their nature, for example suspension power. More over, it has quasi-legislative power, the power to issue directives as to how other banks run their business. This means in a similar manner as the other

commercial banks such as the Bank of Abyssinia, the Awash International Bank which are owned by private persons, the Government owned Commercial Bank of Ethiopia is under the regulatory and supervisory umbrella of the National Bank of Ethiopia. As its primary purpose is business purpose, the Commercial Bank of Ethiopia is therefore deemed as a state enterprise; and is therefore subject of Commercial Law; unlike the National Bank which is an issue of Administrative Law.

The Manner of Giving Service

Here we have to look at the way by which a given government institution gives services to others. Institutions that are part of state administration do not operate under *quid pro quo* principle. *Quid pro quo* principle is a principle that dictates something for something. It is the mutual consideration of one giving valuable thing for another. State administration institutions give services solely to contribute their own share for the achievement of the social, economic, political and cultural objectives of the government. They do not normally require the service recipients to pay a price for the services the latter get. In fact, regulatory powers may also generate revenue. But this is not a price for the services; it's simply a service charge which in most cases is a sort of subsidized price.

Business enterprises, on the other hand, operate under the *quid pro quo* principle, and therefore require an equivalent price for what they are giving be it goods or a service.

Manner of Establishment of the Institution

Both state administration offices and state enterprises are established by legal instruments such as proclamations or regulations. However, there is a difference between the two in the manner of their financing. State administration offices are financed by government budget in the form of annual budget. Whereas, a state enterprise does not expect some money in the form of annual budget for it's financing. It would only be provided with some cash or fixed asset in the form of capital at the start of its business, and no annual budget allocation or expenditure to a state enterprise.

6. Independent contractors

Dear distance learner, the relationship under Article 3(2) (f) of the Labour Proclamation is the last exclusion among the outright exclusions that are made by the Proclamation. As you can remember from our previous discussions and your background knowledge, all the exclusions that we are looking at are exclusions from the rule that defines the scope of

application of the Proclamation under Article 3(1). Hence, any exclusion be it an outright exclusion or a conditional one presupposes the existence of a relationship that falls under the rule enshrined under Article 3 sub-article 1 of the Proclamation. Unless and otherwise an employment relationship between two persons is established pursuant to this provision, there is no need of going further and bothering whether such relationship is excluded or not.

Bearing this obvious notion in mind, and by reading Article 3 sub article 2-f of the labour proclamation, is the law envisaging an independent contractor – client relationship? If your answer to this question is in the negative there would not be any problem. But if you are responding to the otherwise, what do you think is the relevance of such exclusion? Wouldn't this tantamount to "killing the already dead"? According to Article 3(2-f), the Proclamation does not govern "contracts relating to a person who performs an act, for consideration, at his own business or professional responsibility".

The Civil Code's definition for contractor client relation is almost identical with the contract that is excluded by Article 3 sub-article 2-f of the Labour Proclamation. Hence, it is safe to consider the independent contractor as the subject of the Proclamation's exclusion under the above mentioned provision. But, as some of the elements of a contract

of employment especially the direction element lacks, under the previous section of this unit, we have seen contactor-client relationship to be different from employer – employee relationship. Therefore, as such relationship is outside to the coverage of Article 3(1) from the very beginning, the independent contractor's exclusion or otherwise would not make any difference. Even in the absence of Article 3(2-f), the independent contractor and the client are outside of the ambit of labour law.

Conditional exclusion

So far we have seen categories of employees or employment relations that are totally and unconditionally excluded from the coverage of labour law. The categories of employees who are listed under Article 3(2) of the Labour Proclamation are totally and unconditionally excluded. There are also other categories of employees who are conditionally excluded from the scope of the Ethiopian Labour law.

Article 3(3) Proclamation

Notwithstanding the provisions of Sub-Article (1) of this Article:

a. unless the Council of Ministers by regulations decides or an international agreement to which Ethiopia is a signatory provides otherwise,

employment relation between Ethiopian citizens and foreign diplomatic missions or international organizations operating within the territory of Ethiopia shall be governed by the proclamation;

b. *the Council of Ministers may, by regulations, determine the inapplicability of this proclamation on employment relations established by religious or charitable organizations:*
c. *the Council of Ministers shall issue regulation governing conditions of work applicable to personal services.*

Article 3(3-a) of the Proclamation talks about the Ethiopian citizens who are working for diplomatic missions or international organizations. There are three possible laws that would regulate the employment relations between Ethiopia citizens and those organs. These are:

- international conventions to which Ethiopia is a signatory,
- a regulations issued for that purpose by the council of ministers
- in the absence of such an international convention or a council of minister's regulations, the Labour Proclamation.

Therefore, the exclusion of these employees is conditional upon the ratification or issuance of international conventions or council of Ministers Regulations that address the employment.

The other conditional exclusion is the employment of religious and chartable organizations and their employees. The condition attached to this effect is the issuance of council of Ministers Regulation for the purpose of governing their employment relations. In the absence of such regulations, these employment relations are within the coverage of the Labour Proclamation.

One important issue with mentioning here relates to the scope of the exclusion of the employment relation of religious organization with their employees. The primary function these organizations perform is the spiritual service they render to their respective fellows. For the successful performance of such religious strikes, the organizations usually undergo various incidental activities of “secular” nature; some activities even with business nature and employ workers for that purpose. For instance so many churches give service / make money in their shops, industrial undertakings; regular schools of various levels up to college etc. there are also administrative systems within the churches employing guards, secretaries, drivers etc.

As regards the relationship of religious organizations with their employees in the secular activities, for example their contract with drivers, shop sellers, secretaries, school teachers, etc, there may not be a problem with the applicability of the Labour Law for their regulation. However, as the provision is not making a dichotomy between employees of purely spiritual services, such as priests and deacons, on the remaining personal for the purpose of exclusion, it would be could if one poses a question as to what the scope of the exclusion is. To illustrate it, are religious servants including presets and deacons deemed as subjects of the Labour Law; and hence allowed to enjoy the protections the Labour Proclamation accords to workers. For instance, can they exercise the Right to Association and to form trade unions in order to bargain with their employees such as the churches? What would be the role of the internal regulations (rules) of the churches or mosques that dictate rules on disciplinary matters, wage / remuneration, working hours per day, termination of contract of employment issues etc. of religious men? Dear learner, please discuss about this issue with your colleagues and try to give your own opinion on it.

UNIT THRREE

CONTRACT OF EMPLOYMENT

INTRODUCTION

Dear distance learner. Welcome to the third unit of this course. This unit deals with a contract of employment. Contract of employment is the first and mandatory step to words establishing an employment relationship between an employer and a worker. In the foregoing unit, you have seen who a worker is but such definition of a worker presupposes a valid contractual engagement bet an employer and a person. There fore in order to resolve the question of the meaning of a worker and ultimately .the scope of our labour law regime which cover a significant portion of the labour disputes that are brought before our labour tribunals you have to have a clear understanding of this unit of our course especially its first section . In the first section of this unit, therefore, you are going

to see formation of a contract of employment, special emphasis given to the validity requirements there of.

The second section of the unit deals with the duration of contract of employment. under this section we are going to make a discussion on the period with in which an employment relation continues to exist, basically and evaluation of the extent of parties freedom to deter me the duration of contract will be made.

Contract of employment, once concluded does not mean that the terms will not be touched or the relationships are uninterrupted. With a view to see the possibility of altering the terms of the contract and interruption of employment relations, the last two sections are provided. Thus, section three will be devoted to the discussions of variation and suspension of a contract of employment. Under the third section of the unit are going to look in to the requirements the proclamation imposes for the modification or variation of a contract of employment. More over, the grounds for temporarily interruption of employment relations and effects of suspension will be examined. In the last section you are going to see the other mandatory stage of employment relation: termination of a contract of employment. The core themes of this section’s discussion include the kinds of

termination, ground of termination and entitlements of lawful and unlawful termination of a contract of employment.

Learning Objectives of the Unit

Having completed this unit, you will be able to:

- Describe the special requirements available for the formation of a contract of employment.
- Distinguish between definite period and indefinite period contracts of employment, and their manner of termination.
- Compare and contrast between the concepts of suspension and termination of a contract of employment.
- List down the legally prescribed grounds for suspension and termination of a contract of employment.
- Explain the Effects of lawful and unlawful termination of employment contracts.

3.1. FORMATION OF A CONTRACT OF EMPLOYMENT

Dear learner, as you remember from the discussion in the first unit of this course about the emergence and development of labour law; prior to the beginning of state intervention employment relations were solely regulated by contract of employment. but today, in order to back the weaker party in bargaining state intervenes in the employer employee relationship, though the extent of intervention varies from country to country. Though this is the truth in our current context, contract of employment remains to be the starting point for the parties to have employment relationship. This makes an employment contract a special kind of contract. Hence, unless the labour proclamation draws its own specific rules (exceptions) on specific issues, the civil code's general rules on contract would be applicable on employment contracts.

Pursuant to article 1675 of the Ethiopian Civil code, a contract is an agreement where by two or more persons as between themselves create, vary, or extinguish obligations of a proprietary nature. This definition accommodates the basic principles that should be there for all special contracts like, contracts of sale, agency, etc. But still all such special contracts including employment contract have their own definitions that narrow the scope of the general definition of a contract. Accordingly, a contract of employment is defined by article 2512 of the civil code to mean a contract between employer and employee in which the terms and conditions of one's employment are provided. But how does contract of

employment be formed between two per sons? Article 4(2) of the proclamation tries to answer this question. It says,“A contract of employment shall be stipulated clearly and in such manner as that the parties are left with no uncertainty as to their respective rights and obligations under the terms thereof.“

According to this sub-article of article 4, the details of the contract are to be laid down by the parties to the contract but the law tries to make sure that certain requirements are fulfilled. These requirements, as you remember from the discussion of unit- two, are what we call elements of contract of employment.

It’s if and only if the elements of

- direction/authority of an employer
- wage
- duration of engagement for definite to or indefinite period
- employee and
- employer are cumulatively met that a contract of employment is deemed to be, formed.

Besides, in our discussion on formation of a contract of employment the issue of validity deserves due attention. For an employment relation is a contract, the general validity

requirements of contracts need to be fulfilled. These general requirements are provided under the 1960 civil code. Perhaps you have seen them in your course of Law of contracts. As article 1678 of the code dictates, the following requirement must be complied with in order to say a contract is validly formed.

- The parties must be capable of contracting and should give their consent sustainable at law.
- The object of the contract must be found to be sufficiently defined, possible, moral and lawful
- The contract must be made in the form prescribed by the law, it any.

These four requirements of validity: defect free consent, capacity, object and form are equally applicable to contracts of employment. Herein below, we will make a bird's eye view of these formality requirements:

I. consent

Parties to a contract of employment should be able to give their consent sustainable at law. Article 1079 of the civil code dictates that a contract shall depend on the consent of

the parties who define the object of their undertakings and agree to be bound thereby. There must be an intention to be bound that may not be given expressly, but may be inferred from the circumstances. Moreover, according to Article 1680 (1) a contract is deemed completed where the parties have expressed their agreement there to. This makes consent which is expressed in the form of offer and acceptance, the back bone of any contract, including an employment contract.

In order for consent to be deemed to exist, there fore, these must be an offer and acceptance to employ or to be employed. An offer is a proposal by one party to enter into a legally binding agreement with another; while acceptance is the expression of willingness to be bound by the terms of the offer. Both offer and acceptance or one of the two may be made expressly or impliedly. In addition, the terms of offer and acceptance must be sufficiently defined, must be clear (unambiguous) and must not be loose. For example if Ato Abebe says to Ato Zerihun “I will employ you in my company” this offer of Ato Abebe may be ruled as an ambiguous proposal as there may exist various positions and jobs in Ato Abebe’s company. This principle is enshrined under article 4(2) of the 2003 labour proclamation. Which provides “ a contract of employment shall be stipulated clearly and in such manner as parties are left with no uncertainty as to their respective rights and obligations in the contract” The provision also reflects the need for defect free consent of

parties for the validly conclusion of a contract of employment. There fore, if one of the parties is left with uncertainty as to the offer or acceptance of the other party, as a result of the vitiating factors of consent stipulated by the law, the contract's validity would be in question. As it is already said in your course on law of contracts, consent would be vitiated by factors such as coercion, undue influence, fraud and fundamental mistake. As consent is the manifestation of the most important principle in contracts i.e. freedom of contract principles, any consent which is defective is not deemed as a free consent.

II. Capacity

As a rule attainment of majority (eighteen years of age) is necessary to enter into a valid contract of any kind (Articles 198 and 199 of the 1960 civil code of Ethiopia). With respect to labour law we seem to have exception in this regard. Dear distance learner, have you heard of the term "young workers"? What is your understanding about these workers, especially about their ages? Perhaps, you have understood them to mean workers of less than eighteen years of age.

As an exception to the general rule of capacity, a contract of employment could be concluded prior to the attainment of majority. Such workers who do not attain majority

are referred to as " young workers". To have a clear picture of this exeption read article 89 sub-article 2 of labour proclamation.

Article 89(2) labour proclamation:

"It is prohibited to employ persons under 14 years of age."

In fact, the above provision could be regarded as a prohibitive provision as it giving a warning for employers not to employ children below the age of fourteen years. However, acontrario reading of the same allows one to hire workers of fourteen years of age or greater. So the domain of young workers encompasses workers of both sexes who fall between 14 and 18 years of age.

One issue worth pointing at this juncture is the issue of consent of the guardian while a young worker enters into employment. Is consent of the guardian required with consent of the young worker for the contract to be valid? Some foreign jurisdictions' laws expect the guardian's consent together with the young worker's consent as a validity requirement. But it's difficult to say this is a requirement or not in our legal system. Dear distance learner, what is your opinion on this issue? Discuss it with your colleagues and try to give your own comments.

Why fourteen years of age is selected as the minimum age for employment? For example, why not 13, 15, or 16? Do you think it is a figure which is arbitrarily provided by the law maker? As the law maker is presumed to pass reasonable policy decisions, one can't expect this age requirement to be something arbitrarily imposed. Some people hold that 14 years is taken as a minimum age of employment in order to go inline with the "child convention" which dictates primary education (education up to 8th grade) as compulsory. Children are expected to go to primary schools at the age of 6, and by simple calculation 6+8 = 14. So, 14 years of age is assumed as the time of completion of primary education and an age of employment. This is because, if we allow employment below that age, we are in effect avoiding the mandatory requirement of the child's right to education. Other countries also follow 14 years as principle. Hence, after the completion of compulsory education, individuals would be given early wage for their work.

III. Form

With respect to the form of a contract of employment the pertinent provisions for our discussion are article 5 of the 2003 Labour proclamation, and article 1719(2) of the 1960 civil code of Ethiopia.

Article 5 Labour proclamation:

> *Form*
>
> *"Unless otherwise provided by law, a contract of employment shall not be subject to any special form."*

Pursuant to the above cited civil code and labour proclamation provisions, no special form is required unless the law demands. As opposed to the requirements of capacity, consent and object which are provided as principles (rules) for validity, the principle here is "freedom of form" and form is required only when deviations by the law are found. There fore, silence of a certain relevant law about the requirement of form shows parties' liberty to make their contract the manner they wish be it orally or in written form.

Though this is the rule, under some exceptional instances the labour proclamation demands a written contract of employment. As an illustration to this we can take article 11(3) which orders a written agreement when ever parties modify their contract of employment. Hence, in what ever manner a contract of employment is concluded (either orally or in writing) modification of the contract would be legal only when it is done in

writing. Similarly, a contract of apprenticeship is to be made in writing (Article 48 (3) labour proclamation).

On the other hand, if contractants decide to make their contract in writing, Article 6 of the proclamation lays down the contents the parties must specify there in.

These are;

- the names and addresses of the parties,
- the age of the worker,
- the type, and place of work,
- the rate of wage, method of calculation, manner and interval of payment,
- the duration of contract, and
- the signature of the parties.

If the contract of employment is one entered into orally the employer is duty bound to reduce it in to writing and give a copy there of to the worker (Article 7(1). This letter of employment is to be given to the worker within fifteen days as of the date of conclusion of the contract. However, the employer's failure to comply with such duty does not trigger invalidation of the contract. The same holds true for a contract of employment made in

writing at the will of the parties, and proved not to satisfy the requirements of Article 6 of the proclamation. As the contract is still valid under both instances, the worker is yet allowed to enjoy all the rights the contract provides him.

Dear distance learner, the aforementioned kind of letter is not a formality/ validity requirement, as it's not expressly dictated to be so pursuant to article 5, and since such contract is valid per article 8 of the labour proclamation. If this is the case, you may ask why is a written instrument required by article 7(1)? This is just to avoid problem of proof at a latter stage. Compared to testimony given by oral witnesses, a written instrument, especially a pre- constituted proof, has higher probative value. The written evidence would be given due weight than the oral testimony which is likely to be affected by human nature of forgetfulness. Moreover, the ease to produce it before tribunals and the purpose it renders in avoiding cost for witnesses; and generally the role a written document plays in avoiding further litigations make the letter of employment an important document for both parties.

So, if a written instrument of this kind is believed to have all these advantages, why did not the law make it a mandatory requirement? By examining our social reality and our

business peoples', attitude towards written agreements, try to give an answer to this question on the space provided.

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IV. Object of the contract

The rule under article 4(4) which reads "A contract of employment shall not be concluded for the performance of unlawful or immoral activities" is a restatement of the civil code's provision on the "object" of a contract as a validity requirement. Since, you do not observe

any difference on the messages of the provisions of the two legal instruments, you can revisit the discussion you made under Law of contracts course.

V . Contents of the contract

The previously discussed validity requirements for a contract of employment are almost identical with the requirements all contracts should comply with. However, the labour proclamation goes further and it displays due concern even for the parties' stipulations (contents) in their contract of employment. Please, read article 4(4) of the proclamation as to what the details of the contract should look like.

Article 4(4) Labour proclamation

> *"A contract of employment shall not be concluded for the performance of unlawful or immoral activities"*

This is one of the areas where the state intervenes in parties' freedom of bargaining while they stipulate the terms of an employment contract. According to article 4 of the labour proclamation the parties to an employment contract are prohibited to provide for the

worker less favorable conditions than the minimum conditions stipulated by the proclamation, the collective agreements, or work rules. As has just been said under the first unit of this course, the proclamation, the collective agreements, the contract it self and work rules serve as sources of law, when ever we come across labour disputes. The issue that deserves our appreciation on this spot would, there fore, be about the fate of a contract that contravenes article 4(4). To put differently, is the requirement of “content” under the proclamation a validity requirement like consent, capacity, form and object, making the contract invalid?

As the purpose of such a requirement is to protect the interests of the worker who is the weaker party in bargaining, and since to invalidate the contract as a whole is likely to hurt the worker himself, the requirement under Article 4(4) should not be taken as a validity requirement. Therefore, instead of invalidating the contract, it seems valid to replace better or highly favorable conditions in those less favorable conditions of the contract from provisions on the law, collective agreement or work rules. Article 134(2) of the 2003 Labour proclamation gives us a similar guidance to resolve such issues, by providing the possibility of up ward derogation from the minimum protections gives by the proclamation.

Article 134(2) Labour proclamation:

> *"Where the collective agreement is more favorable to the workers in similar matters than those provided for by law, the collective agreement shall prevail. However, where the law is more favourable to the workers than the collective agreement the law shall be applicable."*

For a better understanding of the issue at hand, read the following example. Ato Abebe Damtew has concluded a contract of employment with YZ Company. According to their agreement, Ato Abebe is employed to work for 9 hours in a day. However the maximum duration of service a worker is expected to render per day is defined by the proclamation to be 8 hours only. The collective agreement which has been drawn by the employer YZ and the worker's association on the other hand provides for a 7 hours per day duty of service for all workers.

In this example, the contract of employment is with less favourable terms with respect to working hours of the worker; as compared to those of the proclamation and the collective agreement. Out of these 3 instruments it is the collective agreement which is most protective for the worker. Therefore, instead of invalidating the contract of Ato abebe at,

it seems sound to substitute this specific provision of the contract by the working condition the collective agreement provides. Accordingly, Ato Abebe in the above example is expected to work only for seven hours per day.

3.2. DURATION OF CONTRACT OF EMPLOYMENT

Dear distance learner, so far we have seen how a contact of employment can be validly formed. Under this selection we will see for how long a contract would stay in force once it is validly concluded. Sections 2 of the 2003 labour proclamation deals with duration contract of employment. Employment contracts can be categorized in to two classes as definite period and indefinite period .A definite period contract is a contract that is entered in to for a specific period of time .On the other hand if the interact is found to be one that is concluded for a specified period of time it is a contract for indefinite period .But you have to take notice of the fact that the difference between contract for definite period and contract for indefinite period may not necessarily be on the period with in which the contract stays in force. Rather the two categories mainly differ in the manner of the termination of the contract.

As we are going to see in the future, the period of termination is definite incase of contract of employment for definite duration. The contract can be terminated without any act of the parties simply by operation of the law upon the expiry of the period .For this purpose Article 24(1) of the labour proclamation declares, *"A contract of employment shall terminate on the expiry of the period where the contract …is for definite period ….'*

On the other hand, if a contract of employment is included for indefinite period it means that the contract is concluded for unspecified period. In this case the contract can not be terminated on the basis of the aforementioned provision. And termination of such contracts will be held on some other grounds provided by the law. Therefore, such kind of contract may only be terminated for some thing related to the parties.

Dear distance learner up to now we were talking about the nature of definite and indefinite period contracts of employment. This back ground information perhaps serve you as a spring board for the interesting issue we are going to see next.

The issue revolves around the interpretation of Article 10 and article 9 of the proclamation, most often when an employer alleges that the contract of employment of a worker is terminated by virtue of Article 24(1) (a) of the labour proclamation. Article 10 of the proclamation provides a list of contracts of employment that can be concluded for

definite duration. Further, Article 9 of the proclamation dictates that “any contract of employment shall be deemed to have been concluded for an indefinite period except those provided under Article 10”. From the reading of these two Articles; are particles free to determine the duration of their contract for the purpose of termination of their contract according to Article 24 (1) (a)? By invoking different policy reasons our courts were used to give heterogeneous interpretations on similar cases that involve this same issue. Read those different lines of argument and court decisions as translated by Getachew Gima here in below.

The first line of interpretation is that duration of employment contract may be determined by express agreement of the parties as to whether it is for definite period or piece work or for indefinite period as per Article 4(3) of Labour proclamation. Accordingly, if the contract is silent about the duration of the contract, the contract will be presumed to have been concluded for indefinite period as per Article 4(3) of Labour proclamation. Accordingly, if the contract is silent about the duration of the contract, the contract will be presumed to have been concluded for indefinite period of time. Again if the contract is for the performance of the kind of works that are listed under Article 10 of the proclamation, it would be deemed to have been concluded for definite period or piece work. Therefore,

the contract will be terminated on the expiry of the period or on the completion of the work as per article 24(1) of the proclamation.

The second line of interpretation, on the other hand, is that the duration of the contract is determined by the nature or situation of the work for which a worker is employed. If the work is of continuing nature, the contract of employment is deemed to have been concluded for indefinite period regardless of the agreement of the parties. On the other hand, if the work is not of continuing nature, the contract is presumed to have been concluded for definite period, whether or not the contract is silent about the duration of the contract. But if the employment is for the performance of any of the jobs listed under Article 10 which are not of continuous nature, the contract will be considered as if concluded for definite duration. That means, the classification of employment contacts in to indefinite and definite duration is made on the basis of the nature of the work or the situation under which the work is to be performed. Hence, not the consent of the parties rather the nature of the work (i.e. whether it is continuous or not) or the situation that determine the duration of the contract.

The third line of interpretation, which is in fact the opposite of the above two lines of interpretation dictates that, the duration of employment contract is not to be determined by the nature or situation of the work or by the consent of the parties. Rather, all

contracts are made for an indefinite duration whether the work has continuous nature (the parties agreed) or not. Unless they meet one of the circumstances that are listed under Article 10 of the proclamation a contract has to be considered as concluded for an indefinite period. In other words, if an employer and employee agree to conclude a contract of employment, they have to make the contract on the basis on the condition listed under Article 10 of the proclamation. In other cases the contract is deemed to be concluded for indefinite period regardless of the agreement of the parties, nature or situations of work .Hence, if the employee agrees or submits to undue influence of the employer to sign a contract for fixed duration, a contract is considered as concluded for indefinite period as per Article 9 of the proclamation. Therefore, to rebut the presumption under article 9 and to be considered as an employment contract concluded for definite period the contract must be concluded on one of the circumstances under Article 10 of the proclamation. So, the parties to the contract are free to agree on the duration of the contract only on the basis of the grounds under article 10.

To understand the above raised interpretations properly, it is necessary to see different decisions which are given by different courts.

In the case of Tsegaw Kefyalw Vs commercial Bank of Ethiopia the employee was working as guard of property pledged to the commercial Bank of Ethiopia to secure loan. Before

the property was put for sale to recover the loan, the bank gave the job to another organ and terminated the employment contract when the period for the contract has expired as per Article 24(1). The employment contract stipulates the date at which the contract will be terminated. Because of this, the court found the termination of the contract as a lawful one when this period expired. In this case, it is not proved in which of the grounds under Article 10(1) of the proclamation the employment relation falls. The court took the contract as a fixed term one because of mere expiration of the stipulated duration in the contract. From this we can understand that, the court followed the first line of interpretation by which the duration of employment contract is determined by express agreement of the parties.

Whereas in the case of Ato Gahaw Ewnate Vs Papyrus Hotel; , the plaintiff alleges that his dismissal is unlawful, since , the defendant does not have a legal ground to terminate the contract and claimed for the payment of compensation.

The defendant also contested in his defense that the dismissal is lawful for the reason that, the plaintiff's contract was concluded for definite duration and that his dismissal is due to the expiration of the time.

The court finally decided in favor of the plaintiff on the ground that the work under the contract has to be one that has continuous nature in order to be concluded for an indefinite period of time.

In the case of G/Egezabeher Vs Ethiopia Telecommunication Corporation, the plaintiff before the Labor Relations Board claims that since they are employed as guards which is a permanent activity of the employer and have completed their period of prohibition, they have to be considered employees employed for indefinite period of time The defendant then appealed to the high Court but, the High Court affirmed the decision of the board.

However, the decision of the board and the court got quashed when the case was brought before the cassation division of the Federal Supreme Court. The Court held that, the contract between the parties is concluded as per Articles 4 and 6 of the proclamation in writing due to the security problem at the time; which is one of circumstance under Article 10 of the proclamation and it is also only the undertaking that determines whether the security problem at the time is alleviated or not. Moreover, the plaintiff may have no ground to institute a proceeding while the parties were performing their respective duties in accordance with their contract.

In the case of Ato Jemera Alemu Vs Telecommunications Corporation, the plaintiff claims that he has been working for the last five years in the undertaking/Corporation/ with 150-

3000 birr salary per-month. In the course of performing his duty the employer announces vacancy to hire workers in his position. He adds the proclamation under Article 9 declares his engagement as a contract of employment for an indefinite period of time and based on this provision he claims that the court should decide his contract of employment to be made for indefinite period of time.

The defendant on the other hand contested that the work which was done by the plaintiff is not a permanent one rather it is an occasional work which falls under one of the circumstances under Article 10(1) of the proclamation and also his work is substituted by a machine. The defendant argues that it is not obliged to pay salary for a worker who has no more work. Moreover, the plaintiff may not claim his contract to be concluded for indefinite period by mere fact that he works for more than 45 days and finished the period of probation.

The court to whom the case is brought i.e. West Gojjam High Court decides in favor of the plaintiff on the ground that the type work which was performed by the employee doesn't fall with in the ambit of those types of works that are listed under Article 10 of should be concluded for indefinite period of time regardless of the agreement of the parties for fixed period of time. Hence, the contract would be a contract for indefinite period.

Dear distance learner, do you see the different interpretations given for Articles 9 and 10 by our courts? But today, the third line of interpretation which is employed by the Cassation Division of the Federal Supreme Court is the authoritative and binding interpretation. This is because according to the dictates of Proclamation No.454/2005 a legal interpretation adopted by the Cassation Division of the Federal Supreme Court binds the lower courts.

PROBATIONARY EMPLOYMENT

Once a contact of employment is validly formed, the next step the worker may pass through is the probation period. This period is a period that enables both the worker and employer to determine each other's suitability (read Article 11(1). As opposed to formation of contract of employment which is a mandatory state for employment relations, this period or stage is a permissive one; and hence not all employees are required to pass through it. Unless probational employment is agreed expressly and in writing, silence about it doesn't amount to presumption of probation period.

With respect to the duration of the period of probation the maximum ceiling is determined by Article 11(4) of the proclamation. When parties agree to have a probation period, the maximum duration they can stipulate in the contract is only 45 days. Dear learner, what would be the effect if parties provide the duration of probation to be longer than that the law spells out i.e. 45 days? Base your reasoning on whether longer probation is an advantage or a disadvantage for the worker, and give your opinion on the issue.

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Under the 2006 federal civil service proclamation, the first 6 months of employment are already spelled out as a period of probation for any civil servant. More over, if need be the 6 months probation period could be extended to 9 months. When we compare the labour proclamation with its civil service counter part we get deviations which can be examined from two perspectives. Firstly, in the civil service law probation period is a mandatory one, requiring all of its employees to pass through this stage. The second difference is on the duration of the period of probation. When we see those differences together, the 6

months mandatory requirement and the additional 3 months would make the civil servants' period of probation extended from 6 months op to 9 months, as opposed to the case of workers in the labour law i.e. that is from zero up to 45 days only.

Dear distance learner, what do you think is the policy justification behind such a huge deviation observed in the two legal instruments. Such a difference may be justified from two angles. One may be the nature of employees the civil service demands; and the other may be the harm longer probation is believed to pose on employees.

As there as a significant public interest concern behind of the civil service, it requires more integrity, character or determination from its employees. This in turn calls for due examination of its employees qualities, by taking longer periods of testing. Moreover, as you can infer from the reading of Article 11(5) of the Labour Proclamation, the employer has a wider discretion to unilaterally terminate the contract of employment of the worker. In times when extend period of probation is provided, the employee is believed to be subjected to exploitation and employment insecurity due to the employer's wider discretion of termination. And this is the reason for the law maker to limit the maximum at 45 days for workers in the Labour Proclamation. However, this kind of abusive conduct is

not assumed to exist on the part of the government even in extended periods of probation. So, all civil servants should pass through probation for a minimum of 6 months.

3.3. OBLIGATIONS OF THE PARTIES

Once a contract of employment is concluded in the way you have seen in the first section of this unit, both parties have minimum obligations imposed by the law. Whether the parties have provided it in their contract or not, these obligations are to be met by both the employer and the worker. For a clearer understanding of these obligations enshrined under the Proclamation's Articles 12, 13 and 14, the obligations are divided in separate parts as obligations of the employer on one part and obligations of the worker on the other.

3.3.1 Obligations of the Employer

An employer has the duty to observe the provisions of Article 12 and Article 14 sub-Article 1 of the Labour Proclamation Article 12 talks about positive obligations or obligations to do of the employer. These are

i. Duty to provide work

Under modern pictures, especially with the development of Human Rights, work is an aspect of human dignity or source of honour and for the individual to feel he / she is contributing something to the society. If no work is provided for the worker he may believe that he is not doing anything for the society and is living as a parasite. This is ultimately believed to hurt his integrity. Therefore, by setting aside the traditional thought of considering payment of wage even without work as sufficient, in current ILO standards and domestic Legislations, like ours, duty to give work is incorporated as an obligation of the employer.

ii. Obligation to provide tools and materials

In principle, it is the employer who is duty bound to provide the necessary tools and materials for the worker to render services. But this duty can be contracted out according to Article 12 sub- article 1(b): and the worker himself may be the provider of the necessary materials and /or the tools which enable him perform the work.

iii. Obligation to pay wage and other remuneration and to respect the worker dignity.

Payment of wages and other remunerations is another major obligation of the employer. As you can remember from our discussions under the first unit of this course, the service given by the worker is not for free. This wage element is crucial even to make the contract a contract of employment in the eyes of the law.

Besides, as one can reasonably expect, the employer has the duty to respect the worker's human dignity irrespective of the employer's and the employee's huge gap in financial terms.

iv. Obligation to take measures protecting workers from occupational hazards

This obligation relates to issues of safety and health of workers. It is about making the working environment safe and healthy to the extent possible. To this end, the employer must take all necessary measures and respect the standards and directives given by the

concerned authority. In this respect, the power to issue those standards and directives is vested with the ministry of Labour and social Affairs per Article 170 of the Labour Proclamations. The employer's failure to comply with this duty is a criminal act subjecting him to fine extending up to Birr 1200 –(Art. 184(2-a)).

v. Duty to give certificate of service

Upon termination of a contract of employment or when ever the worker requests, the employer has the duty to give certificate of work (service) for the worker (Art. 12(7)). This letter of service has so many importances for the worker. For instance, the letter of service may help the employee to look at other opportunities of work. Therefore, the letter is expected to contain a sort of general information to be given in favour of the employee and should be addressed "to whom it may concern". What the law demands the employer is to state only quantitative /objective things; the wages he was earning, duration of service, type of work he performed and the like. Therefore no qualifying /subjective information such as reason of termination and conducts of the worker, are included in such a letter unless the worker demands. This makes the letter of service different from the written notice under Article 27(2) which is also given up on termination. On the basis

of Article 27(2), employers often say the reason of termination should be included in the service letter, especially when the termination is by disagreement.

But, as we can understand from the reading of Article 2588, especially its sub-article 2 qualifying things are not aliased to be put in the certificate of service.

Read Article 2588(2) of the Civil Code .

Similarly ILO Recommendation No. 119, Article 8 strengthens our assertion. According to the Recommendation, nothing unfavorable to the worker should be inserted in such a certificate.

Unlike, the rules under the above legal instruments, the repealed Civil servants proclamation had a deviation from the ILO standards and the Labour proclamation, in this respect. According to Article 82 of the repealed Civil servant's proclamation, besides objective things the reasons of termination of an employment of the employee had to be stated by the employer. Such a deviation of the proclamation from the international as well as domestic laws had subjected it to so many criticisms. Hence, the currently enforce Federal Civil Servants Proclamation No. 515/ 2007, under its Article 87 has undergone a

shift and adopted a similar standard like that of the Labour Proclamation, the Civil Code and the ILO Recommendation.

Article 87 Federal Civil Servants Proclamation

Where the service of a civil servant on service is terminated for any reason or where he so requests, he shall be provided with a certificate of service indicating the type and duration of service as well as his salary.

Dear distance learner, are you clear with this discussion? If you did not sufficiently understand the above points, please go back and try to read them again. By the way, how do you compare the certificate of service we were talking about, and the notice the employer gives to the worker per Article 27(2) of the Labour Proclamation?

vi. Other positive obligations

There are also other obligations the employer is supposed to do. The employer is duty bound to defray the cost of medical examination of the worker whenever this is required by law or the appropriate authority. The employer has also the duty to keep the register of

any relevant information about the worker. Moreover, employer is required to observe the provisions of the Labour Proclamation, directives and order collective agreements and work rules that are issued in accordance with law.

Inline with the foregoing positive obligations of the employer, there are also certain acts which the employer is not allowed to commit. These are obligations not to do certain acts as stipulated by the Proclamation. These obligations are listed under Article 14 sub-article 1 of the Proclamation. In addition to the resultant Civil Liability non obedience might bring about violation of any one of those obligations is punishable on the basis of Article 184(2-c) of the Proclamation. So such acts are criminal acts.

Since those negative obligations of the employer are clearly provided under the proclamation. You are invited to read article 14(1) as directly copied here in below.

Article 14(1) Labour Procl.

1. It shall be unlawful for an employer to:

a. impede the worker in any manner in the exercise of his rights or take any measure against him because he exercises his right;

b. discriminate against female workers, in matters of remuneration, on the ground of their sex;

c. terminate a contract of employment contrary to the provisions of this proclamation;

d. coerce any worker by force or in any other manner to join or not to join or to cease to be a member of a trade union or to vote for or against any given candidate in elections for trade union offices;

e. require any worker to execute any work which is hazardous to his life;

f. discriminate between workers on the basis of nationality, sex ,religion ,political out look, or any other conditions.

3.3.2 Obligations of the Worker

In a similar manner like that of the employer, the law maker has provided positive as well as negative obligations on the part of the worker.

The obligations to do/ positive obligations of the worker are listed under Article 13 of the Labour Proclamation. On the other hand, the obligations not to do or the negative ones are found under sub-article 2 of Article 14 of same.

With respect to the positive obligations, the worker is with the duty to:

1. perform in person the work specified in the contract of employment;
2. to follow instructions given by the employer based on the terms of the contract and work rules;
3. to handle with due care all instruments and tools entrusted to him for work;
4. to report for work always in fit mental and physical conditions;
5. to give all proper when an accident occurs or an imminent danger threatens life or property in his place of work. Without endangering his safety and health;
6. to inform immediately the employer any act which endangers himself of his fellow workers or which prejudice the interests of the undertaking; and
7. To observe the law, collective agreement, work rules and directives issued in accordance with law.

Out of such obligations, in the next few paragraphs a discussion will be held on some of them that deserve due attention.

One major obligation of the worker is the duty to give service in person. This means without the consent of the employer, the worker is not allowed to delegate his duty to other persons in whatever circumstances. When we look at its opposite face this obligation is also an entitlement to the worker; as the worker is not obliged to look for a substitute at that particular time.

The duty to report for work always in fit mental and physical conditions; specifically the case of mental unfitness due to intoxication is provided in the form of duty of omission / negative obligation under Article 14 (2) (c) of the proclamation. The worker's non-compliance with such duty is sanctioned by granting the employer the right to terminate the contract of employment without notice per Article 27(1)(i) of the proclamation. Moreover, a worker who assumes employment risk while getting intoxicated is not allowed to be entitled to injury benefits on the basis of Article 96(2-b) of our Labour Proclamation.

Another obligation identical to the obligations of the employer as recognized by Article 12(8) is that duty to observe the law, collective agreement, work rules and directives issued in accordance with the law. All of the listed instruments which the worker is duty bound to observe are sources of obligations or sources of law for both parties to the contract. Since the labour proclamation is a law duly drawn by the appropriate body, as expected of any citizen of the country, the individual worker must observe the provisions of the proclamation. On the other hand, a collective agreement is an agreement which is an out come of the bargaining process of the employer and the workers represented by their trade union. Hence, no problem if the proclamation orders the worker to be bound by his words i.e. the provisions of the collective agreement as such a document is a contract between the employer and the workers collectively.

But, there is a frequently debated issue regarding the worker's duty to abide by the work rules of the employer. These rules are unilaterally made by the employer absent state's or workers' participation. Dear learner please read the definition of "work rules" from Article 2(5) of the Labour Proclamation.

Article 2(5)Labour proclamation:

> *“work rules“ means, subject to the provisions of this Proclamation and other relevant laws, an internal rules which govern working hours, rest period, payment of wages and the method’s of measuring work done, maintenance of safety and the prevention of accidents, disciplinary measures and its implementation as well as other conditions of work;”*

According to Article 2(5), work rules are internal rules of the undertaking drawn by the employer subject to the labour proclamation and other relevant laws. Such rules, which are mostly applied in order to maintain work place discipline, are expected to be made incompliance with all relevant laws including the proclamation. Other wise, unilateral orders of the employer that contravene the proclamation and other relevant laws would be of no effect; and hence the worker is not with the duty to be guided by the “rules” according to Article 13(7) and Article 2(5) of the labour proclamation.

The typical examples of work rules important for the discussion at hand include rules that order workers to wear a dress code (uniform); and the rule authorizing the employer to conduct search at the gates of an undertaking. Dear learner, in your first year course on the Ethiopian Constitution perhaps, you have seen the two constitutional rights; The Right to privacy and the Right to Freedom of Religion.

On the basis of their constitutional right to privacy, workers might refuse to be searched at the gates of their work places, as this contravenes their right to privacy. Similarly, people might refuse the employer's rule to wear dress code or uniform by invoking their right to Freedom of Religion, for their respective religious dictates require fellows to comply with a certain defined dressing style / costumes.

The question here is that should we allow the workers to set-aside the work rules as the latter are against workers' legal rights; or should we simply require them to observe the work rules irrespective of their constitutional rights? In fact, since Article 2(5) subjects the work rules to the provisions of the proclamation and other relevant laws including the constitution for our case, it is unthinkable to totally erode the workers' constitutional rights and requiring them to simply observe the unilateral dictates of the employer. On the other hand, in times the work rules are found to be so crucial for the employer it seems unsound to allow workers not to be bound by such important rules, though they go against some of the constitutional rights of workers. For instance, when we see the rule subjecting workers for search at the gate, this could even be justified by the employer's right to private property which in itself is a constitutional right of the employer.

Then, how can we reconcile such competing interests of the workers on one hand and that of the employers on the other. Unfortunately, we couldn't clearly see the practice in our country and to get some guidelines for application. However, the United State's Supreme Court has adopted its own yardsticks to measure work rules vis-à-vis the Constitution: the "Necessity and Rationality" Test. Any measure (work rule) of an employer that passes this test is a valid one and workers are duty bound to observe such an obligation.

For the US a measure is deemed necessary if it is taken as a last resort as due to the absence of any other less restrictive measure to attain a desired goal. If the measure passes this first test and is ruled as necessary, the next examination becomes about its rationally implementation: the rationality test. By rationally implementation we are requiring the employer to apply the measures i.e. work rules without imposing excessive costs on the workers for example in a non discriminatory and convenient manner. For instance, if we consider search at the gate as a necessary measure for a particular employer by making use of the necessity test the search must be applied horizontally on all workers irrespective of their rank. Plus to that the search must also be held in a manner that is convenient for the workers; for example male by male or female by female search.

Activity

1.Dear distance learner by applying the above two cumulative tests for validity of a work rule, how do you see the Ethiopian Air Lines rule that subjects its captains to dress code (uniform) vis - a - vis the workers' Constitutional Right of freedom of religion?

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2. What would be the fate of a work rule that is ruled as invalid on the basis of the above standard? Explain.

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3. Do you think that it is good to inject the United States supreme court's approach into our Legal system for the evaluation of legality of “a work rule’ per Article 2(5) and Article 12(8) of the Labour proclamation? Why/ why no? Discuss.

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3.4. Variation and Suspension of a Contract of Employment

Dear distance learner, in the previous sections of this unit you have seen the mandatory stage that gives birth to all employment relations: formation of contract of employment, and the obligations the law imposes on the parties as supplementary duties to the obligations parties stipulate in their contract. Under this section we are going to look in to two stages parties to the contract of employment may pass through, variation and suspiration of the contract. Unlike the mandatory formation sage variation and suspension may or may not exist in a certain employment contract. Hence, permissive they are .There fore; it is only when the situation demands or the contractants wish that the issues of variation and suspension come to the scene.

I. Variation of a Contract of Employment

The employment relations governed by Labour law are mainly related to economic activities in the society. Economic activities by their very nature are changing from time to time. Such dynamic nature of economic activities in turn makes employment relations dynamic. This ultimately calls for flexibility in the relations of the employer and the employee. In order to cope up with the changing work environment as a result of promotion, demotion, transfer, change in place of work and the like, parties to the contract of employment may need to modify their contract. Thus, Article 15 of the Labour

proclamation allows parties to modify the conditions of a contract of employment that are not determined under the Proclamation through collective agreements, work rules or by written agreement of the worker and the employee.

Example

Suppose that 'A' is a worker working in an undertaking owned by 'B'. According to their contract, A is entitled to a monthly wage of Birr 800. As wage is one subject of collective bargaining between the trade union and the employer, they may conclude a collective agreement for salary increment. As Result A's monthly wage becomes 900. In effect, the contract of employment of the worker and this employer is said to be varied or modified by the collective agreement.

ii. Suspension of a Contract of Employment

Suspension of a contract of employment is a temporary interruption of some of the obligations of the parties .During such period the parties would with hold their primary obligations. For example, the employer is free from the obligation to pay wage. At the same time the worker is not with the duty to give service. Bear in mind, suspension and the resultant interruption of such obligations of the parties doesn't bring about the

interruption of the contract itself. The contract remains alive. But, as it is not attached with the primary obligations of both the employer and the worker, the suspended contract is considered as a vacant or bare contract, and will wait for the employee to come back. At the lapse of the period of suspension when the worker comes back to work the inactive suspended contract revives and the interrupted obligations become effective.

There are certain grounds that may result in suspension of contract of employment .These grounds are listed down under the previsions of Article 18 of the 2003 Labour Proclamation.

In order to have a clear understanding of the features of the six grounds of suspension recognized by Article 18, we can classify them in to 3 broader categories as:

a. suspension due to voluntary bilateral arrangement of the parties on the basis of Article 18 Sub- article 1;
b. suspension for public interest concern: Article 18 sub-articles 1and 4; and
c. suspension when situation is beyond the control of the parties as recognized by Article 18 sub- articles 3,5 and6.

a .<u>Voluntary Bilateral Arrangement</u>

Suspension by Voluntary bilateral arrangement is also called leave without pay. It exists whenever the employer grants leave for the employee up on the latter's demand. It is there fore a consensual arrangement of the parties with no need to invoke a cause for the demand or the grant of the leave. Similarly, the parties are at liberty to stipulate the duration of suspension. And hence, the Proclamation doesn't limit the period the suspension would last. As suspension per such ground is a voluntary one, it is only when the suspension is beneficial to both parties that the worker demands for suspension and the employer agrees there to.

Dear distance learner, what benefits could the parties obtain out of such sort of arrangement? Read the following illustration. Sometimes payment in an undertaking may not be that attractive, but the worker may be there only for sake of employment security as “something is better than nothing”. In cases of possibilities of getting short term piecemeal works , for example for 3 months with a better wage, such an individual may request the employer to give him leave without pay for the 3 months period; and after 3 months to be back as no option else where.

The worker in this example would get a higher wage for that period of suspension. Besides, he would also get his job when he comes back since his vacant contract is waiting

for him. In other words, employment security is there. This is one possibility in both private and public sectors.

Dear learner, what advantages does the employer get out of such kind of consensual suspension? Please, discuss with your colleagues.

b. Public Interest Concern as a Ground for Suspension

The worker's absence from work due to his /her assumption of socially relevant tasks may serve as a ground for suspension of a contract of employment. Unlike the foregoing ground of suspension, suspension due to public interest concern presupposes a legally stipulated reason that necessities for its existence. Accordingly, Article 18 sub-articles 2 and 4 expressly provide for the grounds that fall under this category.

The first ground for suspension of a contract of employment that falls under this domain is that which is recognized by sub-article 2 of Article 18: leave of absence for the purpose of holding office in trade unions or other social services.

When a worker assumes a post in trade unions or in lower administrative status he doesn’t render service for his original employer. Since the worker is not performing his primary obligation to the employer, there may arise a question as to what the status of this worker should be.

During the previous Ethiopian regime, the employer was with the duty to retain such worker by making payment of wages. So, it was a kind of leave with pay. For everyone’s surprise, the employer had that duty even for workers who went to the war front. However, such an over protective scheme had led the different employers (enterprises) to bankruptcy as their cost of production was rising. Finally, such an unfair kind of arrangement had necessitated for its substitution by another problem solving approach.

One alternative one might think of is just to adopt an opposite approach to the previous approach and to leave the absent worker with no protections at all; and to allow the employer to dismiss the worker even without notice for the latter’s absence from work on the basis of Article 27 (1) (b) of the proclamation. But this could also bring about another danger, as no worker would take such a risk and be determined to run for election or to assume posts that are socially relevant. So, we must provide the worker with some incentive.

The current Proclamation has; therefore, made wise decision that tries to strike a balance between the competing interests of the employer and the worker. In view of this, the employer is permitted not to pay wage for the worker during this period, and the worker, on the other hand, is entitled to the privilege of vacant contract i.e. suspension. Therefore, the worker would not be paid wage as he is not rendering service for the employer. But, still there is no fear of employment security as the employer is with the duty to welcome the worker's reinstatement after the effective completion of his social duty.

The second ground of suspension of a contract of employment in relation to public interest concerns is suspension due to the worker's absence from work due to national call. Dear distance learner, as you have seen above the primary effect of suspension is the fact that the worker is entitled to leave without pay. If you read Article 83(2) of the Proclamation, a worker who exercises his /her civil rights, or one who performs his /he civil duties is entitled to get his/her wage for the time such activities take, irrespective of the worker's absence from work. Please, read Article 83(2).

Article 83(2) Proclamation.

“A worker who exercises his civil rights or duties shall be granted leave with pay, only for the time utilized for the said purpose. “

This means, as opposed to the leave with pay which is granted to the worker under Article 83 (2), the worker who is on a national duty per Art 18(4) is only with the right to get leave without pay. Hence, the legal effects of situations of national call and that of civil duty or right are very much different. This ultimately calls for a clear distinction between the terms “national call”, “civil rights” and “civil duties”.

A civil duty or right is something that is put expressly in a legal document. The typical example of a civil duty is the legally stipulated citizens’ duty to appear before a court to testify as a witness. Regarding a civil right we can take the right to vote during elections. On the other hand, national call refers to citizens’ duties that are not expressly provided by a legal instruments, but are usually imposed by the state during emergency situations, for example during situations of war, flood and the like.

c. Situations beyond the Control of the Parties as grounds for Suspension

Some unforeseeable situations that may happen to either of the parties could serve as grounds for suspension of a contract of employment. Article 18(3), and Article 18(5) and (6) of the Proclamation are the provisions that govern suspension on the basis of situation relating to the worker and the employer.

According to Article 18 sub article 3, the worker's detention for a period not exceeding 10 days may serve as a ground for suspension. For such detention to serve as suspension ground, knowledge on the part of the employer about it is attached as an additional requirement. Accordingly, besides the existence of detention for the specified period, the employer must be notified with the detention of the worker within 10 days as of the date of the detention; or the employer must be supposed to know of the detention. If one of these two commutative requirements lacks; for instance if the employer is not notified with the detention within the appropriate time or not supposed to know of it, the workers detention in itself doesn't trigger the suspension of their contract.

Dear learner, what would be the fate of a worker who is detained for not exceeding 30 days, but the attached requirement of knowledge of the employer lacks? Please, read Article 27(1) of the Proclamation, if it gives you a solution. According to the provisions of this sub Article, absence from work without good cause for a period of five consecutive

working days or 10 working days in any period of 1 month is ground for termination without notice. Therefore, if the employer is successful in proving that the worker in this example is absent from work without good cause, for instance by proving that no ground for suspension is there; he may dismiss the worker without notice. Similarly, irrespective of the existence any appropriate communication made to the employer, detention for a period exceeding 30 days is not a suspension ground pursuant to Article 18 sub-article 3. If we say that there is no suspension under such scenarios the question that rings in our mind could be about the status of the worker who is under such situations. From the reading of Article 28(1) of the Proclamation, a worker's conviction for more than 30 days due to a criminal offence is a ground for termination / dismissal of the worker / without notice. However, detention for the purpose of suspension per Article 18(13) does not presuppose criminal conviction. Then, what would be the status of the worker under the discussion at hand? You are invited to resolve the issue with your colleagues.

In the previous few paragraphs, we have dealt with the suspension ground in relation to be unforeseeable situation that encounters the worker i.e. detention on the basis of Article 18 sub article3. In the next few pages some situations that affect the employer necessitating suspension will be examined.

Such situations involve situations that are beyond the control of the employer. The pertinent provisions that govern such occurrences are Article 18 sub-articles 5 and 6. Sub-article 5 of Article 18 deals with force mature situations hindering the activities of the undertaking / employer. Sub-article 6 on the other hand, talks about fault free financial problems that bring about suspension of the activities of the employer.

> Article 18(5) Proclamation
> *"full or partially suspension due to force majeure of the activities of the employer for a period of not less than 10 consecutive days;"*

> Article 18(6) Proclamation
> *"financial problems, not attributable to the fault of the employer, that requires the suspension of the activities of the employer for not less than 10 consecutive days"*

Under the two provisions mere existence of one of the problematic occurrences in itself is not a guarantee to be regarded as a ground for suspension. It is if and only if the force mature situation or the financial problem that hinders the activities of the employer stays for at least 10 days that suspension is ordered by the law. What is the meaning of a "*force*

majure situation" or a "financial problem" for the purpose of our discussion about suspension?

Force majure consists of unforeseeable circumstances that cause the full or partial interruption of the activities of the employer. Flood is an important example of *force majure* situation; it can therefore, serve as a ground for suspension, provided it has fully or partly interrupted the activities of the employer for a period of not less than 10 days. Financial problems are those problems that have a direct connection with the productivity or service supply of the undertaking, such as shortage of money or necessary inputs / raw – materials. Out of such financial problems those that are not attributable to the fault of the employer may be taken as grounds for suspension. As an illustration to financial problem in the sense of Article 18 (6) we can take the problems some undertakings faced when their raw-materials were intercepted out the Assab part during the Ethio-Eritrean war.

In order to avert any likely abuses of power that might prevail if the employer is to decide on the existence or not of good cause for suspension according to Article 18 sub-articles 5 or 6, the law maker has given such decision power to an impartial body; the Ministry of labour and Social Affairs. So, a sort of checking mechanism is there. Hence, it is not the

subjective appreciation of the employer that is important, but it is the decision of the Ministry that matters. It is if and only if the cause is convincing to the Ministry that suspension is ordered either on the basis of force major situations or economic problems, per sub-articles 5 and 6 of Article 18.

For the Ministry to be able to decide on these issues, the employer has the duty to immediately inform the Ministry about the occurrence of the grounds for suspension provided under Article 18(5) and (6). Please, read the provisions of Articles 20 and 21.

Article 20 (Proclamation.)

Determination by the Ministry

1. The Ministry shall determine the existence of a good cause for suspension within 3 days after receipt of the written information pursuant to Article 19.

2. Where the Ministry finds that there is no good cause for suspension it shall order the resumption of the work and payment for the days on which the worker was suspended.

3. The party who is aggrieved by the decision of the Ministry in accordance with Sub articles (1) and (2) of this Article may, within five working days, appeal to the competent labour court.

Article 21(Proclamation)

Effect of confirmation or Authorization of Suspension

1. Where the Ministry confirms or proves the existence of good causes for suspension, it shall fix the duration of the suspension, provided, however, that the duration shall not exceed a maximum of 90 days.

2. Where the Ministry is convinced that the employer cannot resume its activities with the maximum period set under Sub-article (1) of this Article, the worker shall be entitled to the benefits specified under Article 39 and 44.

Once the Ministry has received the employer's notice, it may confirm (prove) the existence of good cause for suspension. In doing so, it also fixes the maximum duration the suspension would last. However, such period shall not exceed 90 days.

If the suspension ground cases to exist within the time frame the Ministry has provided, there would no more be suspension, and the legal provision that deals with the ordinary effect of lapse of suspension would be applicable i.e Article 22. According to Article 22 of the Proclamation the ordinary effect of lapse of suspension period is reinstatement of the worker to his job.

3.5 Termination of Contract of Employment

Dear distance learner, in the previous section of the unit you have seen how variation and suspension of contract of employment are regulated by our law. Now let us come to another related important issue termination. As opposed to variation and suspension which may or may not exist during the parties duration of engagement, termination is an essential stage that happens to any contract of employment. Dear learner, why is termination regarded as a mandatory stage?

Termination is end of the employment relationship between the worker and the employer. Such a relationship is given birth by the contract entered into by the worker and the employer. However, the relationship doesn't stay forever. Whether one likes it or not, one day the contract will terminate /die. As the worker is always physical person, and for man is mortal, at least the death of the worker is inevitable. This means, irrespective of the existence of other causes for termination the inevitably happening death of the worker would make the death of the contract inevitable.

The labour law provides for certain grounds under which a contract of employment can be terminated. But, in general, a contract of employment can be terminated either lawfully or

unlawfully. It is lawful if the termination is made in accordance with what the labour law provides and is unlawful it is terminated in violation of the provisions of labour law. Regarding termination of a contract of employment, the proclamation has stipulated the legal grounds for termination in a detailed manner, and violation of which makes the termination unlawful (Articles 24-32). In order to have a clear and easily understanding of these legal provisions, we can classify them into 3 broad categories of grounds for termination. These are:

1. termination by the operation of the law (Article 24);
2. termination by the agreement of the parties (Article 25);
3. termination upon the initiation of either party (Articles 27-32).

1. Termination by the Operation of the Law

This way of termination results from the law itself. It is the law that declares the termination without any act of the parties. The grounds upon which contract of employment terminates by operation of the law are enumerated under Article 24 of the Labour Proclamation. Accordingly, the contract terminates by operation of the law in one of the following situations:

i. on the expiry of the period of engagement or the completion of the work where the contract of employment is for a definite period or piece work,
ii. upon the death of the worker,
iii. upon the retirement of the worker in accordance with the law,
iv. when the undertaking ceases operation permanently due to bankruptcy or for any other cause;
v. when the worker is unable to work due to partial or permanent incapacity.

According to Article 24(1) a contract of employment can be terminated upon the expiry of the period of employment. Termination on this ground is applicable on those contracts that the discussion on the duration of contract of employment. The parties' contractual agreement on definite period of employment does not necessarily make the contract a contract for definite period. The law intervenes in the parties' freedom with this respect. Accordingly, unless the nature of the work or the situation the worker was employed in fall under Article 10 of the Proclamation, any contract of employment is deemed to be made for an indefinite period of employment. Therefore, termination on the basis of such ground of Article 24(1) becomes true only on contracts that are concluded for a definite period pursuant to Articles 9 and 10 of the Proclamation.

In addition, if the work is completed, for a contract made for piece work termination follows. Here, for termination what matters is the completion of the work regardless of how long is the time the service takes.

Death of the worker is another ground for the contract of employment to terminate by operation of the law (Art. 24(1)). As employment service is a personal service, if the worker dies termination follows. In some foreign jurisdictions like Japan, employment inheritance is given recognition. According to such countries' experiences, if there is any able bodied daughter or son of the deceased worker, she/he is entitled to employment by the same employer. This notion of employment inheritance is justified by the fact that this would create a sense of belongingness on the new employee, and hence the worker would do much to make the undertaking fruitful.

However, employment inheritance is not recognized by the Ethiopian Legal System. Dear learner, looking in to our socio-economic reality, do you think it would be sound if we inject such an approach into our Legal System?

Retirement of the worker in accordance with the law is an additional ground for termination by law as per Article 24(3). What is the retirement age in Ethiopia? During Emperor Haile Sellassie's period, 60 years and 50 years were retirement ages for male and female workers respectively. During the Derg regime 50 years of age was applicable as a retirement age for both male and female workers.

Currently, the only pension law we possess is the 2003 Public Servants Retirement Proclamation No. 345/2003. This Proclamation has prescribed 60 years as a retirement age for both male and female workers. But, this Proclamation seems to be applicable only for the public service. So, it is not a flat rate Proclamation, and doesn't apply to the private sector, which encompasses all subjects of the Labour Proclamation. Therefore, as this pension Proclamation is a law governing the public service; it doesn't regulate workers who are governed by the labour law. If at all that proclamation goes outside the public service, it can go only to the workers in the public enterprises (Article 3 Labour Procl.). So, what is the retirement age for the remaining workers who are not yet governed by the 2003 Retirement Proclamation? Bear in mind sub-article 3 of Article 24 is providing for retirement to be made in accordance with the law? So, what is that law? For various reasons, retirement is believed to render important purposes for the employer, the worker and even for the society at large. Upon attainment of a certain age

people become less productive, more sick; and may not be receptive to training or new way of life. Such people should also give a way to young employees. So, there arises a need to marginalize people at a certain age for one or another reason. Accordingly, retirement should be there. If retirement is believed to give all these purposes it is unsound to oblige the employer to shoulder the aged worker up to death. So what is the way-out in Ethiopia? Just to make analogy and retire workers in the private sector at the age of 60, like the frequently observed practice in our country? Or what should be done? Dear distance learner, please try to give your opinion on this issue.

Pursuant to Article 24 sub article 4 of the Labour Proclamation, the employer's permanent cease of operation due to bankruptcy or for any other cause is an additional termination ground by operation of the law; and hence with no need of request / initiation by either of the parties.

When the undertaking ceases to operate permanently at a result of bankruptcy the situation is assimilated as to the death of the enterprise.

There are also other causes outside of bankruptcy that lead the enterprise to stop operation permanently and are included as grounds for termination under the provision

cited above. As an illustration we can take the employer's change of purpose or activity. For example, if an owner of a butchery stops such business and opens a pastry the transformation is a complete change of activity so as to serve as a ground for termination according to sub-article 4 of Article 24. In relation to this we must look into "structural adjustment "within an undertaking as provided as a basis of termination per Article 28(1-d). In situations under Article 28(1)(d), there is no permanent cessation in the performance of the employer. Rather, there is a mere structural adjustment in the undertaking such as through amalgamation or changing of some posts. Though the situation under Art. 24(a) and 28(1-d) are similar in that both are grounds for termination, unlike the latter the former situations do not require the initiation of the employer for termination to exist. Moreover, under Article 28(1)(d) the employer is obliged to give advance notice for the worker before rushing to termination of their contract.

In addition to the above four which we have dealt with, Article 24(5) of the Proclamation provides us with another ground for termination of a contract of employment by operation of the law. According to this provision:

> *"When the worker is unable to work due to partial or permanent incapacity"* termination follows.

On the other hand, Article 28(1-b) of the Labour Proclamation stipulates another ground for termination as a result of incapacity of the worker to perform work. According to Article 28 sub article 1(b), a contract of employment can be terminated by notice when *the worker is for reasons of health or disability, permanently unable to carry out his obligations under the contract of employment.*

The grounds for termination as provided under Articles 24(5) and 28(1-b) display a similarity in that both employees who are discussed under each of the provisions are permanently unable to render service. But, there is a difference in the effects of the incapacities discussed in each of these provisions. To put it differently, though both are incapable the fates of the employees under the two scenarios are different. Under Article 24(5) as the termination is declared by the law itself the employer is not required to initiate the termination of the contract. More over, for the termination is termination by the law, no notice is expected of the employer.

When you look into the messages of Article 28(1-b), here the law is providing for a termination ground by prior notice upon the initiation of the employer. Accordingly; it is not by operation of the law, it is rather through the employer's administrative

measure that the worker is dismissed. Therefore, for a lawful termination the employer under article 28 1-b is with the burden of proving the existence of incapacity of the worker. He is also obliged to render an advance notice to the worker. Such realities would make the provisions of Article 28 1 b more protective for the worker than that of Article 24(5).

Dear learner, if these provisions have such a huge difference in their effects, then we are supported to identify the types of incapacities addressed in each of the grounds. The Amharic equivalent of Article 24 (5) gives us a solution.

›”kî 24(5)

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c=[ÒÑØ$" (employees added)

The catch world here is " K=[ÒÑØ On the basis of this there are people who try to make a distinction between the types of incapacities that are discussed under Art-24(5) and 28 (1.b). According to this argument the incapable worker under 24(5) is one who sustained injury at employment On the other hand Article 28(1.b) is talking about One who sustained injury outside of place of employment But this seems not tenable as

an individual who has got injury at employment should get better protection and this argument tries to allege the other way round.

A more plausible way of understanding these provisions is to take Article 24(5) to refer to a worker whose incapacity to perform work is testified by a medical board Hence, up on a medical certification of such an impartial body the worker's contract would be terminated by the operation of the law. So, the employer will not be with the burden of proving this fact. Where as, under Article 28(1-b) the worker's incapacity is declared upon the appreciation of the employer and such fact should be proved by the employer .More over for such termination to be lawful besides as ascertaining the existence of such cause for termination, the employee shoulders the duty to render advance notice for the worker.

1. Termination by Agreement of the parties

Contract of emplacement comes into being by the agreement of the parties. The parties have agreed to have employment relationship and hence, there is no reason why the law should prohibit them from making agreement to end their relation. So parties to contract of employment are free to agree to terminate their contract, just like they are free to have

their contract But, due to the special nature a contract of emplacement has, the Labour proclamation has provided some safety valves. please read Article 25 of the Labour proclamation.

Article 25 Labour Proclamation:

1) *The parties may terminate their contract of employment by agreement, provided, however that waiver by the worker of his rights under the law shall have no legal effect.*
2) *Termination by agreement shall be effective and binding on the worker only where it is made in writing.*

Accordingly, the law demands such agreements for termination to be made in writing. In addition, any prior agreement for waiver of the right to terminate by the worker shall be null and void.

3. Termination of a Contract of Employment by the Initiation of either party

The mere fact that the parties can agree to terminate the contract does not mean that agreement is always a prerequisite to terminate a contract of employment. Contract of

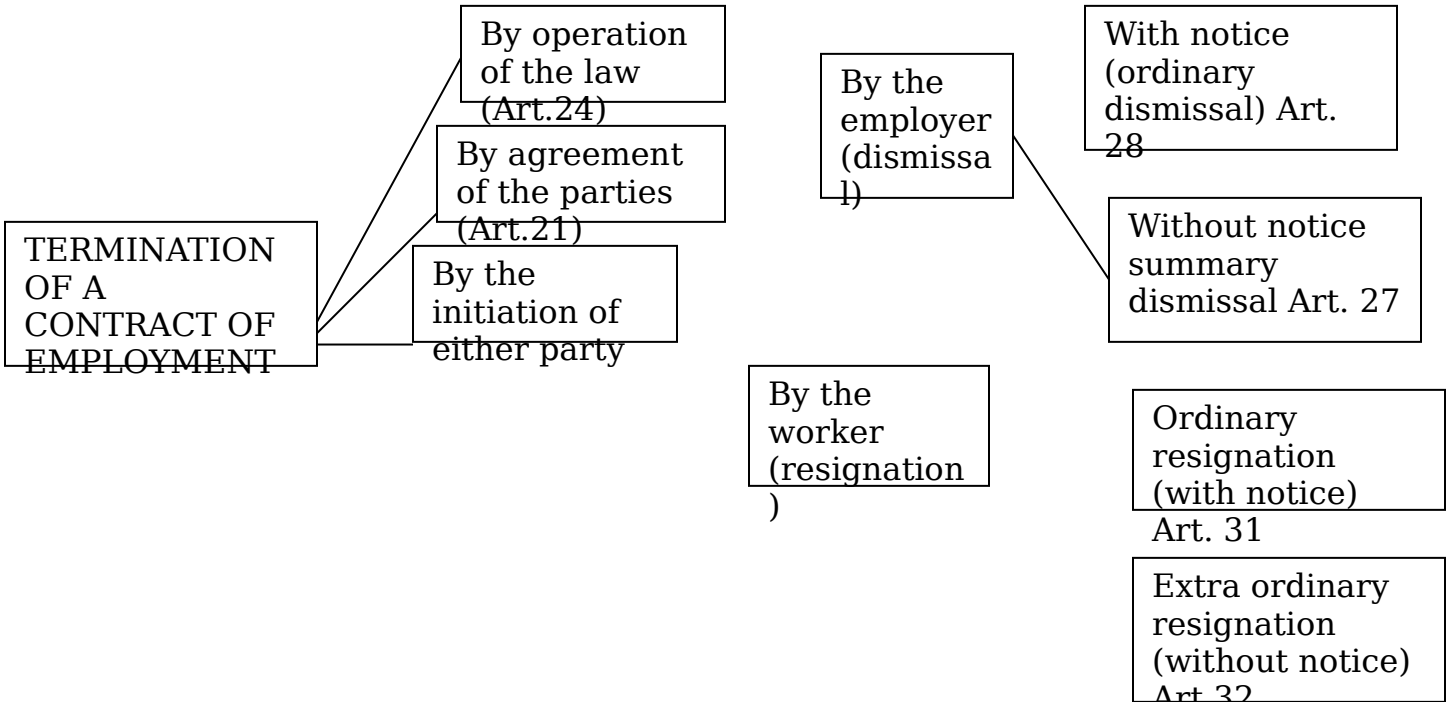
employment can also be terminated by a unilateral decision of either the employer or the worker. In fact, as a rule under the law of contracts, once one gets into a contract, he cannot do anything about it without the agreement of both. As an exception to this rule unilateral termination of an employment relationship is allowed. This is due to the special feature of employment contracts. Dear learner, can you give some reasons that make employment relationship an exception to the above rule that applies to other contractual obligations?

Under this third category of termination grounds we can get separate rules that entitle either the worker or the employer to the right to unilaterally declare the termination of their contract.

With respect to grounds for termination by the initiation of the employer the pertinent provisions are Articles 27 and 28 of the labour Proclamation. Termination by the initiation of the employer is also known as dismissal. Out of such grounds Article 27 deals with grounds that allow the employer to dismiss the worker with no need to grant advance notice for the worker. Hence, summary dismissal the situation is. The other grounds as outlined under Article 28 consist of causes for termination of a contract of employment by

the initiation of the employer by granting an advance notice for the worker. Such dismissal on the basis of Art. 28 is, therefore, known as ordinary dismissal.

When we resort to termination upon the demand of the worker i.e. resignation, the termination may be conducted either with notice or without notice, depending on the ground for termination. The resignation that could be held only with the grant of notice per Art.32 is what we call ordinary resignation as opposed to extra ordinary resignation that is automatically applied with no need of notice on the basis of Article 32.



A summary of the grounds and manners of termination of a contract of employment under the labour Proclamation.

Dismissal without Notice (Article 27)

Article 27(1) of the Labour Proclamation gives us a long list of grounds for termination by the employer without notice. These are grounds attributable to unsuitable conducts of the employee. Hence, the entitlement for the employer is to terminate the contract without notice as some situations are related to the employee's lack of diligence, faithfulness etc.

Since the majority of the grounds recognized under this Article 27 (1) are self explanatory, students are invited you to read them by their own. Therefore, we will focus on some of the grounds that deserve particular attention. According to sub-article 1b of article 27, absence from work without good cause for the period the law specified is one ground for summary dismissal. Thus, good cause for one's absence serves as a defense. Dear learner what constitutes good cause for the purpose of the law? You may give examples of so many situations that could serve as good causes depending on the particular circumstances, like the workers absence from work for 5 consecutive days for medication.

But can one's leave for"ወሰል" treatment constitute good cause for the purpose of this provision? Please, see the issue in light of Article 85(4)?

> *Article 85(4) Proclamation*
> *"Unless the collective agreement provide otherwise, a worker shall be entitled to a sick leave upon presenting a valid medical certificate given by a medical organization recognized by the Government."*

In our discussion on the obligations of the worker especially in the discussion of Article 13(1), we have seen one duty of the employee i.e he should be faithful. Under Article 27(1.C) we see this duty being breached. Such kind of breach of duty is sanctioned by the worker's dismissal without notice. As already said, the effect of the worker's deceitful or fraudulent conduct in carrying out his/her duties is simply termination without notice. But the issue of what constitutes a "deceitful or fraudulent conduct" for is a question that is seen by our courts in two different ways..

For some courts deceit of fraud is to be understood in its criminal sense or meaning. So, for this ground of dismissal to be deemed as available, a criminal bench's decision to that effect is mandatory. According to this approach therefore, unless that particular employee

is convicted for the alleged conduct Article 27(1.C) is not fulfilled and hence there is no dismissal ground

Some other courts, on the other hand, consider the issue of deceit or fraud for the purpose of Article 27(1.C) as a purely administrative matter with no need for waiting for criminal conviction of the worker.

What connection does fraud or deceit for dismissal have with criminal proceeding? In fact, answering this question would supply us with an indication whether the above issue is one which has a purely administrative nature or something that presupposes the worker's criminal conviction for a valid dismissal.

When we see the first approach, it simply takes fraud or deceit as a criminal matter since one word "fraudulent" is found under the Criminal Code. Besides, the provisions of Article 2149 of the Civil Code of Ethiopia tell us that a court (for our concern the court that entertains the dismissal issue) is not bound by another court's (i.e.the criminal bench that sees the case of fraud) ruling. So, regardless of the accused worker's acquittal there may still be a possibility of commission of fraud or deceit on the basis of Art. 27(1.C). This is mainly because unlike criminal issues that need proof of beyond reasonable doubt for the

evaluation of evidence, the labour tribunal requires probability (preponderance) of evidence to arrive at a certain decision. Therefore, it seems plausible to take Article 27(1.C) in its separate sense. Accordingly, there would not be a need for criminal conviction of the worker for the latter's dismissal on this ground.

More over, under the Federal Civil Servant's Proclamation No. 515/2007 we get a guidance that strengthens the above argument. Article 69(2) of the cited Proclamation applies to disciplinary measures of whatever kind that are taken on an employee. According to the provisions of Article 69 (2), "disciplinary measures may be taken irrespective of any court proceedings or decision."

Dear leaner, after all, if we make a criminal court's ruling a prerequisite for the conclusion that the ground under Art. 27(1.C) is existent, and hence expect the employer to wait for such a decision for lawful dismissal, would this dismissal be a summary dismissal?

Another dismissal ground that causes the worker's termination of contract of employment even without that privilege of advance notice by the employer, involves the worker's causing of quarrel and fight at the work place. (Art. 27(1.f-)). Just like the rest of the

grounds enshrined under Article 27 sub artice1, the ground of Article 27 (1f) relates to undue conduct of the worker. of the worker. But, bear in mind, for such violent act of the worker to serve as a ground for dismissal, gravity of the act really matters. The same holds true with respect to fraud or deceitful practices that we have dealt with above. It is not all violent misdeeds according to sub-art 1. f nor deceitful practices per sub 1.C that lead to termination without notice. Therefore, the employer's measure must be predicated upon the ascertainment of the availability of the all each at as well as its gravity so as to be sore that whether a ground is there. This means the decision varies depending on the circumstances of the case. For instance, one huge or grave occurrence may lead to decision against the worker of termination. In other times, for small all faults if repeatedly done this may warrant termination as they would then amount to grave fault.

Having said all these about the Proclamation's expressly provided provisions regarding grounds for termination of a contract of employment without notice upon the initiation of the employer, let us proceed in to the examination of some of the inventions of the current proclamation that were not there under its repealed counterpart.

Generally, if at least one of the grounds enumerated under Art. 27(1) exists; the employer will have the right to summarily dismiss the worker. But, as a summary action the

situation is and immediate response is expected, if the employer fails to take an immediate action against the worker, the act of the employer would not longer be a summary action. Therefore, as the very nature of the grounds is related to the worker's conduct which could be adjusted through time , the employer's tolerance for some time should make him lose his right for dismissal. So, as a new introduction to our labour law regime, in the present Proclamation under Article 27(3), a sort of period of limitation is put. Accordingly, the employer is expected to exercise his right within 30 days from the date he knows of the existence of the ground.

Another new introduction of the current Labour Proclamation is the notion of "suspension pending investigation" as enshrined under Article 27(4). Through collective agreement an employer may be entitled to a maximum of 30 days period so as to investigate the existence of a ground under Art. 27(1). During such period the suspected worker would remain suspended with no wage. If the investigation shows a positive result, then termination follows. If the result shows that no ground for dismissal is there, then the worker would be reinstated to his job with an entitlement for payment of wage starting from time of suspension.

In addition to the enumeration of Article 27(1) on grounds of termination without notice that seems an exhaustive, collective agreement could spell out more other grounds (Art 27(2)). But when we look into sub-art. 2 of Article 27 together with Art 134(2) of the Proclamation we might come across with a difficulty to understand the message of those provisions. Please read Article 134(2).

> *Art. 134(2) Procl.*
>
> *"Where the collective agreement is more favorable to the workers in similar matters than those provided for by law, the collective agreement shall prevail. However, where the law is more favourable to the workers than the collective agreement the law shall be applicable."*

Providing more grounds of termination in the collective agreement would be not beneficial to the worker. On the other hand, if the law is trying to favour the worker,then which is going to be applied; only the Proclamation's listing under Art. 27(1),or the collective agreement as well? Discuss with your colleagues on this issue. Don't forget that Art. 27(1) a dictate of the law like Article 134(2) .

Before winding up this sub-section let us see one incidental point that relates to subject matters of collective agreement which you are going to see in the fifth unit of this module.

In addition to subject matters of collective bargaining that are provided under Articles 128 and 129 of the Proclamation, trade unions and employers can also include the issuance of additional dismissal grounds as an additional subject matter of collective bargaining by virtue of article 27 sub article 1.

Ordinary / Normal / Dismissal (Article 28)

In most legal systems the employer can unilaterally terminate the contract by giving notice for any cause. But in Ethiopia, ordinary dismissal also is regulated. And therefore, it is only when the grounds given by the lawmaker are satisfied that an employer can unilaterally terminate the contract of employment of any worker. Such duty of having a legitimate ground for dismissal is applicable even for an employer who wishes to terminate an employment contract by giving an advance notice for the worker. This is intended for employment security matters. But employers were unhappy on this issue, claiming that the law has denied them of the right which the worker already has. According to Art 31 of the Proclamation, the worker is entitled to terminate his contract for any cause provided he has given an advance notice for the employer. In fact, this is the basic difference between the question of termination of a contract of employment by the

worker and the employer as no ground is needed for the former's act, as apposed to the latter's which is strictly regulated by Article 28 of the Proclamation.

In order to terminate the contract by way of notice the employer has to first make sure that a ground for dismissal is available pursuant to Article 28. Then, if there is any ground he has to look into the years of service of the worker. The duration or years of service of the worker is important to calculate the period of notice the employer should give to the worker according to Article 35 of the Labour Proclamation.

35. Period of Notice

1) Unless otherwise provided for in this proclamation, the period of notice given by the employer shall be as follows;

(a) one month in the case of a worker who has completed his probation 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 to nine year.

(c) three months in the case of a worker who has a period of service of more than nine years;

(d) two months in the case of a worker who has completed his probation and whose contract of employment is terminated due to reduction of work force.

2) Not withstanding the provisions of Sub- Article (1) of this Article, the period of notice for a contract of employment for a definite period of piece work a shall be agreed up on by the parties in the said contract.

3) The period of notice fixed in this proclamation shall run from the first working day following the date on which notice is dully given.

4) The obligations of the parties deriving from the contract of employment shall continue in force during the period of notice.

Regarding the grounds of ordinary dismissal, Article 28 is the pertinent provision. It has come up with an exhaustive enumeration of the grounds. Sub-article 1 of it deals with situations related to the worker's loss of skill or capacity to properly perform his work. Where as, the grounds that are recognized under sub-article 2 are related to the undertaking's or employer's organizational or operational requirements that necessitate termination /dismissal.

The first ground under Art. 28(1) relates to loss of competence of the worker per Art. 28(1.a). But, such ground is deemed to exist only when the worker is unable or refuses to upgrade his competence by using the training opportunities provided by the employer. Bear in mind, it is only when the employer performs his duty to make some efforts to upgrade the worker's competence that loss of competence serves as a ground for dismissal. Competence is usually something inherent and improvement is limited to every body's capacity to accept such training; as opposed to conduct which could be adjusted. Therefore, even though the employee is unable to upgrade himself through the opportunities supplied by the employer, the latter is not entitled to automatically sack such an incompetent worker; like he did to the misbehaved worker under Article 27 (1). When we see the other side of the coin we also get the interests of the employer. Though the employee under Art. 28(1.a) is innocent (though incompetent), it is unfair to oblige the employer to shoulder the worker and go bankrupt since this would ultimately affect all the employees as well. Hence, on the basis of the provisions of Article 28 (1.a) dismissal is allowed. But, such an innocent worker is at least entitled to the privilege of notice, as opposed to the misbehaved one who is dismissed with out notice.

Dear learner, what differences did you observe between the ground we are discussing about and the ground of dismissal addressed by Article 27(1.e) that serves as a ground for

summary dismissal? Bear in mind, under both instances there is a similarity in the grounds that the workers are not performing their duties to the extent they are expected to achieve.

The second ground that is dealt under the category of grounds of ordinary dismissal relating to the worker is connected to the health or permanent disability of the worker that renders him unable to carry out his duties under the contract since we have seen this issue in a detailed manner under the discussion of Article 25 (5), you are invited to go back and refer to that section of the module.

As an additional ground for termination with notice that relates to the worker, the law has put a mobility clause under its Article 28(1.C). If the employee is not willing to move with the undertaking when the undertaking moves for compelling reasons the way out is termination as the person may have some interest in the original place of employment, for example, family, education etc. sometimes, this sub-article is confused for branch offices; and employers try to invoke it following a worker's refusal to go to a branch of agreed to work in. In fact, if the place of employment is not exactly defined in the contract and if the worker is only hired in the undertaking there may not be any problem if the worker is required to go anywhere with the undertaking. But, in situations where the worker is

employed to work in the head office only, the worker's refusal to go to a branch office doesn't serve as a basis for termination, in the sense of Art. 28(1.C).

Dear learner, now we are going to go to the discussion of the provisions of sub-article 2, of Article 28 of the Proclamation. Before that try to summarize the 3 grounds that we saw above and identify the attributes they share with and the features that distinguish them from the grounds of Article 27.

When we turn our attention to the examination of the provisions of Article 28 sub article 2, we observe their similarity with the grounds stipulated under sub-article 1 of the same Article; both categories consisting of grounds whose existence needs to be accompanied by the grant of notice for the termination to be lawful. However, unlike those enumerated under Art. 28(1) and 27(1) the grounds provided under Art. 28(2) do not consist of situations related to the worker whose contract is to be terminated. Here, the worker may be diligent and punctual enough; and he may also be one who is demonstrating his best performance; but his contract is terminated due to some causes that relate to the undertaking / employer.

The first ground here consists of any event that happens to the undertaking causing permanent cessation of the service the worker renders. One best example is *force majure* in the sense of Article 18(5) that causes suspension. As you remember, suspension on the basis of Article 18(5) can stay in force only for the period the Ministry fixes, which in case exceeds 90 days. But if the *force majure* situation continues to exist beyond the period already stipulated by the ministry termination by notice follows.

Likewise, a reduction in profit as a result of the reduction in market share of the employer because of the fall in demand and decrease in the volume of work can cause termination with notice. Such a negative situation is a symptom unhealthy to business. So as to avoid the resultant incurable cancer i.e. bankruptcy which affects all the employees and the undertaking itself, the law allows the employer to take some preventive measures, in the form of termination. Such measures could save the employer as well as the rest of the workers from bankruptcy and termination by operation of the law per Art. 24 (4). So, by the sacrifice those dismissed workers paid, bankruptcy and its negative effects could be averted. In relation to this issue, you have to bear in mind that for such grounds to be deemed as existent, the undertaking’s reduction in profit for the reasons mentioned by the provision is adequate.

The last ground of termination that falls in the discussion at hand concerns one additional situation in the undertaking as recognized by sub-article 2.C. in contrast to the immediately preceding two grounds that involve negative situations occurring in the undertaking / employer and in effect lead to negative outcomes on the employment security of the employee, the situation here is a positive one for the undertaking, though it triggers dismissal of the worker which is a negative outcome. This ground consists of the employer's decision for the introduction of new working methods, new technology etc for the sake of increasing productivity. For instance, the undertaking may start to operate in a capital intensive manner by the use of different machinery. Such decision may call for the reduction of extra work-force / labour that used to do the same task the newly introduced technology is doing.

This is all about the discussion of the merits of the provisions about the grounds for termination of a contract of employment upon the initiation of the employer. But with respect to the issue of dismissal as a result of organizational or operational requirements of the employer per Article 28(2), there remains an additional task we are supposed to do. The issue relates to the procedure of termination, once the employer ascertains that a ground of termination is available. In times when the termination affects one employee only the employer can conduct the termination by simple provision of notice for the

respective worker by invoking article 35. The dismissal would, therefore, become an ordinary dismissal, as the employer is not obliged to go through other procedures for the implementation. And this is also true in the implementation of dismissal on the basis of Art. 28(1).

In most cases, however, it may not be a question of terminating the contract of one worker; rather it normally causes the termination of employment contracts of many workers. For instance, undertaking x has 50 workers, due to a *force majure* situation the undertaking was forced to close two of its departments. Then, it means that employment contracts of almost all the workers working in these departments are going to be terminated. This is what we call redundancy of work; which may result in the termination of the contract of at least two or with the substantial number of workers. When redundancy results in the termination of the contract of substantial number of workers, it is called reduction of work force.

But, reduction of work force is defined under Article 29 sub article 1 in a different way. It is defined as *"reduction of the work force of an undertaking for any of the reasons provided for in sub-article (2) of Article 28 affecting a number of workers representing at least ten percent of the number of workers employed or, in the case of an undertaking*

where the number of employed is between twenty and fifty, a reduction of workers affecting at least five employees over a continuous period of not less than ten days.”

Accordingly, in order to establish whether a termination involves a reduction of work force or is an issue of ordinary dismissal, besides investigating the existence of a ground according to Article 28(2), one has to look in to the number of workers who are going to be dismissed in light of Article 29(1). Suppose that undertaking ABC has 50 workers. Due to fall in demand of the goods of the undertaking and the decrease in its profit, it was put in a difficulty. With the view to save the undertaking it became necessary to terminate the contract of eight workers of the undertaking. Since there is a ground per Art. 28(2.b) and the additional requirement i.e. number of workers is met, the situation may become a reduction of work force according to Article 29(1).

Dear distance learner, what if the number of workers who are affected by the dismissal in the above example is only 3? Clearly, the employer can terminate their contract by granting them an advance notice on the basis of Article 35 of the Proclamation. Bear in mind, though we have agreed on the point that the difference between ordinary dismissal as enshrined in Art. 28(2) and reduction of work force (Art. 29(1)) is mainly on the

implementation/ procedure of reduction, we didn’t yet deal with the procedure of reduction of work force.

For the number of workers who are affected by termination due to reduction of work force is significant, this is believed to have social consequences. Thus, the employer is duty bound to pass through a rigorous procedure for its implementation. (Article 29(2 and 3). First of all the employer must consult the trade union or workers representatives about how should the reduction take place. In this process, the employer has to give priority for the workers with skill and higher rate of productivity. And such workers should be retained in the undertaking unless the reduction necessitates their dismissal, especially when the number is no huge. But in case of equal skill and rate of productivity, the workers to be affected first by the reduction shall be in the following order:

- those having the shortest length of service in the undertaking;
- those who have fewer dependants;
- those not covered in the above two categories;
- those who are disabled by an employment injury in the undertaking;
- worker’s representatives;
- expectant mothers.

Worker’s representatives and pregnant women have got higher protection to go last; whenever their skill and rate of productivity is equal with the rest of the workers. Other wise, they could even be the first to be sacked if they are demonstrating a lesser skill or low rate of productivity. Note! The above order of priority should not be understood to mean all the workers in the undertaking are going to be fired. For example, if the required number is satisfied by reducing those having the shortest length of service, the reduction stops then and there. Hence, no need to talk about the priority of the rest of the workers.

Dear distance learner, according to our population policy there is a need to decrease fertility rate; by discouraging birth through family planning. But according to our Labour Proclamation, expectant mothers are highly protected whenever a reduction is held. Wouldn’t this encourage fertility? How do you see the Labour law’s policy decision in light of our population policy? Please, discuss with your colleagues.

Any how, had the labour Proclamation not provided such an arrangement; employers would have more or less followed the reverse approach for their benefits.

Ordinary Resignation (Article 31)

It is not only the employer who can unilaterally terminate contract of employment. The worker too has the right to unilaterally terminate the contract; i.e. he is at liberty to resign. But, if a worker wants to terminate a contract, he can do so without necessarily mentioning the cause. To be more specific, unlike the case of the employer, the law doesn't require having a predetermined ground for the worker's decision to resign. The only requirement imposed on the worker is to give notice of 30 days for his employer about such decision. Accordingly, Article 31 of the Labour Proclamation provides that;

> *Without prejudice to Article 32 of this Proclamation, any worker who has completed his probation period, may, by giving thirty days prior notice to the employer, terminate his contract of employment.*

As you may have understood from the reading of Article 31 and the above discussion, the employee is granted a privilege which the employer doesn't have, since it is only the latter that is with the duty to base him on legitimate grounds for unilateral termination of a contract of employment.

According to Article 31 of the Proclamation, regardless of the nature of the post of the worker or his replace ability a 30 days advance notice is given for the employer. The purpose of notice is to give the employer an opportunity to look for a substitute worker. In

a different manner, Article 35 requires the employer a month, two months, or three months notice depending on the duration of service of the worker. So we observe a segregated rate of notice for the employee and a flat rate of notice for the employer i.e. one month notice.

In relation to this the employer's association wasn't happy about this discriminations, so that the duration of notice should take into account whether the employee is easily replaceable on not as the purpose of notice is to give the employer time to look for a substitute. But the government didn't accept the association's request for a segregated rate of notice on the basis of the employee's replace ability up on parties' negotiation. The reason was that obliging a worker to stay in the job he is unwilling to stay in for more that this specified period is in effect legalizing slavery. Dear learner what do you think? Should the duration of notice by the employee be left to the parties' negotiation or left to the law?

For the sake of comparison you can take the 15 days notice requirement which was found in the repealed Labour Proclamation (Proclamation No. 42/93). In fact, the assumption then was in Ethiopian situation it is easier to get a substitute employee than getting a substitute employment (job). Hence, the employee was required to provide his employer only with a 15 days advance notice for resignation, what ever the nature of his past was.

How about in the current situation? In fact, whether we treated it as fair or unfair for the employer, the law has clearly provided us with a 30 days notice to be given to an employer.

On this similar subject, the Federal Civil Servants Proclamation No. 515/2005 provides for a rule that requires the Civil Servant to render a 30 days notice to his employer for a lawful resignation. This rule is similar with the dictates of Article 31 of the Labour Proclamation. But, as an exception to the above rule the Federal Civil Servants Proclamation provides for the possibility of the employee's stay at work for a maximum of three months in a situation where he is indispensable to the job and could not be easily replaced. Please read Article 78 of that Proclamation.

Article 78 Civil Servants Proclamation:

78. Resignation

1) Without prejudice to the obligation provided in laws and contracts any civil servant may, by giving a one month prior notice, resign at any time.

2) Any civil servant, who has terminated his service with giving one month prior notice, provided in Sub - Article/1/of this Article, may be subjected to civil and criminal liability.

3) Where the service of the civil servant is indispensable and he could not be replaced easily, the Head of the government institution may delay his release for a period not exceeding three months including the date of application.

Dear distance learner, have you clearly understood the differences and similarities between the Civil Servants Proclamation and Labour Proclamation provisions on ordinary resignation? Well, if you feel that you are clear with the above discussions, try to jot down their similarities and differences in the space provided below.

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An additional point that is addressed by Article 31 of the Labour Proclamation concerns workers who are on probation. As you can see from this provision, the duty of notice for unilateral termination of a contract of employment is applicable only on those workers who have completed their probation. Therefore, for a worker who is still on probation termination without advance notice is allowed. This point is also strengthened by Article 11(5) which declares *"if the worker proves to be unfit for the job during his probation, the employer can terminate the contract of employment without notice and being obliged to pay severance pay or compensation."* Such right of automatic resignation *wi*th no need of notice may be taken as an instance of extra-ordinary resignation which we are going to see in the up coming topic.

The worker's non-compliance with the duty of rendering an advance notice pursuant to Article 31 of the Proclamation is sanctioned by Article 45 of same. Accordingly, a worker who leaves his work without the appropriate notice is obliged to pay his one month's wage in the form of compensation to the employer. The only sanction here is the payment of compensation; and the worker would not be obliged to work for the one month period of notice. The previously cited Civil Servant Proclamation also provides for the sanctions following the Civil Servants breach of such duty. You are invited to make a comparison of

the provisions of Article 78 sub-article 2 of the Civil Servants Proclamation, and that of Article 45 of the Labour Proclamation.

Extra-Ordinary Resignation (Art. 32)

This situation is what is referred to as termination of a contract of employment by the initiation of the employee without notice. Unlike the case in ordinary resignation which we saw above, extra-ordinary resignation presupposes a valid ground for a lawful termination of a contract per Article 32(1) of the Labour Proclamation.

Summary dismissal (termination without notice) is an entitlement for an employer in case of misbehaviour on the part of the worker. As a counterpart, when we have misdeeds on the part of the employer, the worker is at liberty to automatically terminate his contract of employment. Among from the grounds enumerated by Article 32(1) in most developed countries what is cited in this respect is sexual harassment at work that falls under sub-article 1-a for our purpose. Though termination on the basis of all of the grounds of article 32 comes by the initiation of the worker, it is the employer who commits those misdeeds. Sometimes, such acts may also be done by the employer deliberately just to trigger the worker for resignation so as to bring their contract to an end, and hence termination on

such occurrences is also called “indirect dismissal”. Literature also terms it as “constructive dismissal”, compared with “constructive possession” in Law of Property which is one instance of indirect transfer of possession.

Out of the grounds of termination without notice by the worker as a result of the employer’s act, the latter’s commission of “any acts contrary to the worker’s human dignity and morals or other acts punishable under the criminal code” calls for a closer observation. As an illustration, we can take the aforementioned case of sexual harassment, discrimination on the basis of nationality etc. The issue is from whom should an act come from for such an abusive act to serve as a ground for termination? Actually, the law says such acts are those that are committed by the employer. But, are such acts causes for termination only when committed by the employer; for example by the owner of on undertaking? What if the act comes from other personnel of the undertaking: from superior staff or from another ordinary worker? Do they fall under sub-article 1-a of Article 32?

With respect to the misdeeds by ordinary workers, within the undertaking’s internal grievance handling procedure remedies can besought. So horizontal abuse can not be deemed as a ground for extra-ordinary resignation in the sense of Art 32(1-a). But, in

cases of managerial abuse it is difficult to seek remedies from inside since in the majority of cases it is the manager who is the final decision maker through the procedure of hearing the claims of the worker. In view of this difficulty, other jurisdictions regulate such problems by assimilating top layers of the under taking to the employer. Thus, undue acts coming from the management staff are considered as grounds for termination in the eyes of the law.

As you may remember from the discussion made on summary dismissal, if the employer fails to immediately act once he is aware of the existence of aground, then his right for termination is banned by a period of limitation. In a similar manner, the worker's right for unilateral termination without notice is subject to a period of limitation. The worker should act within 15 working days as of the date on which the act occurred or ceased to exist. The fact that the worker losses his right of automatic resignation due to period of limitation doesn't mean that he is obliged to be there for long. The only duty on the worker would therefore be to give a notice for the employer per Article 31, since there is no need to a have a cause for unilateral termination by the worker as opposed to that of the employer.

3.6 Entitlements of Lawful Termination of a Contract of Employment

It is only when a worker is dismissed by his employer upon lawful grounds and with the grant of an advance notice whenever necessary, that a contract of employment is deemed to be lawfully terminated. On the other hand, it is only when a worker resigns by giving an advance notice or based on a lawful ground per Art. 32 that his resignation / termination becomes lawful. Similarly, it is in times when the parties freely agree to end their relationship or when the contract comes to an end by the operation of the law that the parties contract of employment ceases to operate in a lawful manner. Other wise, any termination that is held on in violation of the law is unlawful termination.

However, the fact that the worker's contract is terminated lawfully doesn't mean that the worker goes empty handed. There are various entitlements which the worker may be allowed to get. The entitlements that are accorded for workers upon termination are different depending on the circumstances of the case. Generally, the entitlements include:

- severance pay according to Articles 39 and 40
- compensation according to Article 41
- letter (certificate) of service per Article 12(7) and

- unutilized annual leave converted in to cash on the basis of Article 75(5).

i. Severance Pay

Severance pay is a payment which a worker is entitled to get from the employer whenever there is termination of a contract of employment. In principle, this payment is made irrespective of the party who terminates it and the manner in which the contract is terminated. In our older laws including the repealed Labour Proclamation /Proclamation No 421/93 this principle was kept intact. It is only when the worker would get pension payment that he would not get severance pay. Even dismissal because of disciplinary measures was used to entitle the worker to severance pay. Leave alone a worker dismissed by the employer, one who leaves his work by his own will at any time was granted this right. Generally, severance pay was an entitlement to every worker leaving due to any reason. When we see the tendency of our past laws it seems that severance pay was assumed as a social security benefit.

Taking a radical position from the past trend severance pay has now been qualified under the present labour law legal regime. Therefore, it is no more a benefit that is given for all workers whose contract is lawfully terminated. Because of this Article 39(1) of the 2003

Labour Proclamation lays down grounds for severance pay to be paid. In effect, the law is reducing the grounds for such an entitlement.

Article 39. General

1.) A worker who has completed his probation

(a) Where his contract of employment is terminated because the undertaking ceases operation permanently due to bankruptcy or for any other reason.

(b) where his contract of Employment is terminated by the initiation of employer against the provision of law,

(c) where he is reduced as per the condition described under this proclamation,

(d) where he terminate his contract because his employee did things which hurts the workers human honor and moral or the thing done by the employer is deemed as an offence under the penal code,

(e) where he Terminate his contract because the employee being informed of the danger that threats the security and health of the worker did not take measures, or

(f) where is contract of employment is terminated because of reason of partial or total disability and is certified by medical board, Shall have the right to get severance pay from the employer.

2.) Where a worker does before receiving severance pay, the severance pay shall be paid to his dependants mentioned under Article 110(2).

3.) The distribution of payment of severance pay to dependents in accordance with this article shall be effected in the same manner as the payment of disablement benefit.

Later on Proclamation No. 494/2006 which is an amendment of the 2003 Labour Proclamation has come up with some additional grounds for severance pay. You can get a copy of this Proclamation attached at the end of this material. According to Article 2 sub-article 2 of the amendment proclamation, a worker whose contract is terminated by operation of the law upon attainment of retirement age and where he has no entitlement to a provident fund or pension right is entitled to severance pay. In addition, termination of a contract of employment because of illness or death is recognized as an additional

ground for severance pay. Similarly, this benefit is allowed to a worker who serves for five years and resigns by his own will, provided he has no contractual obligation, relating to training, to serve more with his employer. Finally, termination by the initiation of the worker because of sickness due to HIV/ AIDS is introduced by the amendment proclamation as an additional ground for severance pay.

Once it is ascertained that a ground for severance payment is available, the next task would be to see its amount; and Article 40 of the 2003 Labour Proclamation deals with this issue. According to this Article severance pay equals to thirty times the average daily wages of the worker for the first year of service, plus one- third of the amount for each additional year. But, the total amount shall not exceed twelve months wage of the worker. This implies that the amount of severance pay is contingent upon years of service and wage amount of a worker. According to the rules of Article 40, for a worker who rendered a 1 year service, one months wage is the amount he receives in the form of severance pay. However, for a worker with a service period exceeding one year there comes a need for further mathematical calculation. For a simpler understanding of the calculation you can apply the following formula.



S = x + 1/3 x (y-1) ≤ 12 x

Where

S = severance pay

X = one month wage of the worker

Y = length of service in years

The above method of calculation of amount of severance pay was the same also under our older laws.

Dear distance learner, what do you understand from the phrase under Article 40 which says *"provided the total amount of [severance pay] shall not exceed twelve months wage of the worker"?* Is the 12 months wage a maximum ceiling above which unacceptable and hence no negotiation is allowed on it. In fact, there are some people who treat it as a maximum ceiling and something non- negotiated. But, to say that it is a maximum ceiling what purpose does the legislator have to fix the maximum if the parties agree to that effect? Bear in mind, if the parties agree on a payment of more than a 12 months wage in their contract or through collective agreement it is the worker who would benefit more

out of such terms; and this is what our law desires. From our discussion on the history and rationale of labour law under unit one, you know why the law intervenes in the parties' freedom to freely bargain on various terms. Accordingly, more favourable terms to the worker than those provided by the law are welcomed, for the law is there to back the weaker party in bargaining for the ultimate ends of social welfare and industrial peace. Therefore, it seems tenable that ceiling for the amount of severance pay as a gap filling phrase. Hence, if the parties keep silent in their contract or in a collective agreement about the maximum payment the worker is entitled to, the worker would not get a payment in the form of severance pay exceeding his 12 months wage. This approach would save the employer from likely financial problem following termination of a contract of employment of workers of longer years of service. Otherwise, in a situation where a better term is available for the worker, the ceiling of the law should be lifted. This is also the practice in many big enterprises that have collective agreements to this effect.

In addition to the total sum accorded for all workers who are entitled to severance pay according to Article 40(2) of the Labour Proclamation, an additional benefit is granted for some workers whose contract is terminated on some lawful grounds. (Article 40 (3)). The grounds that allow for such an additional benefit are work force reduction and termination as a result permanent cessation of the activities of the employer due bankruptcy or for any

other cause as per Articles 29 and 24(4) respectively. Under such special circumstances the amount of severance pay that is going to be paid for the worker, increases by his two months wage. So, the total sum the worker gets in the form of severance pay would become:

$$S = x + 1/3\ x\ (y-1) + 2x$$

Where **S = severance pay**

X = one months wage

Y = length of service in years

The grant of such an additional benefit only under the above special circumstances indicates us that the law maker is very considerate when the contract is terminated without any of the reasons coming from the parties.

i.i. Compensation

Compensation is another entitlement for a worker whose contract is lawfully terminated by his initiation under certain circumstances. In the majority of cases compensation is paid for a worker only when the termination is an unlawful one. But, when we talk about compensation under the discussion at hand, compensation is a warded for a worker though the termination is based on a lawful ground. By virtue of Article 41 of the Labour Proclamation, a worker who terminates his contract of employment in accordance with Article 32(1) shall be entitled to compensation.

Dear distance learner, the provision that we have cited above deals with issues of constructive dismissal that we saw previously. Since the worker is forced to resign due to the misdeeds of the employer, the law entitles such a worker one additional benefit in the form of compensation amounting to his one month's wage. Therefore, the total sum the worker gets in the form of severance pay per Article 40 (2) and in the form of compensation would become:

T = S + X

Where T = total sum of money

S = severance pay

ie x + 1/3 x (y-1) < 12x

X = one months wage

iii. Letter (certificate) of service

As an obligation the employer has to grant the worker with a letter (certificate) of service whenever the worker so requests; and upon termination of their contract as envisaged under Article 12(7) of the Proclamation. On the other side, it is also an entitlement for the worker, especially for one whose contract comes to an end. The worker is allowed to get this certificate free of charge and with no negative indications on it. Dear learner, for a detailed examination of such entitlement of the worker, please go back and refer to the discussion held at the beginning of this about obligations of the employer.

iv. Unutilized Annual Leave Converted into Cash

Another entitlement that is accorded for a worker when a contract terminates is the payment of unused annual leaves in cash form. In principle, annual leave should be taken by the worker. Unless and otherwise provided by the law, it is strictly prohibited to pay wages in lieu of annual leaves according to Article 76(2) of the Proclamation. But, as an exception sub-article 5 of Article 77 allows a worker to get payment of cash in lieu of the leave he has not taken upon termination of his contract. Sub-article 5 of Article 75 seems to encompass all workers whose contract is terminated. But, there is a frequently debated issue in this regard; particularly about termination due to death of the worker.

Article 77(5)

> *A worker whose contract of employment it terminated under this Proclamation is entitled to his pay for the leave he has not taken.*

As you know, death is one ground of termination of a contract of employment under the Labour Proclamation. The question here is whether the above provision is inclusive of death, so that the successors of the deceased can claim for the payment of the leaves he didn't take. To put it differently, in cases of a worker dying before utilizing his annual leaves; can his successors claim so as severance pay by invoking Art. 77(5) or is this non-transferable because of personal nature of annual leaves? Bear in mind, death is one

ground for severance pay under the Labour (Amendment) Proclamation. But, though death of the worker is a guarantee for severance pay which is purely of a pecuniary nature, it is difficult to deduce that death should fall under Article 77(5) since leave is something personal. Moreover, the rule of Article 76(2) strictly prohibits the payment of wages in lieu of the annual leaves, and Article 77(5) is an exception to that principle. This implies us that had the worker in the above issue not died, he would have remained in his job; and hence he would have taken the leaves. So, it seems sound to exclude death as a ground for the benefits accorded by Article 77(5).

3.7. Unlawful Termination of a Contract of Employment

In the immediately preceding topic you have seen what a lawful termination is and we have also discussed on the entitlements a worker may be allowed to enjoy once his contract is lawfully terminated. Under this section of Unit-Three we are going to resort to the discussion of unlawful termination; its meaning, types and effects of unlawful termination of a contract of employment.

Unlawful termination refers to a termination that contravenes the provisions of the Labour Proclamation (Article 42). The most important provisions of the Labour Proclamation for the identification of the lawfulness or unlawfulness of termination of a contract of employment are Articles 24, 25, 26, 27, 28, 29, 30, 31 and 32. A termination becomes unlawful if it contravenes the rules of at least one of the provisions of the mentioned Articles. A termination is regarded as lawful only when it is held on the basis of the above cited provisions. Accordingly, any termination that falls outside of the domain of lawful termination will automatically fall under the category of unlawful termination.

As you may have understood from the evaluation of the messages of the above cited provisions on termination of a contract of employment throughout the discussions of the third unit of this material, they provide for rules on either grounds of termination or on the duty to provide notice or on both. The rules that demand for the presence of a lawful ground for termination are what we call substantive requirements; distinguished from the procedural requirements that solely refer to the parties' duty to grant a prior notice for termination. Based on this we can also make a dichotomy of types of unlawfulness in relation to termination, as substantive unlawfulness and procedural unlawfulness.

By substantive unlawfulness, therefore, we are referring to that which is held against the grounds of termination the law stipulates. In other words, a termination suffers from substantive unlawfulness whenever it is conducted without lawful grounds.

On the other hand, procedural unlawfulness purely indicates one's non-compliance with the duty to give an advance notice whenever the law demands to do so. It doesn't have any relation with the existence or otherwise of a lawful ground for termination. It is rather about termination with lawful ground less the legally prescribed advance notice. Under such instances, the party has a lawful ground to bring the contract to an end i.e. to terminate, but he terminates the contract without rendering notice to the other party as the law orders. To conclude; in procedural unlawfulness what lacks is due process.

Dear distance learner, from the two types of unlawfulness with respect to termination of a contract of employment, which one is more serious? It is very easy to rule substantive unlawfulness as more serious than procedural unlawfulness.

Dear distance learner, having seen the meaning and types of unlawfulness, now you are going to look in to the effects of unlawful termination of a contract of employment as enshrined in our Labour Proclamation. Before that, attempt the following question. Can

there be substantive unlawfulness on the part of the worker? Why /why no? If you have clearly understood what we have said on the discussion of termination of a contract of employment by the imitation of the worker according to Art. 31 of the Proclamation, you should respond to this question in the negative.

i. **Substantive Unlawfulness**

Article 43 of the Labour Proclamation provides us with the effects of substantive unlawfulness. Please read the Article 43, especially its sub-articles 1 and 2 in order to have a better understanding of the up coming discussions.

Article 43

> *1. Where a contract of employment is terminated because of those grounds mentioned under sub-article (2) of Article 26, 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.*

> *2.subject to sub-article 1 of this Article, were a worker's contract of employment is terminated contrary to the provisions of Articles 24, 25, 27, 28 and 29 of this Proclamation, the labour dispute settlement tribunal may order the reinstatement of the worker or the payment of compensation.*

Pursuant to Article 26(2) of the Labour Proclamation, the worker's membership to a trade union, his seeking or holding office as a workers' representative, his submission of grievance or his participation in judicial or other proceedings against the employer, and his nationality, sex, religion, political outlook, marital status, race, color etc. shall not in any case be grounds for terminating the contract of the worker. This strictly prohibitive provision shows us the law maker's big concern about fundamental rights of the worker. Take for example an instance in which a worker is dismissed for the reason that he has brought a suit against his employer. This situation squarely fits with the grounds under Article 26(2-c). In this example and in the rest of the circumstances of Article 26(2) the employer's decision is aimed at taking vengeance against the worker. So, literature names dismissal on the basis of the grounds of Article 26(2) as retaliatory dismissal.

Sub-article 1 of Article 43 provides for the effects of retaliatory dismissal. According to that provision, worker dismissed in violation of Article 26(2) is allowed to be reinstated to his employment, unless he opts to leave his job in which case he gets compensation. Here, the law allows “specific performance” compelling the employer to hire the worker without his will. To conclude, in cases of retaliatory dismissal the effect is always reinstatement, unless the worker desires to leave his job by taking compensation.

For a worker who is reinstated, the entitlement following his re-employment is back-payment of wages. If the worker rejects the statutory right of reinstatement, compensation will be given to him in the manner provided by Article 43(5) of the Proclamation which we will see in detail the future.

Concerning the effects of unlawful dismissal out of cases of retaliatory dismissal, Article 43(2) is the relevant article. Bear in mind, when we talk about such unlawfulness, it is about a dismissal with no legal grounds but such illegal causes are out side of those listed under Article 26(2).

Article 43(2) talks of 2 options as effects of such unlawfulness as either reinstatement or payment of compensation. These are alternative remedies one of the two to be decided by

the appropriate labour tribunal depending on the nature of the dispute. It is up to the tribunal to choose one remedy among the two alternatives on case by case basis. So, here, re-instatement which is a guarantee for one's employment security may not always be the privilege of the dismissed worker, un like the case in retaliatory dismissal which entitles the worker to re-instatement by operation of the law as a statutory right.

In choosing one alternative from the two alternative measures, there is a parameter the tribunals should employ. The tribunal takes in to account whether there would be fruitful cooperation between the parties after dispute. This is because one of the basic principles of labour law is maintenance of industrial peace. Thus, if the tribunal believes that there is a serious antagonism disrupting the parties' future relationship, it decides for the dismissal of the worker with the payment of compensation. If the finding of the tribunal is in the otherwise, then it orders the worker's reinstatement to his job. While re-instated, the worker is allowed to get back-payment of wages.

If the court decides for the worker's dismissal with compensation, the amount is so huge. This same amount of benefit also goes to the worker who rejects the Proclamation's decision for re-instatement and opts for leaving according to Article 43(1). The amount of

compensation is also determined by the Labour proclamation under Article 43 sub- article 4.

Article 43 (4) Labour Proclamation:

> *The Compensation to be paid under sub- articles (1). (2) or (3) of this Article shall, in addition to the severance pay referred to in Articles 39-40,be as follows This provision shall also apply to a worker conversed by the relevant pension law.*
>
> *a) one hundred eighty times the average daily wages and a sum equal to his remuneration for the appropriate notice period in accordance with Article 44 in the case of unlawful termination is contract of employment for an indefinite period;*
>
> *b) a sum equal to his wages which the worker would have obtained if the contract of employment has lasted up to its date of expiry or completion provided, however, that such compensation shall not exceed one hindered eighty times the average daily wage in the case*

of unlawful termination of a contract of employment for a definite period or for piece work.

Generally, once a contract of employment is terminated unlawfully and the parties are separated for good, there are some entitlements accorded to the worker. Most of the entitlements are given to all workers while few others are attached with the ground of termination. There fore, the entitlements the worker gets would become:

- compensation according to Article 43(4),
- severance pay, on the ground under Article 34(1-c) its amount as determined by Article 40 that we saw under our previous discussion;
- unutilized annual leave as per Article 77((7) that we examined in detail before;
- 6 month's wage if any;
- payment of wage in leave of notice period, if there is any procedural unlawfulness (Article 45), and
- letter (certificate) of service according to Article 12(7) of the Labour Proclamation.

ii. Procedural Unlawfulness

Unlike substantive unlawfulness that exists only on the side of an employer, procedural unlawfulness may be committed by the worker or the employer as the case may be. This is because, as no ground for resignation is expected of the worker, it is difficult to think of a substantive unlawfulness on the part of the worker. But, as notice may be expected of the worker during resignation we can have procedural unlawfulness of a worker.

As you remember from the discussion on the types of unlawfulness; we have said that procedural unlawfulness is less serious than substantive unlawfulness since the employer has still a ground for termination in the former situation. As a result, the remedy available for the worker when the employer fails to grant him an advance notice is only an entitlement of wages in lieu of the notice period in the form of compensation (Article 44). The law doesn't entitle the worker to reinstatement for the only reason that he doesn't get an advance notice from the employer.

Similarly, in cases of procedural unlawfulness on the part of the worker, such minor procedural fault doesn't oblige him to work for the employer as this amounts to slavery. The only sanction imposed on the worker is just to make a payment of a one month's wage for the employer by way of compensation (Article 45).

Review Questions

1. Describe the similarities and differences between suspension and termination of a contract of employment?

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   _____

   _____

   _____

   _____ .

2. Severance pay is commonly understood as the minimum entitlement a worker should get as a reward for the service he/ she was rendering for the employer. If such is the case , then what do you think is the law maker’s reason to specify certain grounds for severance pay and in effect to deny some workers of this right. Discuss.
3. List down the entitlements that are common to lawful and unlawful termination of employment contracts.

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4. Discuss the entitlements available for any worker whose contract is lawfully terminated on the basis of Article 27 (1).

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_____ .

UNIT – FOUR

LEGALLY STIPULATED MINIMUM LABOUR CONDITIONS

INTRODUCTION

So far we have taken a look at contract of employment – how it is formed, what obligations it imposes on the parties, how it can be varied, suspended and terminated. Now let us turn to some important issues about employment relationships. In this unit we are going to see what the contents of the individual employment contract or the collective agreement should provide for. Any contract or collective agreement should provide for the legally stipulated minimum labour conditions. Minimum Labour condition is about the rules that deal with the minimum conditions which an employer and employee should fulfill and respect both at the time they conclude their contract and then after in their employment relationship. For a better understanding let me take you to the discussion held in the first unit of our course. Labour law is a law by which the state intervenes in the parties freedom of contract. The rationale for such an intervention is mainly to protect the interests of the employee. This is usually done by stipulating the minimum working conditions which the worker should benefit from, regardless of the contents of their contract. Therefore, these legally stipulated minimum conditions may also be defined as benchmarks below which the contract can't go downwards. Accordingly, what the law blames is downward derogation by providing less favourable terms than those the proclamation gives for the employee. Thus, derogating upwards is welcomed by law as

already said previously.

Therefore, the discussion under this unit would focus on the evaluation of the various working conditions the proclamation gives as the minimum the employee should enjoy.

To this end, in the first section of the unit, you are going to have a general overview of the minimum working conditions under labour law. Hence, what minimum conditions consist of and their purposes are the core points of discussion. In the second section of the unit, we will consider the Proclamation's provisions on hours of work, weekly rest days, and leaves. Here, the major points of the discussion are the maximum working hours of the worker set by law, the entitlement for a weekly rest and the various leaves the worker is allowed to take by law. The third section is devoted to the safety and health rules. Here you are going to examine the rules relating to the protection of health and safety of workers as well as the manner in which employment injuries are to be compensated. The last section of the unit is about guaranteeing employment security of the worker by law.

Learning Objectives:

At the end of this unit, you will be able to

- . Define what working conditions mean

- Discuss the general rules related to minimum working conditions
- Explain the obligations of both the worker and the employer so as to prevent employment injuries
- Discuss the mechanisms of compensating employment injury and
- Write down the ways by which workers are protected against improper loss of job.
- Discuss the legally stipulated minimum labour conditions with respect to working hours in a day, rest periods, employment security, and safe and healthy working conditions of workers.
- Identify the preferential as well as differential treatments labor law provides for some special categories of workers

4.1. General Background

Pursuant to Article 2(5) of the Labour Proclamation, working condition refer to the working hours, rest pervious, leaves, employment security, safety and health conditions and other employment issues. The minimum labour conditions are therefore intended to govern employment relationships whenever there is no agreement on certain issues or

whenever contractual terms are inviolation of the minimum standard set in the Labour Proclamation. For instance, if the parties in their contract remain silent about the daily working hours or stipulate in their contract for a 10 hours per day duty, the legally stipulated 8 hours per day will apply.

4.2. Hours of Work, Rest Period and Leaves

These are some of the aspects of minimum working conditions. There are three reasons that triggered the law to provide these aspects. First, they are aimed to prevent the premature deterioration of workers. Premature deterioration refers to the situation whereby the worker may go out of the productive members of the society as a result of very long hours of work through out his life. This situation would ultimately make the individual dependant upon the productive members of the society. In order to overt such a danger the law allows the worker to have a rest through various mechanisms such as by limiting the hours of work, giving a weekly rest period and leaves of various kind. Secondly, they attempt to protect the workers and the society at large from the inevitable danger of bodily injury resulted by over exhaustion of the worker. The third reason for the regulation of these aspects of working conditions by law is to give a room for workers so

as to attend their personal and social commitments.

To begin with working hours, they are those hours in a day or in week as the case may be in which the worker renders service to his employer. Just like the case of the rest of working conditions, any statutory intervention in parties freedom was highly debatable. Concerning the inure of working hours statutory limitation of it, particularly for adult workers was regarded as highly questionable. It has, however, become a general trend to fix the maximum hours of work by law and/or by collective agreement. Actually, it has now become one of the most essential objectives of labour law. This is the reason why the first ILO convention of 1919 has expressed it as one objective of labour law. This document has contained the principle of eight hours as a normal working hours per day. This principle was almost universally applicable. But, some countries have set aside this principle and introduce the principle of 40 hours per week. Others, on the other hand, try to fix the maximum hours of work in terms of either per day or per week. How is the situation in Ethiopia? Read Articles 61 and 63 of the Labour Proclamation.

Article 61 (Procl.)

“ Normal hours of work shall not exceed eight hours(8) a day or fourty-eight(48)hours a week "

Article 63 (Procl.)

“Hours of work shall spread equally over the working day of a week, provided, however, where the nature of the work so requires hours of work in any one of the working days may be shortened and the differences b e distributed over the remaining days of the week without extending the daily limits of eight hours by more than two hours“

Article 61 of the Labour Proclamation determines the maximum duration of service of the worker in hours that he renders within a day or a week. Accordingly, the normal hours of work are limited to be hours per day or forty-eight hours per week. In relation to this, the Proclamation further defines what “normal hours of work” mean. It is “the time during which a worker actually performs work or avails himself for work in accordance with law, collective agreement or work rules.”

While Article 61 of the Proclamation fixes the maximum normal working hours of a worker Article 63 gives us the manner of distribution of these working hours within a week. Accordingly, to this provision, the hours of work shall be spread equally over the working days of a week. Six working days of a weak are recognized under labour law, the seventh day being a weekly rest period. Dear distance learner, what do you think is the law’s reason to come up with the rule of Article 63? Try to analyze this issue in light of the

objectives of some of the aspects of minimum working condition which we saw in the first paragraph of this section.

Besides the above rules, under its Article 63 the proclamation has provided some exceptions allowing the possibility of deviation from the rules. Where the nature of the work so requests the workers may be obliged to work for a less more than 8 hours in a day by distributing the extra hours on the normal 8 hours of work in the same week. This tells us about the possibility of working for more than 8 hours per day. However, in no case can the parties extend the maximum duty for more than 10 hours a day.

Generally, the normal duration of hours of work and the manner of distributing it should be fixed and field in accordance with Article 61, 63 and 64 of the Labour Proclamation. Though this is the case, the Ministry of Labour and social affairs is empowered to reduce such normal hours of work given under Art. 61 in some economic sectors, industries or occupations under special conditions of work such a reduction is without entailing a deduction in wages of the worker (Article 62).

A related issue with our discussion on hours of work is the question of overtime work. Articles 66, 67 and 68 of the Proclamation are the important provisions that deal with this

subject. When we see these provisions of the proclamation, we can infer the due concern of the law maker on overtime work. The law tries two discourage over-time work at various stages. The first thing that the proclamation does is to prohibit overtime work. By acontrario reading of Article 66(3) which declares “overtime shall be worked in cases expressly provided for under Article 67(1) of and on the express instructions of the employer ”,we can reduce the prohibition of overtime work, as a rule. The second stage the law employed so as to discourage over time work is to restrict the circumstance in which overtime work is permitted as an exception to the rule of Article 66(3). These exceptional circumstances are exhaustively enumerated under Article 67(1).

Article 67(1) (procl.)

“A worker may not be compelled to work over-time, however, over-time may be worked whenever the employer cannot be expected to resort to other measures and only where there is“

In the sense of Article 67, a worker is compelled to undertake overtime work only when one situation among the enumerations of the law is fulfilled. But, this doesn’t mean that the worker is always compelled to do so whenever the circumstances under this provision are available. Though one of the compelling reason is there for example, force majure per sub-art.10, overtime work is ordered as a last resort by the employer. This means, there

are two cumulative conditions under Article 67(1). One is when the employer can not resort to other measures just to tackle the compelling reason for over-time engagement of the worker on the basis of accident (actual or threatened), force majure, urgent work or a need for substitution of absent workers assigned on work that runs continuously without interruption.

Even if an employer is successful enough in proving that he is allowed to order his worker for over-time work by passing through that very narrow road of Article 67(1), the law still tries to discourage him from doing so. This third stage discouragement is by way of allowing a segregated rate of payment of wages for over-time work. (Article 63). As per Article 68 of the Labour Proclamation, in addition to his normal wage, a worker who works overtime is entitled to get payment for the work he undertakes during this time.As already said, law doesn't stop at this stage. It rather made the rate of payment for an overtime work higher than that of the normal hours of work. Accordingly, the following rate of payment is given by the Labour Proclamation. In case of

a) work done between 6a.m. in the morning and 10 p.m.in the evening at the rate of the ordinary wage multiplied by one and one quarter
b) night time, work done between 10 p.m. and 6 a.m., at the rate of ordinary hourly wage multiplied by one and one half

c) work done on weekly rest day, at the rate of the ordinary hourly wage multiplied by 2.
d) Work done on public holiday, at the rate of ordinary hourly wage multiplied by 2 and one-half.

Here, overtime work is rated on the basis of two categories of situations. Payment for an overtime work done during the working days of the week and payment for overtime work done during the rest day and public holidays. Concerning the first category, for overtime work done during the daytime or early evening, the payment is calculated at the rate of one and one fourth multiplied by the ordinary hourly rate. Take for example factory where in the normal working hour is 7 hours from Monday to Sunday. The normal schedule of work of the undertaking is from 8:30 a.m. to 12:30 am. In the morning and from 1:30 p.m. to 4:30 p.m. in the afternoon. Meanwhile, upon the undertaking's order a worker performed an overtime work on Wednesday from 5 p.m. to 9 a.m. Assuming that the worker's ordinary hourly wage is Birr 4, the rate of payment for the overtime work will be at the rate of one and one-fourth multiplied by his hourly wage which is Birr 4.

But, when we come to payment for overtime works done on weekly rest day and public holidays, the rate of calculating the overtime pay is a little bit higher than that of an

overtime work done during the working days. In the above illustration, assuming that Wednesday was a holiday. I invite you to calculate the rate of overtime payment and the amount of money the worker earns by way of overtime pay. You can use the space provided below.

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At this juncture, there is an important issue we should raise. Article 68(1-c) of the proclamation provides that overtime payment for work done on weekly rest day has to be paid at the rate of two multiplied by the ordinary hourly rate. Regarding, a work done on weekly rest day Article 71(2) of the proclamation provides for another rule, that says:

> *Subject to the provision of Article 68(1), a worker who, by virtue of the provision of this chapter, works on a weekly rest they shall be entitled to a weekly rest period, provided, however, that he shall be compensated in the*

form of money if his contract of employment is terminated before he is granted the compensatory rest period.

Dear distance learner, what do you understand from these provisions of the labour proclamation? Do you think that every work undertaken on a weekly rest day is an overtime work? An answer to this question is found under Article 60(1) of the proclamation that tells us what an overtime work could mean. According to this provision work in excess of the normal daily hours of work fixed in accordance with the provision of this proclamation shall be deemed to be overtime work. From this definition and the reading of the above cited provisions, we can understand that every work done on a weekly rest day may not necessarily be an overtime work. This means, in so far as the work is done in compliance with the legally defined normal daily hours of work regardless of the time when that work is undertaken such service is deemed as one which is performed on a normal basis. For a better understanding let us consider the case of the worker in the previously raised example. Suppose that particular worker was on duty on his rest day,sunday,and he was performing his task for 5 hours only.Here the work he has undertaken is not deemed as an overtime work, since the duration of engagement is not in excess of the normal daily hours of work of the undertaking which is 7 hours. So, his case would be treated under Article 71 of the proclamation instead of Article 68.

When you go further and take a look at Article 68(1)(d) and Article 75 you will encounter a similar situation in cases of works done on public holidays, which, in fact, could be resolved in a similar manner with that of the above issue.

As incidental point to the foregoing discussions, we raised terms like “weekly rest day” and “public holiday” without defining them. Both weekly rest day and public holiday are treated as rest period. To see them separately, weekly rest day is a rest period that a worker gets once every seven days of a week, for a period of not less than 14 uninterrupted hours. Whenever it is possible, the law recommends the day to fall on Sunday and be granted simultaneously to all of the workers of an undertaking. But the parties are allowed to make a different arrangement through collective agreement in times the nature of the work of the undertaking prevents the weekly rest to fall on Sundays. Hence, another day may be stipulated at a substitute to Sunday. Unlike a weekly rest period which has to be given on equal intervals i.e. on a weekly interval by the employer, public holidays may not have such a feature for the purpose of the two paid rest days is different. Moreover, public holidays are observed under the relevant law to be enjoyed by citizens.

Besides fixing the hours of work of the worker and giving him a rest period, granting various leaves for the worker is another area of intervention by the law. The labour proclamation entitles the worker to annual leave, sick leaves ,marriage leave, mourning leave and union leave. Among these kinds of leaves annual leave is an entitlement for any worker (with no need to have a specific cause to get it) and hence we will focus on its examination.

An annual leave is a leave for few days that a worker is entitled to get once or twice a year. The law is much concerned about this benefit of the worker, so as to meet the objectives such leave could serve. Perhaps, you can rehearse the purposes the lawmaker foresees while allowing leaves from our previous discussion. For instance, the law prohibits the worker from waiver of his right to annual leave. Accordingly, a term of agreement that prohibits taking annual leaves has no effect. Not only this, as you may remember from our detailed examination of the entitlements following lawful termination and unlawful termination of a contract of employment under the third unit of this material, annual leave cannot even be replaced by wage unless it is allowed by law as in the case of termination. Read the following provisions of the Labour Proclamation.

Article 76 (Procl.) “ -- - - - “

Article 77 (Procl.) “ - - - - “

Therefore annual leave is an entitlement for any employee who is subject to the labour proclamation and its manner of calculating of the duration be regulated by Article 77. But, bear in mind; an additional annual leave with pay may be fixed in a collective agreement for workers engaged in particular arduous works or in works undertaken under unhealthy conditions.

The duration of annual leave is 14 days for the first year of service plus one day for every additional year. Such duration of leave excludes public holidays and weekly rest days. It also excludes periods of intermittent occurrences such as sickness and maternity. Thus, if a worker has fallen sick while he is on annual leave, the period /days of his sickness should not be counted on the duration of annual leave. That is why Article 79(4) declares that where a worker falls sick during his annual leave, Articles 85 and 86 shall apply. These latter provisions are provisions on the grant of sick leave. Therefore, in situations of the above kind i.e. sickness the issue of the worker ends to be a question of annual leave. It would rather become an issue of sick leave, an issue we are going to entertain after a while.

Regarding annual leaves, the law has also provided us with some rules on the status of the worker who is on annual leave. During this time, the worker whose contract is suspended? I expect you to write a short note on this issue on the few lines below.

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As per Article 78(2), an employer shall grant a worker his annual leave in accordance with a leave schedule in the course of the calendar year in which the leave becomes due. The leave schedule has to be repared with due regard, as far as possible, to the wish of the worker and the need for maintaining the normal functioning of the undertaking. It is after a year’s service that an annual leave becomes due. Therefore, a worker can not claim for the proportional annual leave before he serves a year. At least for his first year of service, he cannot demand annual leave before finishing the year.

Another important leave under our labour proclamation is sick leave. Sick leave is granted for a worker who is incapable of working due to sickness other than sickness resulting from employment injury. It's given to workers who completed their probation. The maximum a worker is allowed to get in the form of sick leave is for a period of six months counted consecutively or separately in a year. For a legitimate claim for sick leave, the worker is duty bound to notify his employer about his sickness on the day following his absence, unless the employer is in position to know of this fact.

Unlike annual leave which is always a paid leave, sick leave may be or may not be a paid leave depending on the length of the duration of time the worker takes as a sick leave. Accordingly, a worker may get a fully paid sick leave, a half-paid sick leave, a sick leave without pay in the following manner.

i) for the first one month of the sickness, sick leave with 100% of his wage;
ii) for the next two months of his sickness, sick leave with 50% of his wage;
iii) for the last three months which is the maximum period of sick leave, the worker is granted with leave without pay.

4.3 Safety Working Conditions

In the history of employment relationships, when the principle of freedom of contracts was a governing rule, during the conclusion of the contract voluntary assumption of risk was used to be the principle, and no safety working conditions were stipulated. This necessitated the intervention of the state to counter-balance the malpractice. The state intervenes by its labour laws that provide for the minimum protective rules aimed at protecting the safety and health of workers as well as curative measures for problems related to working environment.

In view of such an end, the 2003 Labour Proclamation has come up with safety and health rules of two aspects: for prevention and for compensation. Preventive rules are those rules designed to prevent employment accidents and diseases to the extent possible. Even if one takes utmost care ,accidents or diseases could occur because of unforseeable occurrences. Plus, if cost of prevention is found to be greater than cost of accidents ,prevention may fail to work. So, we may be forced to resort to compensatory (curative) measures that are aimed to give remedies for the worker who sustains an employment injury. That is the reason why our larour Proclamation has also compensatory provisions.

The previsions of Articles 92 and 93 deal with prevention of employment injury. Regarding prevention, the law has imposed obligations both on the employer (Article 92) and the worker (Art-93). So, a two way traffic the duty is.

Article 92 of the labour Proclamation demands on employer to takes the necessary measures so as to safeguard adequately the health and safety of the workers. He has in particular the duty to.

Article 92 (Procl.) "……"

First of all, the employer must taken the measures and should comply with the safety and health requirements the labour law provides. In addition, he has to adequately instruct workers about the hazards involved in their work so that they can protect themselves from likely health hazards. He is also with the duty to assign a safety officer who makes sure that everything is going well. The employer must also establish an occupational and health committee of the undertaking. Besides the provision of protective equipment, clothing and other necessary materials, he has to register any accident or disease happened in the undertaking and make a report of same to the labour inspection. Generally, compared to the obligations of the worker that we are going to deal with after a while, most of the

obligations of the employer are with pecuniary nature since in the majority of cases it is the employer who is in a better financial position than the worker the aforementioned duties are imposed on the employer instead of on the worker.

Though the law has clearly stipulated the duties of the employer, this in itself is not a guarantee to keep the safety and health of workers. Sometimes the employer may fail to abide by these rules. In other times, for various reasons there might still be a likely danger regardless of the employer's due effort. In order to avert such problems the labour inspection plays a paramount role. Whenever this organ feels that the conditions in the undertaking become a threat to the health and safety of the workers, it takes necessary measures; as empowered to do so by Article 179 of the Proclamation. For this purpose the long listing under Article 92 prescribes the obligations of an employer to prevent or at least to minimize employment injuries. These some obligations are enshrined in Article 12(4) of the Proclamation which is discussed in the third unit of the course. The labour inspection service has also the duty to supervise and ensure that undertakings are not dangerous to the safety and health of workers. At last, take a note that any violation of the law by the employer withregard to safety and health of the workers is followed by a criminal liability which is punishable with fine up to Birr 1200.

On the issue of preventive aspects of safety and healthy conditions of work, the worker's duties are clearly provided under Article 93 of this Labour Proclamation. Accordingly, a worker has the following obligations in the prevention of injury.

Aricle 93 (Procl.) " - - - "

These obligations demand the worker to exert utmost efforts in order to avert any danger that is likely to harm his safety and health as well as that of the rest of the workers. Those corollary duties of the worker are important because the purpose of the law cannot be achieved only by the efforts of the employer, but by joint efforts of both parties.In fact, the obligations under Article 93 are also given under Article 14(2a) of the Proclamation is the form of positive obligations of the worker.

As has just been said above, there are also remedial measures that should be taken whenever the aforementioned preventive measures fail. Hence these secondary options come to the scene whenever the primary option i.e. prevention is not successful. This is mainly about compensating the employee sustaining employment injury; and, therefore, such a remedy is a post injury remedy. Here, the liability of the employer is inspite of taking all necessary measures required of him to prevent employment injury.

In the past, before the emergence of labour law compensatory provisions, the worker can claim compensation by virtue of extra contractual liability provisions, by proving fault of the employer. This is because in their contracts what parties used to provide was a voluntary assumption of risk principle, and therefore, any injury was deemed as something foreseeable by the worker. Because of the difficulty to prove the fault of the employer, added to the court's inclination towards the employer in creating various defenses even if the worker is fortunate enough in proving fault, getting compensation was almost the next door of impossibility.

Later in time, labour laws come up with compensatory provisions that establish employer's liability without fault. Therefore, irrespective of the employer's due diligence to prevent harms, if his worker sustains employment injury, he is liable to pay compensation for the worker. What is expected of the worker is to prove that due to employment injury he has sustained disablement. The same holds true for the Ethiopian context. But, payment of compensation is not the sole post injury obligation of the employer. Rather, there are some other measures the employer should take/see Articles 104 and 105.

Generally, the remedial stage of employment injury has two levels we should pass through

so that we can asses as to what the liability of a particular employer looks like. The first stage is to determine the existence of liability. It would be the employer who is predominantly liable. Once we determine that liability exists, we should determine to what extent the employer is liable. And this stage of determination of the extent of liability is what we call the second stage. If no liability is there, according to our first stage evaluation, we should not be bothered about the extent of liability.

Determining the existence of liability

To establish the existence of liability of the employer, there has to be injury in relation to employment either directly or indirectly. Therefore, this issue would ultimately be a discussion of the existence or otherwise of employment injury on the basis of Article 95(2) of the labour Proclamation. This provision defines employment injury as an injury which a worker sustains during or in connection of with the performance of work; it can either be occupational accident or disease. In order to have a full fledged meaning of employment injury and finally to establish the existence of the employer's liability, let us take a look at the definitions of employment accident and disease.

An employment accident is any organic injury or disorder sustained by a worker during or

in connection with the performance of his work, (Article 97(1)). Employment accidents are usually sudden and immediate as opposed to employment diseases which are a totality of effects that are accumulated on time. Under our Proclamation, employment accident particularly includes the following.

Article 97(1) Procl. “ - - - -“

As a general understanding and similarly from the meaning ascribed to it occupational accident operates on the principle of sine qua non, which means without which not. In the principle of sine qua non, something can exist on the condition of the existence of some other thing. Accordingly, sustaining an injury in the place of work is an indispensable pre requisite for the existence of occupational accident. It doesn’t matter what causes the accident, rather where and when it has happened is the key. The injury can be caused by the employer or any third party. What matters is the place where the accident occurs. Depending upon circumstances, the law tries to extend place and time rule to some situations. For example, a worker under the employer’s instruction per Art. 97(1a), wherever he is and whenever it is, if he sustains accident that accident is occupational accident.

The other face /type of employment injury is employment disease. By employment disease

we are referring to any pathological condition caused by physical, chemical or biological agents in relation to the work undertaken by the worker (Article 98). The employment disease the worker sustains may be one that harms his anatomy or physiology, which means his bodily structure (menology) or normal functioning of his body, respectively.

For a disease to be regarded as an employment disease it must arise as a consequence of the type of work the worker performs, or it must arise due to the situations in the surrounding where he is obliged to work during a certain period prior to the date the disease became evident. But, as an exception to this rule, an epidemic or endemic prevalent in the area where the work is done cannot be considered as an employment disease, unless the worker who contracted such disease is a worker exclusively engaged in its combat by reason of his occupation.

For the establishment of occupational disease, cause and effect relationship between the nature of the work and disease is mandatory. Hence, occupational disease does not operate on sin qua non principle. As you can reasonably expect, given the fact that diseases are usually accumulations of long term effects, it is very difficult to establish causation between a certain disease and one’s occupation. In view of tackling such kinds of difficulties worker might encounter, the Proclamation prescribes issuance of a directive

containing schedules that list diseases to be of occupational diseases. In order to cope up with the changing environment, the schedule has to be revised at least every five years. This is actually one duty of the labour inspection service pursuant to Article 177(3) of the Proclamation.

Dear distance learner, as you may understand from our present discussion, occupational disease is already difined by Article 98 of the Labour Proclamation. So, what is the relevance of the schedule that we raised above? Well, such schedule has a paramount importance for the worker to avoid problems of proof. If a worker encounters a disease listed in the schedule, provided that he is working a corresponding type of work, he is not required to prove the existence of occupational disease and would not be bothered about establishing causation according Article 98. On the other hand, for the disease not listed on the schedule, the worker needs to have proof that establishes nexus between the work he performs and the disease on the basis of this same provision.

Dear distance learner, so far we have seen employment injury and its two aspects: occupational disease and occupational accident. But we didn’t yet resolve our starting issue of determining the existence of liability of the employer.

In this regard the level of liability of the employer is the so called strict liability /liability irrespective of fault. So, when the worker proves the existence of employment injury, be it an occupational accident or disease, the employer can't be exonerated from liability by showing that he has taken precationary measures. Once the fulfillment of occuption injury is proved in this manner, the only defense available from existence of liability of the employer is victim's intentional fault on the basis of Article 96 of the Proclamation. Because the defense is very narrow, the scope of liability is wider.

Extent of Liability of the Employer

Once we make sure that the employer's liability for injury of the worker in the way we saw above, the extent of liability of the employer is determined by provisions of the Labour Proclamation. Under this discussion we will focus on the obligations a respective employer may shoulder.

The first category of obligations of the employer consists of medical benefits that should be extended to the worker. These include first aid, general and special medical care and cost of hospitalization. Under the second category of obligations, we get payment of cash benefits recognized under the Labour Proclamation. For a general understanding read

Article 104 of the Labour Proclamation.

Article 104 (Procl.) “ special obligation

1) An employer shall have to excute the following obligations:

a) to provide the injured worker with first aid in time;

b) to carry the injured worker by an appropriate means of transport to the nearest medical center;

c) to notify the occurrence to the appropriate organ in accordance with the directives issued by

minister.

2) The employer shall have the obligation to pay the funeral expenses specified under article 110(1)(b) “

First aid is normally given at the spot of injury or at a work place. In addition, the employer should not only take the injured worker to hospital, but also should cover all medical expenses upon the decision of the medical board. If the injury causes death to the worker, the employer should cover the funeral expenses that may go up to two month’s salary of the worker.

With regard to cash benefits the Proclamation recognizes, the employer may be obliged to

pay one or more of the disablement benefits the Proclamation stipulates. These cash benefits include:

1. Periodic payments
2. Dependant's benefits, and
3. Disablement benefits

All these payments are made whenever the injured worker sustain disablement of what ever kind from among the law recognize. Therefore, in the following few pages we will have a look at disablement and the benefits accorded to the worker or dependent of who sustains one from the different types of disablement.

"Disablement means any employment injury as a consequence of which there is a decrease or loss of capacity to work."; Article 94(1) of the Labour Proclamation. Existence of physical or functional injury may not necessarily entitle a worker to claim compensation. A worker is entitled to get compensation only when there is decrease or loss of capacity as a result of the employment injury. The only situation by which compensation can be claimed in the absence of reduction or loss of capacity to work is when there is a serious mutilation or disfigurement of the injured worker. Thus, in such instances we cannot say there is reduction nor loss of working capacity; it is only a

physical injury. But as has just been said the law exceptionally entitles the worker to payment of compensation.

According to our Labour Proclamation disablement is divided into three main types- temporary disablement, permanent disablement and death.

When there is a reduction of the worker's capacity to work for a limited period of time ,then the situation is temporary disablement. The time frame we apply here is the period in which the worker undergoes medical treatment for recovery from the injury. On the other hand, when there is an incurable injury causing in reduction or total loss of working capacity, then it means there is permanent disablement.

Permanent disablement is either partial or total permanent disablement. Permanent partial disablement refers to an incurable employment injury decreasing the worker's capacity to work. Here, the person can still work, but what he faced is a reduction in his working capacity. Permanent total disablement, on the other hand, means an incurable employment injury resulting in the total loss of capacity to be engaged in any kind of remunerative work. Bear in mind, if the injured worker is with the capacity to be engaged even in some other remunerative works, then there is no permanent total disablement.

Compared to temporary disablement, permanent disablement is more serious, though not as grave as death which also an instance of disablement.

Determination of disability is a medical issue. so we, as lawyers, have to be assisted by medical men. Hence, this is an area of medico-legal issue. Accordingly, Article 102(1) of the Labour Proclamation, the degree of permanent partial or total disablement has to be fixed by a competent medical board in accordance with an assessment table of disablement. The assessment table is to be drawn by directives issued by the Ministry of Labour and social Affairs. Thus, the injury is assessed by the medical board after which the board produces its report to the court.

Dear distance learner, have you got the meaning of disablement and its types from the foregoing discussions?

Having seen these points, let us go back to the issue we raised before i.e. the cash benefits to be paid for a worker following employment injury. Periodic payment, disablement benefits and dependants benefits are cash payments wade as corollaries to temporary disablement, permanent disablement and upon death respectively.

Periodic payment is benefit the employer gives to the injured who sustained temporary disablement. This payment is made, until the worker recovers from the immediate injury that forced him not to resume work. The duration of the periodic payment is equal to the period that the worker is under medical treatment. However, the maximum duration for this payment cannot exceed one year.

Periodic payment is aimed at enabling the worker live in the condition he had before sustaining the injury. For the maximum of 1 year period, the amount the worker gets by way of periodic payment is calculated in a decreasing rate from the date of injury. The payment is made at the r
e of full amount of the wage for the first three months of his injury, two-third of his wage for the next tree months and half of his wage for the remaining six months. The periodic payment of the worker may cease whenever one of the following takes place,

1. When the worker is medically certified to be no longer disabled,
2. On the day the worker is entitled to disablement pension or gratuity or
3. Twelve months from the date the worker stopped work.

The cash benefit accorded to a worker in permanent disablement, upon a medical board decision, is a disablement benefit. After the injured worker recovers from his immediate

injury through medical treatment, the next step is determing the permanent disablement he sustained due to the injury. If this worker was a beneficiary of periodic payment, on the day he is entitled to disablement benefit, his periodic payment stops. The amount of disablement benefit/compensation paid, differs on the type of permanent disablement a worker sustains.

According to Article 109 of the Labour Proclamation, an employer is duty bound to pay a lump sum of disablement compensation to a worker who sustains permanent disablement as follows.

a) where the injury sustained by the worker is permanent total disablement, a sum equal to five times his annual salary.
b) Where the injury sustained by the worker is below permanent total disablement, a sum proportionate to the degree of disablement calculated on the basis of the compensation provided for in sub-article (3)(a) of Article 109.

As previously indicated disability is evaluated in relation to reduction in working capacity of a worker. To what extent the employment injury reduced the worker's working ability is the basis of compensation. The degree of disablement may be a total permanent disablement or a partial permanent disablement the latter being determined in various

degrees. Generally, there are two approaches countries apply in order to determine disability and its different degrees in medical areas.

These are

1 the scheduler method of compensation, and
2 the specific utility method of compensation

Under the first approach we get a schedule consisting of list of body organs on its one side and on the other amount of compensation to be paid for the injury. For instance, the schedule may stipulate a 2500 Birr compensation for loss of right hand etc. this approach is very simple to administer and it maintain objectivity with no subjective consideration of the importance of a body part for a particular worker. We simply give the injured worker the cash, irrespective of the actual loss of working capacity he sustains as a result of the loss in that specific body part. But, sometimes medical officers may express same, for example loss of right hand in the above example, in percentage terms instead of converting in to cash. In both cases it is a flat-rate; and any kind of human being is allowed to get equal compensation for loss of a specified body organ. So, the scheduler method of compensation does not take into account the specific importance of some organs to some specific person. In other words, it doesn’t consider the job performed by the worker and the last organ to compensate the problem the worker faces.

Under the specific utility method of compensation, however, the lost organ is seen in light of its specific importance for the worker's particular job. As an illustration to this take a driver who lost his leg. If we apply the scheduler approach to compensate the injured driver, the compensation he gets is equal that any worker is allowed to get. But under the specific utility approach as the driver who lost his leg would be encountering huge problem in productivity, his entitlement to compensation if likely to be of a greater amount. Today, to be more fair and compensatory, countries are moving away from the schedular method and coming closer to the specific utility method of compensation.

But, in Ethiopia as you can understand from the provisions of Article 102 of the Labour Proclamation, it seems the scheduler method is preferred. Accordingly, there would be an assessment table and that percent of disability from such schedule is converted in to compensation by the tribunals /courts. This can be illustrated in the following manner. Suppose that the injured worker's wage is 400 Birr per month, and according to the schedule his degree of disablement is 40 percent. The compensation this worker gets is calculated in accordance with Article 93(3)(b) of the worker is equal to 5 x 40% x 4500 Birr i.e. 96000 Birr. This is a clear case of permanent partial disablement.

The disablement compensation to be paid for permanent total disablement is also a lump sum payment which is **5 x his annual salary**. If we take the above illustration given for permanent partial disablement, assuming that the injury sustained by the worker is a permanent total disablement, then the amount of compensation he gets is 5x 4500 Birr 28000.

The third and worst scenario of permanent disablement is death of the injured worker. In such situations the employer pays compensation to the deceased's dependants. This payment is what we call "dependents' benefit" which is a lump sum payment calculated as follows:

5 x annual salary of the deceased

Dependants' compensation is a benefit dependants get in addition to the payment they get for funeral expenses that should not be less than two months wage of the worker (Article 110). The payment of funeral expenses is actually subject to the provisions of collective agreement or work rules. For the purpose of the labour law dependants are:

a) the worker's widow or widower
b) children of the deceased who are under eighteen years of age; and
c) any parent who was being supported by the deceased worker.

The total sum of money in the form of dependants' benefit is divided and given for the above mentioned three categories of dependants as follows:

_50% for the deceased worker's lawful husband or wife,

_10% each for the deceased worker's children below eighteen;

_ 10% each for the deceased worker's parents who were being supported by him.

4.4 Special Categories of Workers

Dear distance learner, so far we have been dealing with the legally stipulated minimum labour conditions that prescribe the least protection the worker should get from the employer. These rules mainly impose the minimum obligation of the employer and some even consist of the obligations of the worker for his own sake. Such rules are generally applicable to all employment relations that fall under the coverage of the labour proclaimation .The same holds true for the formation , variation suspension and termination of any employment contract. But our labour law recognizes and provides for special rule that regulate some special contracts of employment.These special employment contracts are contracts of employment with

1 Apprentice workers /articles 48-51/

2 Young workers /articles 89-91/

3 Female workers / articles 87 and 88 / and

4 Foreigners employed in Ethiopia /article 174 /

1 For all practical purposes the above categories of workers are under the ambit of the labour proclamation. But sometimes they are treated differently and most of them preferentially because of different reasons. Hence, the discussion under this selection of the unit would focus on the special rules of the proclamation that give special protection for such workers and the special obligations imposed on them if there is any .In line with this we will also see any deviations of proclamation concerning its rules on various stages of these special contracts, starting from their formation upto termination.

4.4.1. Apprentice Workers

Apperntice workers are people who are not full fledged employees. They enter into a contract of employment in order to acquire skill predominantly and service they give is only incidental.

Unlike the case in all other of employment contracts wherein doing a job is the primary, if not the sole obligation of the emplyee, the apprentice’s performance of work for his employer is simply a means to the end of acquisition of skills.

If such is the reason for the individual's involvement in a specific kind of job, you might ask as to why the person concludes a contract of employement.Histroically speaking transfer of skill was through family line.The child learns the skills of his parents through home instruction and hence there was no need to have a contract for that purpose.Later in time, with the coming of industrialization everything including training started to become commercialized. So the skill started to be transfered through contract; and one way of such transfer is a contract of apparentship.

Under our law a contract of apprentiship is deemed be formed when the elements under article 48/1/ are fulfilled and when the contract is made in a writen form. This provision provides:

> " There shall be a contract of apparenticeship when an employer agrees to give a person complete and systematic training in a given occupation related to the function of his undertaking in accordance with
> the skills of the trade and the person in return agrees to obey

the instruction

given to carryout the training and works related thereto."

This sub article of article 48 shows us the unique features that distinguish a contract of apparenticeship from other employement contracts.As you may have understand from the discussion made on obligations of the employer,the major obligation of the employer is that to pay wages. But here it is not the payment of wages, it is rather the duty to give the apprentice complete and systematic training that is considered as a primary obligation of the employer.On the other hand as a primary duty the employee in a contract of apprenticeship should obey the instructions of the employer that are important to acquire the skill, as opposed to his major obligation to render service had his contract been an ordinary contract of employement.There is also a difference in the type of payement on ordinary employee and an apparentice could earn.The employer may give remuneration for the apparentice. But such remuneration is not wage; it is instead an incidental payment in the form of stipend pay.

Dear leaner is that forgoing discussions on the unique features of formation of this special contract of employement and the obligations it imposes on the parties clear? Well as has just been said, the sole purpose of a contract of apparenticeship

is acquisition of skill and experience. Due to this reason, the proclamtion has come up with some unique rules that are applicable in this area which we will see next.

As a contract of apparenticeship is concluded not in the idea of income more rendition of service for the employer, it is not for all kinds of jobs that apprenticeship is entered in to. It is only in acts/jobs that could be internalized through the process of learning by doing that a person can be employed as an apprentice. For this purpose the ministry of labour and social affairs is expected to identify which types of occupation and works are legible for such process, in addition to defining the duration of apprenticeship and its theoretical and practical aspects as well as the manner of giving tests for apprentices.

With regard to the apprentices working displays a deviation on conditions during his employment tenure, the labour proclamation payment of compensation for his permanent injury. Just like all workers under the labour law, the apprentice will be entitled to employment injury compensation whenever he sustains injury while acquiring skill. To be more specific, this benefit is also recognized to go to the apprentice in times of total or partial permanent incapacity or upon his death because of employment injury. Upton this stage the law gives similar protection both for the apprentice worker and for all the rest of workers. Here, you have to

notice our reason to pick up this single aspect of working condition, and to focus on discussing payment is to show the proclamation's different treatment on this specific subject; not because the apprentice worker is protected only by this provision. As has just been pointed out previously, for all practical purpose workers under this special category as well as those in the rest of special categories of workers are subjects of the labour proclamation. Therefore unless and otherwise there are special rules in the proclamation, these workers are governed by the commonly applicable rules. Therefore the apprentice is a beneficiary of the protections under different aspects of the legally stipulated minimum working conditions such as hours of work, safety working conditions etc, unless special rules are there. One among such special rules is the rule on the manner of calculating compensation for permanent injury or death as a result of employment injury of the apprentice worker.

In principle, for total and partial permanent injury the compensation is 5x 12 month wage and 5x (rate of incapacity) x12 months wage respectively .But for the case of the apprentice it is not the actual income he earns. stipend pay that is taken as a reference to calculate the injury compensation. Instead," after completing his contract of employment what would have been his income/ wage" is

used as an extended base for calculating the compensation of apprentice-/ Article 109(4).

Obviously, compared to the stipend pay he gets, the wage the apprentice would have earned in the form of an ordinary employee is much greater .As a result, the compensation which the apprentice would obtain become huge. The reason for such protective policy is t give due care for the apprentice. If this area is not properly regulated he/she may sustain injury .So the huge compensation payment the employer shoulders forces him to assign somebody who regulates the apprentice because of his lower knowledge on the matter.

Compensation for
Total permanent disablement =5x
(anticipated) x12
Monthly wage
Comp.for total
Permanent = 5 x (rate of incapacity)
x 12 Months
Disablement anticipated wage

A contract of apprenticeship can be terminated upon the expiry of the period of the training. The completion of the training within the specified period ends their contract of employment. Upon termination of the contact ,the employer is with the obligation to give a certificate indicating the occupation he has been trained in, the duration of the training and the like. There are also other special grounds for terminating a contract of apprenticeship recognized by the law. In times when

1 The employee is no longer able to discharge his obligation due to change of work or other causes beyond his control ;
2 The apprentice violates the disciplinary rules of the undertaking ;or
3 The apprentice is permanently incapable of continuing his raining or completing his training within the specified time limit ;the employer is at liberty to terminate their contact with notice.

The right to unilaterally terminate the contract is also given to the apprentice. He can do so by rendering advance notice for his employer whenever the employer fails to observe his obligation under the contract or the law. As you remember, the most important duty of the employer is to assign the apprentice on works relevant to his training and to give him complete and systematic training. The employer's

failure to abide by such obligation can serve the apprentice as a ground for terminating with notice. Moreover ,the apprentice is at liberty to unilaterally terminate the contract with notice for reasons related to his health, family or other similar grounds .If the apprentice shows that he can not discharge his obligation without seriously endangering his health, he can even terminate his contract with no notice. In addition if the employer changes the terms of their contract, the apprentice is allowed to unilaterally end their contract without giving advance notice to his employer.

Dear distance learner, having seen how a contract of apprenticeship can come to an end, now we will have an interesting point on the effects of termination of this kind of contract. when a contact of apprenticeship is terminated for whatever reason the apprentice is not entitled to reinstatement , severance pay and compensation because the major purpose was not to render service and get income. So we can't transfer those provisions on entitlements of termination applicable for contracts of a different purpose to contracts of this purpose.

Dear learner before directly heading to the examination of the rules on young workers. let us give you an activity that enables you summering the special rule of

a contact of apprenticeship.

1. what is the difference in purpose between an ordinary employment contract and a contract of apprenticeship ?

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2. What are the special requirements of the law on the formation as well as on the modification of a contract of apprenticeship?

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3. Compare and contrast grounds for termination of an ordinary contract of employment with that of a contract of apprenticeship?

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4. What are the entitlements following lawfull termination of a contract of apprenticeship? Here you are recommended to go back to the discussion made under unit three.

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4.4. 2. Young workers

In the first section of the third unit of this material we have said that a Peron who

atleast attains the full age of 14 years can validly conclude a contract of employment as a worker.If the worker who enter in to the contract is below the age of 18 but attains full age of 14 he/she is termed as a young worker.Since we have already delibrated upon the reason for prescribing 14 years as a minimum age for employment, under this topic we are going to discuss on the way the law regulates the young workers relation with his employer.

Though the low allows for the employment of such people of tender age, it is an undeniable fact that still they are not mentally and physically well matured.So the proclamation's tendency towards regulating this special category of workers revolves around keeping their psychological as well as physical wellbeing ;by properly regulating them.Thus ,the labour proclamation has provided for protection for young workers that can be categorized into three.These are

1 Limits as to types of works ;
2 Limits as regular working hours ,and
3 Limits as to particularly working time

a. Limits as to types of works

The law prohibits to employ young workers in a work which on account of its nature or to the condition inwhich it iscarried out, endangers the life or health of the young workers

performing it .Inaddition, the legislator has come up with some type pf ultra hazardous or dangerous activities for a humanbeing who is not mentally and physically matured upon which young workers are prohibited from being employed .These activities include

a. Work in the transport of passenagers and goods by roads ,railway, air and internal water way ,dock-sides and warehouses involving heavy weight lifting, pulling or pushing or any other related type of labour.
b. Work connected with electric power generation plants transformers or transmission lines ;
c. Underground work,, such as mines quarries and similar works and
d. Work in sewers and digging tunnels

The above enumeration under article 89/4/ is not an exhaustive listing; and hence the minstry of labour and social affairs may prescribe a list of some other activities prohibited to young workers.

Dear distance learner, is" work in the transport of passenger and goods" inclusive of taxi boys ("weyala's")so that young workers are prohibited from being employed in this service ?please ,discuss with your colleagues .

The prohibition under article 89 /4/ are not applicable to work performed by young workers attending courses in vocational schools that are approved and inspected by the

competent authority.

b. Limits as to regular working hours

The other aspect of protection of young workers is the special limitation on the maximum working hours per day of these workers. On the basis of article 61(2) of the labour proclamation ,the maximum working hours applicable for the adult worker is limited to be 8 hours per day. But,with the view to grant more protection for the young workers, the law further puts a limitation under article 90. Accordingly, the young worker can work only up to 7 hours in a day.

c. Limits as to particular working time

The law doesnot stop on fixing the 7 hours maximum period in day the young workers can stay on duty .It rather goes further to limit the way the maximum hours work should be distributed. For instance, the young worker can not work with in the rang of the night i.e 10 p.m and 6 am which is from 4:00-12:00 e¯ƒ K?K=ƒ on Sundays or on public holidays. Moreover , the law prohibits the employement of young workers on overtime basis .

Dear distance learner, this is all about the special protection given to young workers. But,

there are criticisms on whether all these protections are really appropriate, especially for our own context. For example, on the limitation on the types of works allowed for young workers, some say that let us inform the young worker about the likely dangers and if he needs and decides we should allow him to do it .some others, on the other hand try to reject this opinion. According to their opinion as such choice is a choice between life and death it would not be appropriate to allow the young workers to decide. what is your opinion on this ?There are also people who treat the limitation on the working hours very luxorious; as it is condemning to death young workers to deny them work on Sundays.

4.4.3 Female workers

Historically female workers were discriminated both at recruitment and payment level. For this reason today they are given special treatments for equal employment opportunities and for equal pay for equal work as well. There special biological constitution also warrants special treatment for female workers.

The Ethiopia labour law too accords special protection for female workers. Such protection is given through two modes. The first way of protection is a sex (gender)based way of protection which gives special treatment to all female workers .As such protection are uniformly given to all female workers Without any discrimination among them ,this

modality of protection is also called horizontal treatment .The other modality of protection applied by our labour law is what is known as particular situation protection .These protections apply for female workers who are at particular situation like when there is pregnancy or maternity.

Horizontal Treatment (Article 87 (1) and (2))

One area of protection for all female workers involves the protection against any discrimination on employment and payment on the basis of sex. The other area of treatment consists of female workers' prohibition to be employed in works which are hazardous or harmful to their health. Concerning this subject ,the ministry of labour and social Affairs is empowered to come up with a listing that should be on exclusionary area for female workers not to engage in.

Particular situation protection (Art.87(3,4,5)& Art.88)

Depending on the particular situation a female workers is found in, different protections may be accorded .Under our labour proclamation such particular situations are pregnancy of the worker and her post-natal time(confimement).

According to Article 87(3) ,a pregnant women shall not be assigned to night works between 10 P.Mand 6 P.M. Moreover, the law prohibit pregnant women’s employment in over-time work .The proclamation has also stipulated protective rules on employment

security of women workers during their pregnancy and until four month of their confinement .Accordingly, even if grounds for termination are there she can not be fired except when she agrees with her employer to terminate their contract, upon behavioural problems per Article 27 or during work reduction according to Article 29.

Inaddition, the proclamation has provided for three categories of maternity leaves at different situation of pregnancy and period of confinement .These are leave for medical check up, prenatal leave which is 30 days before giving birth and postnatal leave which is 60 days after giving birth.

4.4.4. Foreigners (working in Ethiopia)

This category of workers is the fourth out of the categories of workers that are regulated by some special rules of the labour proclamation .So far; we have been discussing on the law's tendency to specially treat apprentice; young workers and female workers mainly by giving them special protections.However, the special treatment of foreigners working in Ethiopia is not to accord protection. So, as opposed to the preferential treatment we saw previously ,the treatment of foreigners is a deferential one. Such measures are assigned at discriminating those foreigners because every country needs to employee its nationals,and

not that of others unless the service is scarce in Ethiopia.. So when all the services one needs cannot be satisfied nationally, in the global market a country may look for that services from outside alternative market.

On our globe, interms of development, we have the north (developed)and the south (consisting of the developing and the least developed)situations.When labour migrates from the North to South it is predominantly of skilled type ;but the labour that migrates from South to North is predominately unskilled. The South requires skilled labour because it has not such skill. But in the North, it is only when their nationals are unwilling to do a certain job that they employee from the South. Ethiopia, as it is located in the south, it needs to employee skilled labour that it require from foreign markets.And hence there is no need to employee unskilled labour from out, which it already possess.In view of such an end ,our labour proclamation has provide for limitation of various types on the employment of foreigners in Ethiopia .One among such limitation is the requirement of work permit which is issued by the ministry of labour and social Affairs .The work permit is given for an employment in a specific type of work only for three years; subject to renewal every year. However, the ministry may vary the three year limit as required .On top of all these limitations as to license to work ,type of work and duration of employment, there is a possibility to cancell the work permit where the ministry ascertains that the foreigner is not required for the work.

UNIT – FIVE

COLLECTIVE LABOUR RELATIONS

Introduction

Dear distance learner, in the 1st unit of this module you have briefly seen the need for and purposes of industrial organizations, in particular trade unions and employers' organizations. Under this unit, you are going to discuss thoroughly the rules and /or principles governing the collective aspect of labour relations. As the term "collective" implies, the rules and principles that you will discuss in this unit dictate how and when workers and employers collectively deal with each other to create industrial peace. Accordingly, this unit is further divided into two bread sections. The first section talks more about the formation of trade unions and employers' organizations, and their activities as well as roles in bringing industrial peace.

Under the second section, you will discuss particularly the nature and content of collective agreements and the process of collective bargaining as an important means of resolving

collective labour disputes. The issues that will be raised in this section would, more importantly, enable you to acquaint yourself with the basic knowledge and skills which serve as the essential tools in the process of collective labour disputes resolution.

Learning objectives

At the end of this unit, you will be able to:

- list down the importance of trade unions and employers' organization
- explain the activities or functions of trade unions and employers' organizations
- identify the rights of workers and / or members of trade unions
- define collective agreement
- explain the nature and contents of collective agreement
- describe collective bargaining as a peaceful process of collective labour disputes resolution
- explain the importance of collective bargaining

5.1. Trade Unions and Employers' Organizations

5.1.1. The Right to form Organization

The importance of anchoring legal recognition for the right to form organization in the employment arena is not doubtful now throughout the world. In deed, both workers and employers should be given the right to form their own organizations to promote their social and economic interest as well as to defend any moves detrimental to their occupational interest. As part and parcel of the fundamental right of freedom of association, the right to form industrial organizations is widely recognized today as one of the pillars and expressions of a sound labour relations policy.

In today's modern economic order unorganized workers or employers would, no doubt, have a limited capability to enforce their rights or defend their interest. Today, many agree that there can be no permanent prosperity to the workingmen, there can be no industrial peace, unless and until the principle is firmly and fully established that in industrial life the settlement of wages, hours of labour, and all the important conditions of work, are made between the employers and the workers collectively and not between

employers and workers individually. The individual worker theoretically bargains with his employer as to the wages to be paid by his employer; but practically there is no bargaining. The individual worker must accept the wages and conditions of employment that are offered to him by his employer. It is a matter of no concern at all to an employer if one workingman refuses employment. The employer thinks nothing about it, because there is another workingman ready to take the job.

As a consequence of this system of individual bargaining, which is really non-unionism, the conditions of the best persons in the industry are brought down, practically, to a level with those of the weakest workers in the industry. As you will see it in the coming part of this module, collective bargaining, of course, means that there shall be uniform and minimum standards of wages, hours of labour, and other important conditions of work.

However, the idea of a group of people associating for mutual protection and benefit in relation to employment had come under severe attack from every quarter in the history of mankind, though it is a common enough one today. After long years of struggle and challenges, it was the Industrial Revolution that gave birth, in particular to trade unions as we know them today. It was not without challenge, even then after, that the idea of trade unionism acquires its current status world wide. The major legal obstruction to

unions during the early part of the nineteenth century was that, as their main purpose was to improve the working conditions of their members, they were seen to be in restraint of trade and therefore, considered to be illegal if they performed this function.

Dear distance learner, as you will deeply discuss about it in the forth coming topics, forming industrial organization is vital to both the workers and employers for effective realization of their legally recognized rights and interests. Acting collectively by forming organizations is thus not a mere privilege but also a precondition attached to both the workers and employers to put pressure on or influence one another, and thereby promote and protect their respective rights and benefits. This is mainly due to the very fact that industrial organizations provide a great deal of advantage not only to the workers and employers but also to a state, as a guardian of its subjects, by creating a fertile ground for peaceful labour disputes resolution process. Effective resolution of labour disputes is closely linked to promotion of the right to collective bargaining. As will be discussed later on, collective bargaining, on the other hand, presupposes the existence of organizations in general and trade unions in particular. In other words, in order to have a collective bargaining the formation or existence of trade union is a necessary prerequisite. That is why, of course, forming industrial organization is said to be not a mere privilege but a

precondition for effective protection and implementation of the rights of both parties in the labour relations.

Dear distance learner, despite the tremendous benefits organizations would provide for both the workers and employers, the right to form organization ages only few decades since it acquires legal recognition under Ethiopian law. It was only upon the coming into effect of the 1955 revised constitution that we came to see a legal provision on freedom of association. Nonetheless, it was after eight years that a proclamation containing detail matters on this core right of workers was enacted in 1963 in support of the constitutional sanctity of freedom of association.

Currently, there are a number of legal provisions that recognize this core right of workers and employers under our laws. For instance, article 31 and 42 of the FDRE constitution, article 113 of the present labour proclamation expressly recognize the right of workers and employers to form their own respective organizations. In addition, you can find a large number of provisions from international instruments adopted and ratified by Ethiopia such as the ILO convention 11, convention 87 and convention 98 which directly refer to the rights of workers and employers to form industrial organizations. The provisions under those international instruments apply not only to workers and employers in the industrial

sector but also to civil servants and workingmen, as a class, in other sectors, too. However, due to the limitations for the sake of time and scope of this course, our discussion regarding organizations mainly focus on industrial organizations, and trade unions in particular.

When we talk about the right to form organization we are not referring to a single right; rather it is a bundle of rights which include the rights of workers and employers to form their own organizations without the interference or influence of any third party, to prepare their own constitutions that govern their respective organizations, to choose the leaders of their organizations freely and fairly, to formulate and design the programmes and objectives of their organization, and so on.

Dear distance learner, you must, however, note that the right to form organization is not an “exclusive right” in a sense that it cannot be realized without preconditions. Just like many other collective legal rights, the right to form organization presupposes the fulfillment of various requirements, for its effective realization. For instance, in order to form a trade union sustainable in the eyes of the law, workers are expected to fulfill the following preconditions or requirements:

i. minimum number of members;

ii. constitution; and
iii. registration with the Ministry of Labour and Social Affairs

Accordingly, in order to form a trade union, workers must make sure that they satisfy the minimum number of members required by the law. As per article 114(1) of the labour proclamation, a trade union may be established in an undertaking where the number of workers is ten or more. According to this provision the minimum number of workers required to form a trade union is ten. The number of members of the union shall not be less than ten. However, workers should be given greater opportunity to form organization, and the legislative drafter must endeavor to reduce, as much as possible, any obstacles that may dwarf this opportunity. Taking this fact into account, the law has tried to come up with another alternative whereby workers who work in undertakings which have less than ten workers may form a union. As provided under article 114(2) of the proclamation, workers who work in undertakings which have less than ten workers can form a general trade union. General trade union is simply a type of trade union which workers of two or more different undertakings may jointly form. But, at any rate the number of members of such a union which is to be formed by workers of more than one undertaking shall not be less than ten. For example; let us say that the number of workers in undertaking “A” is five, while the number of workers in undertaking “B” is four. As can be understood from

the above discussion it is obvious that neither workers of undertaking “A” nor that of “B” may independently form their own trade union. This is because the number of workers in each of these two undertakings is less than ten. Similarly, workers of both undertaking “A” and “B” may not even jointly form a general trade union, unless they call far additional workers from another undertaking to join them. Because, the sum of the number of workers of undertaking “A” and undertaking “B” is still remain less than ten.

Having a constitution is the other requirement for the formation of a trade union. Workers who agree to form a trade union must prepare and submit the constitution of the union to the Ministry of Labour and Social Affairs. A constitution in this context can be defined as a written document in which the objectives of the union and the rights & duties of its members as well as their relationship with the union are embodied. The constitution governs the powers / functions/ and duties of the leaders of the union, the rights and duties of the members as well as their relationship with the union, and so on. In addition, what a constitution may also contain is listed under article 117 of the Labour proclamation. Thus, preparing a constitution that contains such matters is the other precondition to form a trade union.

Registration is the last essential requirement to form legally recognized trade union. After fulfilling the above two conditions the “union” must get registered with the Ministry of Labour and Social Affairs if it is sought to perform the desired activities or discharge functions sustainable in the eyes of the law. Accordingly, in order to form legally recognized trade union workers who have agreed to form a union need to submit their application to the ministry together with the necessary documents such as the constitution. Workers who satisfied the above two requirements (i.e. constitution and the minimum number - - -) would normally accepted by the ministry and get registered without challenge. The ministry may, however, refuse to register a union for certain reasons. The grounds of refusal for registration are provided under article 119 of the proclamation. Therefore, the ministry may refuse to register a trade union or employers’ organization for any one of the reasons provided under this provision. Nonetheless, according to article 118(1) of the proclamation the ministry shall, after examining the documents and ascertaining that they are duly completed, issue a certificate of registration within fifteen (15) days of receiving the application. Where the Ministry does not notify its decision within this period, the organization shall be deemed registered. Once a trade union or employers’ organization get registered it shall have legal personality and as such it will have the capacity to perform juridical acts in its own name,

in particular capacities such as to enter into contract, to sue or be sued, to own, use and transfer property, and so on.

So far, we have seen three major requirements for the formation of a trade union in particular. Except the first requirement that applies to trade unions only, the other two requirements apply to both trade unions and employers' organization. This is to mean that preparation of a constitution and registration are also the necessary preconditions to form legally recognized employers' organization. Unlike the case for trade unions, the law is silent as to the minimum number of members required to form employers' organization. Therefore, in the absence of any clear provision to this effect, it is sympathetic to say that employers' organization can be formed so long as the number of employers who agree to form organization is not less than two. To sum up, the requirements or preconditions necessary for the formation of a trade union or employers' organization are more or less the same, except, of course, the one that requires the minimum number of workers to form a trade union. In general, both workers and employers can form their own respective organizations after fulfilling the requirements discussed above.

Dear distance learner, trade unions and employers' organizations are types of industrial organizations that could be formed at the grass-root level. In addition to these, there are

industrial organizations such as “federations” and confederations” that could be formed at a vertical level. In order to strengthen the unity and sprit of co-operation of their members, more than one trade unions may jointly for “trade unions federation”. Like wise, several employers’ organizations may jointly form “employers’ federations”. Similarly, more than one federations of trade unions may come together to form a trade unions confederation, and more than one federations of employers may jointly form employers confederation. Confederations are the upper level industrial organizations. Nonetheless, the law is silent as to whether trade unions federations and employers’ federations can have more than one confederation of their own. But, practically there is only one confederation (i.e. Confederation of Ethiopian Trade Unions, CETU) and few federations, so far, in the country. Dear distance learner, for an in-depth understanding of federations and confederations in general, and their functions in particular, you are invited to read the provisions of the labour proclamation.

5.1.2 Trade Unions and the rights of workers

Labor is the creator of all wealth, and as such the laborer should, at least, be entitled to a remuneration sufficient to enable himself and family to enjoy more of the leisure that rightfully belongs to him, more social advantages, more of the benefits, privileges and employments of the world. In other words, all those rights and privileges are necessary to make the worker capable of enjoying, appreciating, defending and perpetuating the blessings of modern civilization. As past experience of mankind has revealed, labour has so for been unable to arrest the encroachments of capital, neither has it been able to obtain justice from lawmaking power. This is mainly due to lack of practical organization and unity of action. "*In union there is strength*". Organization and united action are the only means by which labouring class can gain any advantage for themselves. Good and strong labor organizations are enabled to defend and preserve the interests of the working people. By organization workers are able to assist each other in cases of strikes and lock-outs, sickness and heath. And through organizations it is the workers as a class, who are able to gain a lot of social and legislative advantages.

Dear distance learner, workers' organization, what is often known as trade union, in any industrial sector provides tremendous benefits not only for the workers, as a class, but also for the employers. In the absence of a trade union in a given industry, workers would engage in a disorganized way of strike or they may use other ill means to express their

dissatisfaction that may arise in their relationship with the employer. In such cases, it would be very difficulty for the employer to handle and solve the problems in the absence of a trade union with which the employer could easily deal with. But, in industries where there are trade unions, the employers would be better off, in terms of time and money for dealing with trade unions than unorganized workers. Therefore, the formation of trade unions, in particular, is vital if it is sought to achieve and maintain peace and stability in industrial life. Of course, that is the reason why the right of workers to form trade unions is, today, recognized in the legislations of many countries.

Dear distance learner, though the formation of trade unions is vital for every aspect of labour relations, you must note the fact that a trade union has to be formed with the free and full consent of workers without any influence or interference from any quarter. This fundamental right includes the freedom of worker to join any of the trade unions they like, or not to join a certain trade union, or even to withdraw themselves from the membership of a trade union at any time they wish. As a result, no one, even the employer or the trade unions themselves, can force any worker to join a certain trade union or to withdraw from the membership of a trade union. Any acts that aimed, directly or indirectly, at forcing a worker to join or not join, or to withdraw from a trade union is taken to be illegal. For

instance, any activity of the employer that, directly or indirectly, forces a worker is clearly prohibited under article 15 (1) (a) of the Labour proclamation.

In many countries there are certain kinds of associations or practices such as yellow dog, closed shop, unions shop and Agency Shop which indirectly force workers to join trade unions. Such systems or associations are there, often, to provide especial benefit to its members only as well as to help employers by avoiding strike. In such systems, though non-member workers are not directly obliged to join such unions, they are forced to pay fees that used to run the activities of the unions. Such practices, in general, would have the effect of, though it is indirect, forcing a worker to join one of the unions. Dear distance learner, this is a sort of unionism widely practiced in other countries. It is uncommon to observe such sort of unionism under Ethiopian law. The legality of practices that may put pressure on workers freedom, or activities where by the employer would make any discrimination among workers based on membership to a trade union by providing special benefits to members of a trade union is questionable under Ethiopian law. A similar problem may, of course, occur in relation to implementing collective agreement and/or collective bargaining. Collective bargaining in short, is a process through which some representatives of the working class (often leaders of trade unions) negotiate with the employer regarding matters on wages, working hours, and other important conditions of

work. And the effort to reach on an agreement on such matters inevitably demands both parties to incur transaction costs in terms of time, labour, money and the like. But, once the agreement is signed, after parties have reached on agreement, the agreement will apply to all workers without due regard to workers membership to a trade union. The agreement shall, by no means, be made applicable to some workers only who are members to a trade union, by excluding non-member workers. Thus, any activity or attempt of either the employer or trade unions, be it overt or covert, that aims at making a discrimination among non-member workers and members to a trade union would be contrary to the provisions of the constitution or other international and domestic legislations. But, in such conditions there may be a problem as to the question that who shall cover the transaction costs incurred to bring the collective agreement? On the workers side, the cost is, often, to be covered by the trade union from the income collected from its members in a form of membership fees. If that is the case, making the collective agreement applicable to all workers would, perhaps, amount to giving undue advantage to non-member workers at the expense of members to the trade union who are paying membership fees. So, according to some writers the solution to such a problem is making all workers (including non-member workers and members to the trade union) to share the costs incurred during the bargaining process. Dear distance learner, do you think this is a good solution? Or, do you think that making workers, who are not members

to a trade union, to share the costs, would amount to indirectly forcing them to join trade unions? Try to express your opinion on the space provided below.

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5.1.3. Functions of Trade Unions and Employers' Organizations

As can be read from article 115 of the labour proclamation No. 377/2003, the major functions of both trade unions and employers' associations are:

- to represent members in collective negotiations and labour disputes before the competent body when so requested or delegated;

- to observe the conditions of work and fulfill the obligations set forth in the proclamation;
- to respect the rights and interests of their members in particular;
- to ensure that laws, regulations, directives and statements are known to as well as be observed and implemented by their members; and
- to initiate law and regulations concerning employers and workers, and participate actively during the preparation or amendments of such laws and regulations. In addition to the activities mentioned herein above, both trade unions and employers' associations are expected to discharge other functions provided for in their respective constitutions.

In addition to the above functions, federations and confederations are expected to discharge functions such as strengthening the unity and sprit of co-operation of their members, participating in the determination or improvement of the conditions of work at the trade or industry level as well as encouraging members to strengthen their participation in the construction of the national economy, representing their organizations in any conferences; and discharging other functions in accordance with their constitutions.

Dear distance learner, apart from the various economic and social functions mentioned above, the role of trade unions and/or employers' associations (as an organized community) in the political sphere of the country is neither expressly nor impliedly recognized under the current labour proclamation. The 1963 proclamation under article 22 expressly prohibited those organizations from participating in any political activities, whereas proclamation no. 64/1968, on the other hand, had come up with a number of provisions that allowed these organizations to participate in the initiation as well as determination of the political objectives and goals of the country. But, the current labour proclamation says nothing about the role of trade unions and employers' organization in the political arena. In other words, the proclamation contains no single provision that neither expressly prohibits nor allows those organizations to participate in political activities. However, workers' and employers' organizations must have full freedom to formulate their own programmes of activities to defend the social as well as occupational interests of their members. As the ILO convention No. 87, to which Ethiopia is a signatory, under article 3(1) states, some legislative provisions regulating this area may be compatible with freedom of association principles, provided that they are carefully drafted. The legislative drafter must take particular care with provisions which touch on participation in political activities, and/or the right to strike.

The activities of workers' and employers' organizations can not be completely separated from political matters. Various social and economic policies formulated by the government will inevitably have impacts on workers and employers, and therefore, their organizations must be free to express their members' views about such policies by appropriate means. The government, thus, must ensure, if necessary by appropriate legislative measures, that workers and employers are left free to exercise these rights. Nonetheless, it is only organizations for furthering and defending the interests of their members that are protected by convention No. 87, as article 10 of this convention says. Therefore, both workers' and employers' organizations should not lose sight of the importance which should be attached to the independence of the trade union movement. Neither workers' nor employers' organizations should enter into arrangements with political parties which would compromise their continued independence, or their social or economic functions.

5.2. COLLECTIVE BARGAINING and COLLECTIVE AGREEMENTS

Dear distance learner, so far, within this unit, we have seen the formation and purposes of industrial organizations in general. As indicated earlier, the primary role of those organizations and trade unions in particular, is to create fertile grounds where

workers and employers could collectively negotiate with each other mainly with respect to matters of wages, hours of work and other important conditions of work. Collective bargaining is the process of collective negotiation to be conducted to this effect. Collective agreement, on the other hand, is an end result of such collective negotiation. Collective bargaining and collective agreement can be taken as the two most important concepts as far as the collective aspect of labour relations is concerned. Thus, under this section, you are going to discuss in detail about these two important concepts of labour law.

5.2.1 COLLECTIVE BARGAINING

5.2.1.1 Definition and Significance

As the term itself implies “collective bargaining” in short refers to a process whereby workers through their organizations negotiate with their employer or employers’ organizations regarding matters on determination of working conditions and terms of employment, or the regulation of relations between workers and employers or workers’ organizations and employers’ organization/s. According to the ILO convention No. 154 article 2 collective bargaining is defined as all sort of negotiations that 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 hand, for determining working conditions and terms of employment; and/or regulating relationships between workers and employers, or workers' organization/s and employers' organization/s. Similarly article 124(2) of the Ethiopian labour proclamation No. 377/2003 defines it as any "*negotiation made between employers and workers organizations or their representatives concerning conditions of work or collective agreement or the renewal and modifications of the collective agreement*."

Dear distance learner, as you can see from the above definitions collective bargaining is one, and the major, of the collective aspects of labour relations, and as such it presupposes the existence of trade unions, in particular. In order to have collective bargaining the existence of a trade union or trade unions is a necessary precondition. This is, of course, what has been reaffirmed by article 125(1) of the Labour Proclamation. That is why we said earlier that the formation of a trade union, in particular, is vital in all aspects of collective labour relations.

Collective bargaining is recognized world wide as a crucial means for bringing industrial democracy in every society. As a result, a large number of international instruments have

come about, at the international level, with the recognition of this core right of workers. And such international instruments, just like other binding agreements, oblige ratifying states to recognize and promote collective bargaining through domestic legislations and other appropriate means. The International Labour Organization (ILO) could be cited as the primary source which gives rise to many of the international instruments made to recognize and promote collective bargaining. The promotion of collective bargaining is one of the central and most important concerns of the ILO. As it is recognized by the declaration of Philadelphia, the ILO has a "*Solemn Obligation to further among the nations of the world programmes which will achieve - - - - the effective recognition of the right to collective bargaining*". The importance of collective bargaining has been recently reaffirmed by the 1998 ILO Declaration on Fundamental principles and Rights at work. As can be read from paragraph 2(a) of this declaration, member states, irrespective of whether they have ratified the relevant conventions, are obliged by the very fact of membership to the ILO, to promote and realize the principles concerning the effective recognition of the right to collective bargaining. There are also many other ILO conventions and recommendations, in particular the 1949 the right to organize and collective bargaining conversion No. 98 and the 1981 collective bargaining convention No. 154, which are made to this effect. Apart from the ILO conventions and recommendations, the right to engage in collective bargaining had also been recognized by other

international and/or regional instruments such as the 1948 Inter-American Charter on Social Guarantees, the 1561 European Social Charter, and the 1989 European Communities Charter on Fundamental Social Rights of workers.

Dear distance learner, from the following excerpts you can realize the paramount importance attached to collective bargaining by such international instruments as well as the law and practice of many states of the world.

The importance given to collective bargaining in these international instruments on basic human rights, as well as the law and practice of a great many states, is testimony to the emphasis given by national and international social policy to the principle that workers, through their collective right to organize in defense of their interests, should be enabled to use their collective power to negotiate better terms and conditions of employment with employers for their members than each worker could achieve by negotiating individually. It is thus a means of seeking to overcome the unequal bargaining power of individual workers vis-à-vis employer in negotiating individual employment contracts by according workers' organizations a right to conclude collective agreements which supersede such contracts. In return, employers can expect improved productivity from a more work force

granted better working conditions and sentiment that they are able to participate in determining these conditions.

The primary objective of national policy should be to promote and encourage free and voluntary collective bargaining, allowing the parties the greatest possible autonomy, while establishing a legal framework and an administrative structure to which they may have recourse, on a voluntary basis and by mutual agreement, to facilitate the conclusion of collective agreements.

ILO convention No. 98 requires ratifying countries to:

> *"take measures appropriate to national conditions, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiations, with a view to regulation of terms and conditions of employment by means of collective agreements. (Art. 4)"*

Convention No. 154 provides more straight forwardly that ratifying countries are to; "take measures adapted to national conditions to promote collective bargaining" (Article 5(1)).

One of the primary means by which member states seek to comply with those obligations is through the enactment of labour legislation. Other means may include collective agreements, arbitration awards, administrative rules and regulations, decrees and ministerial orders, as well as the establishment of administrative bodies to monitor the observance of the legal obligations and the provision of conciliation and medication services to assist the parties.

5.2.1.2 Parties to the Collective Bargaining and Procedural Requirements

Dear distance learner, after careful reading of the previous section, hopefully, you are now able to define what collective bargaining means as well as to appreciate the paramount importance attached to it. If collective bargaining is as such vital in a employment relationships, you need to answer questions such as, who are parties to a collective bargaining?, or to which sector of employment or workers and employers does the right to engage in collective bargaining applies?, are there procedural requirements in law to effect collective bargaining? If so, what are the procedural requirements? You are going to deal with such issues under this section.

Looking at the relevant ILO conventions and recommendations, one may say that the right to engage in collective bargaining applies to all workers' organizations and employers and their organizations. Broadly speaking, all workers' organizations and employers or their organizations have the right to engage in collective bargaining. This is the general principle under international instruments. There are, however, exceptions to the extent that certain specific exclusions are permitted under domestic legislations. Such exclusions that deny some sectors of workers' organizations the right to engage in collective bargaining is permissible under international instruments, provided that they are made with due care. For instance, the ILO conventions No. 98, 151 and 154 provide that the extent to which the right to engage in collective bargaining apply to the armed forces and the police may be determined by national laws, regulations or national practices. This means a government, by way of legislation or practice, may deny or grant either partially or completely, this right to these sectors of "workers" organizations. Moreover, convention No. 98 expressly provides that collective bargaining does not deal with the positions of public servants engaged in the administration of the state. This indicates that although such persons have the right to organize by virtue of convention No. 87, this does not guarantee that the right to engage in collective bargaining is extended to employees of this category.

Under Ethiopian law, collective bargaining as a collective right is recognized by the labour proclamation No. 377/2003. And, this right applies to all trade unions and employers or their organizations as defined by this proclamation. This is to mean that the right to engage in collective bargaining applies to workers' organizations and employers or their organizations that are governed by the Labour Proclamation. By virtue of article 125 of this proclamation, parties to a collective bargaining are trade unions and one or more employers or their organizations. Thus, the existence of a trade union is a necessary prerequisite in order to enjoy /exercise/ the right to engage in collective bargaining. In an enterprise where there exist more than one trade union it is the trade union which gets 50%+1 or more support by all employees of the enterprise that can exercise this right (see article 115(a) of proc. No 377/2003).

Collective bargaining is required to be made with the free consent of the parties. Accordingly, any party who wishes to engage in collective bargaining can request the other party to this effect. The request is required to be made in writing. The party who wishes to do so is also required to prepare and submit a draft on matters for negotiation. Among other things, each party to a collective bargaining shall have the duty to bargain in good faith. Effective collective bargaining involves the stimulation of dialogue and the promotion of consensus. The ultimate purpose of this kind of duty is to ensure that parties

have every possible opportunity to reach on agreement. This is a very important requirement which has been given emphasis by lots of international and national legislations. Under the ILO Recommendation No. 183, this requirement is extended to a duty incumbent upon the employer, as a party to negotiation, to provide the trade union with information required for meaningful negotiations. Dear distance learner, you are invited to read such and other procedural requirements for a sound collective bargaining from article 139 of proclamation No. 377/2003.

5.2.2 COLLECTIVE AGREEMENTS

5.2.2.1 Definition and Nature of Collective Agreement

Dear distance learner, in the previous sections you have dealt with collective bargaining in general. One of the central objectives of collective bargaining is to conclude a collective agreement. Collective agreement is the result of joint negotiation between two sides of industry, that is, a trade union and an employer or employers' association. It is defined by article 114 of the Labour proclamation as "*an agreement concluded in writing between one or more representative of trade unions and one or more employers or agents or*

representatives of employers' organizations". The agreement to be concluded may be relating to matters concerning employment relationships and conditions of work or regarding the relations of employers and their organizations with trade unions. In addition, article 129 of the proclamation gives a list of the specified matters to be included within the collective agreement.

Collective agreements have two major functions. On one level they deal with issues important to the trade union as an entity and the employer or employers' organizations. This is because such agreements would deal with matters such as negotiation rights, when the agreement will be renegotiated, and so on. Such issues are not as such important to the relationship of the individual employee and his/her employer and as such do not bind the individual parties. But, on the other hand, many terms of the agreement could be relevant to the individual employee, in particular terms such as the conditions for protection of occupational safety and health, arrangement of working hours etc. It is, therefore, important to see the enforceability of the agreement between the collective parties and individual parties. The following section deals with how the terms of the agreement bind the parties collectively and individually.

5.2.2.2 Enforceability of the Terms of a Collective Agreement

A collective agreement operates on two levels. It is first an agreement between the union and the employer or employers' organization/s. As a result, it binds those entities as they are parties to the agreement. As article 139 of proclamation No. 377/2003 says "the provision of a collective agreement shall be applicable to all parties covered by it". In addition to this, article 135(1) of the proclamation states that where a trade union which is a party to a collective agreement dissolved, the collective agreement shall continue to be valid between the workers and the employer. Those provisions indicate that collective agreement is a legally binding agreement at both the collective and individual level. This means the trade union which is party to a collective agreement can enforce the terms of the agreement against the employer and vice-versa, on the basis of privity of contract.

In addition to being an agreement between the collective parties, the agreement concluded by the trade union and employer or employers' organization is likely to affect individual employees. Matters relating to wages, for example, will affect all of the workers of an enterprise. However, the problem that may arise is how can the individual worker enforce the terms of a collective agreement against the employer? In some countries the individual employee can hardly enforce the terms of the agreement on the basis of privity of contract. This is because it is the union, and not the individual employee, who is a party

to the collective agreement. Thus, the only way the individual can enforce the relevant provisions of the agreement against his/her employer in such countries is only if those provisions have become part of the employment contract between them. Accordingly, terms at the collective level can become incorporated into individual's employment contract either impliedly or expressly.

The former way of incorporating the terms of a collective agreement into the individual contract of employment is the most complex and it is probably the most common one. The basis of implied incorporation is that there is evidence that both parties have accepted the agreement as binding. On the part of the employer this is not difficult as he is often one of the parties who negotiated the agreement at the collective level and obviously agrees to be bound by it. On the part of the individual employee, there are a variety of ways whereby courts could determine whether the individual has impliedly accepted the agreement as binding. One of such a ways is that if the employee continued working once the collective agreement had been signed, this indicates acceptance on his part of the relevant provisions of the agreement.

Express incorporation is the other way of incorporating the terms of a collective agreement into the individual contract. The major problem with implied incorporation is

the matter of evidence that whether the employee has accepted the change in his/her terms and conditions of employment. Express incorporation of the agreement provides such evidence. Such incorporation is a simple process and merely requires a statement in the agreement to the effect that the relevant previsions of the agreement concluded by a certain trade union shall be part of individual's contract of employment. Dear distance learner, as far as our law is concerned the individual employee needs neither such implied nor express acceptance in order to enforce the relevant provisions of a collective agreement. As it can be seen from article 134 and 135 of the Labour Proclamation, either the trade union, as an entity, or workers individually can enforce the relevant provisions of the agreement against the employer. What matters under our law is whether the relevant provisions of the collective agreement is more favorable to the workers in similar matters than those provided by law. So long as the relevant provisions of the collective agreement provide more benefits to workers than those provided by law, those provisions bind the employer. Therefore, the enforceability of such terms seems undisputable whether it is challenged by the collective parties or individual employees.

5.2.2.3 Conditions for the Validity of a Collective Agreement

Collective agreements, just like other binding contracts, need to fulfill the necessary conditions required by law for its validity. Conditions of validity of a collective agreement include requirements such as regarding the form and content of the collective agreement, the legal force of the collective agreement and who they bind, registering the agreement with the Ministry of Labour and Social Affairs, and so on. Accordingly, the law requires a collective agreement to be in writing, indicate the parties to the agreement, and be signed by representatives of the parties to the agreement. A collective agreement is also required to indicate the date on which it comes into force. This requirement, however, is not a mandatory requirement unlike the former requirements. The date at which the agreement starts to be effective is left to be determined by the parties. Thus, failure to indicate such date does not affect the validity of the agreement. In case where parties fail to indicate such date in the collective agreement, the agreement would have a legal effect as from the date of signature by virtue of article 133(2) of the Labour Proclamation.

Registering a collective agreement with the Ministry of Labour and Social Affairs is the other essential requirement for its validity. This requirement is imposed with the view to allow the minister to follow developments in collective bargaining, to determine whether there is any legal defect in the agreement and inform the parties thereof, and to be better prepared to assist the parties in dealing with any disputes arising out of the agreement or

in further negotiations between the same parties. Indicating the length of time for which a collective agreement expires is another requirement. Just like the date of commencement of its legal effect, this is not a mandatory requirement that affects its validity. Parties by agreement may indicate the time in which the agreement ceases to be effective. In case where parties fail to indicate such time in the agreement, the law provides a three (3) years period for effective functioning of the agreement. No party can challenge, unless expressly stipulated otherwise in the agreement, the collective agreement before 3 years from the date of its validity unless a major economic change occurs. Upon the occurrence of a major economic change, any party who seeks to challenge the collective agreement may submit the reason to the Ministry before the expiry of the 3 years period.

The last and the most important condition for the validity of a collective agreement relates to its content. A collective agreement is expected to satisfy, at least, the minimum standards set by the labour proclamation, particularly standards set in favor of workers. Provisions of a collective agreement can be applicable only if they are not less favorable to the workers in similar matters than those provided for by law. As can be read from article 133(1) of the proclamation, "*any provision of a collective agreement which provides for conditions of work and benefits which are less favorable than those provided for under this proclamation or other laws shall be null and void*". Therefore, in order to have a valid

collective agreement, the provisions of the agreement shall not prejudice the minimum standards set by the labour proclamation or other laws.

Review Questions

1. Suppose that the total number of workers working in a certain undertaking is eight (8). And, all of the workers of this undertaking have agreed to form a trade union. But, they are not well aware of the legal requirements and/or conditions necessary to form a legally sustainable trade union. Thus, they are seeking for a legal advice on the primary steps they should take and conditions they need to fulfill. To this end, if those workers approach you for a legal advice, what sort of advice will you give them as a legal professional? state your open ion briefly

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2. What are the significances of forming industrial organizations, in particular trade unions, in the employment arena? Discuss its importance briefly

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3. List down the basic or the most communion activities to be performed by industrial organizations as recognized under our law

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4. How do you define a collective agreement?

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5. Suppose that the employer (e) of a certain undertaking and its workers (represented by their trade union) have recently signed a collective agreement. According to one of the provisions of the collective agreement workers are expected to work a minimum of 48 hours in a week as normal working hours. However, some months after the conclusion of the collective agreement, two of the workers of this undertaking have refused to attend at work for the period stipulated in the collective agreement. The employer, on the other hand, insists that as the agreement is dually signed by the trade union that represents all workers of the undertaking, every worker is duty bound to respect the terms of the collective agreement. As a result, a dispute is a raised between the employer and the two workers who oppose the application of the collective agreement.

Answer the following question based on the facts given in the above hypothetical case

If you were one of the competent professionals in an organ legally empowered to resolve such a dispute, how would you resolve the above dispute?

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6. What are the conditions necessary for the validity of on collective agreement? Explain it briefly.

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7. State the essential pre requisites to collective bargaining.

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8. How do you distinguish collective agreement from collective bargaining?

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9. Discuss the role of collective bargaining in bringing industrial peace.

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UNIT- SIX

LABOUR DISPUTES AND INDUSTRIAL ACTIONS

INTRODUCTION

Dispute seems to be unavoidable phenomenon within the relationships of individuals in every aspect of human life. So long as social and/ or economic transactions keep growing and get more and more complex with human existence, dispute is, of course, unavoidable. Likewisew, labour dispute is not an exception to this natural fact. The attempt to bring industrial peace thus demands formulating the appropriate and efficient labour dispute settlement mechanisms. Implementing the appropriate dispute settlement mechanism to a particular labour dispute, on the other hand, is highly dependent upon analyzing the nature and type of labour dispute concerned.

This unit is, therefore, dedicated to deal with issues relating to labour disputes and industrial actions such as strike and lock-out which, some times, followed after collective labour disputes. Accordingly, this unit is divided into two broad sections. Under the first section of this unit you will discuss about labour disputes in general, and the definition and classification of labour disputes in particular. Dear distance learner, this section of the unit will provide you great benefits, as identifying the nature and type of a particular labour dispute is essential for determining and/or applying the appropriate labour dispute resolution mechanism. The subsequent section of this unit deals with industrial actions--

strike and lock-out in particular. As you will make an in-depth discussion about them in this section of the unit, strike and lock-out are some of the legally recognized actions which parties to a labour dispute, may take to influence one another so that the other party will be forced to accept some conditions of work as desired by the party who would take the action. Industrial actions as such may be taken as one aspect of labour dispute resolution system. Thus, this section, too, will enable you to understand some of the important points that could be raised in the process of labour dispute resolution.

Learning Objectives of the unit

At the end of this unit you will be able to:

- define labour dispute
- list down the different types of labour disputes
- distinguish the difference between the various types of labour dispute
- define strike and lock-out
- describe the procedures required to take strike and lock-out
- identify the prohibited activities in cases of strike and lock-out

6.1. LABOUR DISPUTES

6.1.1. Definition and Classification of Labour Disputes

As defined by Art. 136(3) of the labour proclamation, labour dispute means:

> *"any controversy arising between a worker and an employer or trade union and employers in respect of the application of the law, collective agreement, work rules, employment contract or customary rules and also any disagreement arising during collective bargaining or in connection with collective agreement"*

As can be seen from the above legislative definition, in order to say a labour dispute, the dispute must arise either between workers and an employer at individual level or between a trade union and an employer or employers' organization at collective level. For instance, a dispute that may arise between workers themselves cannot be called a labour dispute. Thus, labour dispute refers to any controversy that may arise only between a single worker or a number of workers and an employer, or between a trade union and an employer or employers' organization. The dispute between these parties includes any

controversy with regard to matters relating to the application of the law, collective agreement, work rules, employment contract and so on.

Dear distance learner, apart from providing the definition of labour disputes, the labour proclamation further refers to a classification of labour disputes into individual and collective labour disputes without, however, providing an explicit definition of any of those kinds of labour disputes. Nonetheless, though the proclamation does not come with fully explicit provisions to this effect, the definition of both types of labour disputes can be derived implicitly from provisions allocating a certain kind of labour dispute to a particular dispute settlement mechanism or procedures. But, before trying to sort out such implied definitions, it is better to see first the most widely applied modes of labour disputes classifications.

Labour disputes may be of different kinds, each of those kinds may often susceptible to a particular type of dispute settlement procedure at a final stage. Most countries distinguish between several types of labour disputes and have established separate procedures for dealing with them. In fact, the distinctions and procedures in any country would reflect the particular historical development of its labour relations system. There are, however,

two widely recognized classifications of labour disputes. And, the two most widely applied distinctions are between:

- individual and collective disputes, and
- disputes about rights and disputes about interests (also known as economic disputes)

As the distinction of labour disputes into individual and collective is the one reflected under our law and thus needs our primary concern, first let us briefly see the distinction of disputes about rights and disputes about interests.

A right dispute is a dispute concerning the violation of or the interpretation of an existing right or obligation embodied in a law, collective agreement or an individual contract of employment. The source of such a dispute is an allegation that workers /a worker/ have not been given their proper entitlement(s) as provided under the law, collective agreement or contract of employment.

An interest dispute, on the other hand, is one which arises from differences over what future rights and obligations should be, usually resulting from the failure of collective bargaining; it does not arise from -controversy over an existing right, but from an interest

of one party to create such a right, by incorporating it within a collective agreement, and an interest of the other party not to do so.

When we come to individual and collective disputes, the distinction is less easy to draw. This is mainly for the reason that some times an individual dispute may develop into a collective dispute, particularly where a point of principle is involved, and if it is taken by a trade union. Besides, it is the subject matter of the dispute, rather than the number of workers involved therein, that determines to distinguish an individual dispute from collective dispute. However, it is this type of classification which is expressly recognized under our law. And, as mentioned earlier, though there are no provisions in the labour proclaim

ation provided to give explicit definition for neither individual nor collective labour disputes, the definitions of both kinds of disputes can be impliedly derived from various provisions of the proclamation. As can be understood from article 138(1) of the proclamation, individual labour disputes are disputes between a single worker or several workers and the employer regarding matters such as:

- disciplinary measures including dismissal,
- questions related to hours of work, remuneration, leave, and rest day;
- questions related to issuance of certificate of employment and release;

- claims related to termination or cancellation of employment contracts,
- claims related to employment injury; and other similar matters

C lective labour dispute, on the other hand, is a dispute between workers or a trade union and employer or employers organization regarding matters such as wages and other benefits; establishment of new conditions of work; the conclusion, amendment, duration and invalidation of collective agreements; the interpretation of any provisions of the proclamation, collective agreements or work rules; procedure of employment and promotion of workers; claims related to measures taken by the employer regarding promotion, transfer and training; claims relating to reduction of workers; and other similar matters affecting workers in general and the existence of the undertaking.

Dear distance learner, as you can see from the definitions given above, the number of workers involved in a dispute does not matter in order to classify a certain labour dispute as individual or collective labour disputes. There may be several workers involved even within an individual labour disputes. What matters is the subject matter of the dispute. In general, a dispute is individual if it involves a single worker or a number of workers as individuals (or the application of their individual employment contracts). And, it will be a

collective dispute if it involves a number of workers collectively, that is with regard to issues which concern them collectively. Obviously, both individual and collective disputed could be disputes about rights; for instance, a worker may be aggrieved for not having been treated in accordance with his contract of employment, and a trade union might be aggrieved because its members have not been treated in accordance with the terms of a collective agreement to which the union is a party. Interest disputes, however, are always collective in character.

6.2 INDESTRIAL ACTIONS

Industrial actions often expressed in the form of strike and lock-out are the prevalent phenomenon in every sound labour relations system that promotes for industrial peace and recognizes labour freedom. Though the role of both workers and employers are mutually supportive in building national economy, their interest would inevitably be antagonistic or computing when it comes to their respective benefits or interest. Thus, in order to avoid or minimize disputes and /or conflicts between workers and employers and thereby protect the public at large as well as workers and employers themselves from the ill effects of such disputes, it is indispensable to create industrial peace. Industrial peace,

on the other hand, can be achieved primary by creating the machinery through which both workers and employers are given the opportunity to deal their differences with peaceful negotiation process. Anchoring legal rules concerning collective bargaining and collective agreement would have paramount importance in this regard.

However, there are a number of cases where a collective bargaining held by workers and employer/s may end up with deadlock. Even in case where workers and employers could not be able to reach on agreements by themselves, the law requires them to exhaust other peaceful means to resolve their difference. They could do so for instance, through the help of a conciliator assigned by the minister of labour and social affairs or the labour Relation Board. At the request of either of the disputing parties, parties may seek to get final solution for their disagreement from the conciliator or the labour Relation Board. There are, however, many cases where the decisions of such bodies could not be given within the required short period of time. Particularly, in such cases it is indispensable, therefore, to recognize the rights of both parties to take industrial actions. Of course, that is why this core right of workers and employers is protected by various laws, more importantly by the constitution. Industrial actions briefly are the means by which both workers and employers try to put pressure on one another to get acceptance for their respective proposed interest or work conditions by the other party. Since industrial actions may have

detrimental effects on both parties as well as the public at large it needs to be taken as a last resort to settle labour disputes. While often when talking of industrial actions it is assumed that this means a strike or lock-out, these are only some type of industrial actions and it will be useful to note that there are also other forms of industrial actions such as overtime ban, Go-slow and so on. However, it is industrial actions particularly expressed in the form of strike and lock-out that are expressly recognized under our law. Thus, our discussion in this regard will be confined to strike and lock-out.

A strike is a situation where the workers are withdrawing their labour and refusing to work. As defined by Art. 136(5) of the labour proclamation, strike means:

> *"the slow-down 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".*

Dear distance learner, from the above definition you need to note two important things about strike. Firstly, a strike is a measure taken by workers to persuade their employer to

accept the work conditions as desired by workers. Second, strike can be expressed either by reducing the normal rate of work /slow-down of work/ or by completely withdrawing labour and refusing to work. By going out to strike workers could be able to put economic pressure on their employer so that the employer will be forced to make concession with regard to, at least, some of the points of their disagreement. Strike, therefore, is a lawful weapon available in the hands of workers to protect their interest. As a result of this, strike is considered today as one of the legally recognized means to bring industrial peace. Dear distance learner, after reading the following excerpts you will be able to appreciate the need for recognizing strike as a legitimate means of bringing industrial peace.

The working people find that improvements in the methods of production and distribution are constantly being made, and unless they occasionally strike, or have the power to enter upon strike, the improvements will all go to the employer and all injuries to the employees. A strike is an effort on the part of the workers to obtain some of the improvements that have occurred resultant from bygone and present genius of our intelligence, of our mental progress. We are producing wealth today at a greater ratio than ever in the history of mankind, and a strike on the part of workers is, first against deterioration in their condition, and, second, to be participants in some of the improvements. Strikes are caused from various reasons. The employer desires to reduce

wages and lengthen hours of labour, while the desire on the part of employees it to obtain shorter hours of labour and better wages, and better surroundings. Strikes establish or maintain the rights of unionism; that is, to establish and maintain the organization by which the rights of the workers can be the better protected and advanced against the little forms of oppression, some times economical, sometimes political-- the effort on the part of employers to influence and intimidate workers' political preferences, strikes against victimization; activity in the cause of the workers against the blacklist - - -.

A strike on the part of workers is to close production and compel better terms and more rights to be acceded to the producers. The economic results of strikes to workers are advantageous. Without strikes the rights of workers would not have been considered. It is not that workers or organized labour desires the strike, but it will tenaciously hold to the right to strike. Everyone recognizes today that peace-full industry is necessary to successful civilized life, but the right to strike and the preparation to strike is the greatest preventive to strikes themselves. If workers were to make up their minds tomorrow that they would under no circumstances strike, the employer would do all the striking for them in the way of lesser wages and longer hours of labour.

Dear distance learner, have you appreciated the paramount importance of strike from the above reading? Just like a strike is at the disposal of workers as a means of protecting their interest, employers, too, have a right to take industrial actions to put pressure on workers so that they will be forced to make some concessions as desired by the employer. Lock-out is the counter-balance weapon for employers that help them to put economic pressure on workers to get concessions regarding the points of their difference. As defined by article 136(4) of the labour proclamation, "lock-out" means:

> "*an economic pressure applied by closing a place of employment in order to persuade workers to accept certain labour conditions in connection with a labour dispute or to influence the outcome of the dispute*".

As can be inferred from the above definition lock-out is one form of industrial action to be taken by the employer. For the same reason that workers' right to take strike is recognized, employers should be given similar right to protect their interest. Industrial action in a form of lock-out is, therefore, the measure taken by employers by closing the undertaking to persuade workers to accept certain labour conditions in connection with a labour dispute. According to this same definition, there needs to be a labour dispute in order to take lock-out. Lock-out is, of course, similar to strike in this regard. In addition,

strike and lock-out have similar effect in a sense that both are used to put economic pressure in order to persuade the other party to accept certain labour conditions. Moreover, both strike and lock-out have the effect of suspending some obligations of the parties under a collective agreement or contract of employment. This means the employer, for instance, does not have the obligation to pay wages to workers in cases of strike or lock-out. Similarly, workers, too, do not have the obligation to work or give their services. As a result, both strike and lock-out would inevitably have detrimental impacts on the parties as well as the public at large. For example, with a view of taking industrial action in a form of strike if all of the workers of a certain manufacturing enterprise stop working, the employer will be affected economically. As the enterprise will not be able to produce with out the workers labour input, the employer will, obviously, be prevented from some sort of economic gain. Similarly, such production gap will affect the public at large as the product can be out side the market until the strike comes to an end. In general, industrial actions will often have ill economic effects on the society in various ways. That is why, of course, industrial actions are said to be taken as a last resort to settle labour disputes. Thus, the law provides various procedural requirements to be observed by either workers or employers before they resort to taking industrial actions. Therefore, before resorting to strike or lock-out parties have to make sure the observance of those requirements under the labour proclamation.

As per article 158 of the Labour Proclamation the following steps shall be taken before initiating a strike or lock-out:

i. The party initiating a strike or lock-out shall give at least 10 days advance notice to the other concerned party indicating the said reasons for taking the said action
ii. Both parties should make all possible efforts to solve and settle their dispute through conciliation.
iii. In case of strike it should be supported by a majority of the workers concerned in a meeting in which at least 2/3rd of the members of the trade union were present.
iv. Measures should be taken to ensure the observance, by employers and workers, of safety regulations and accident prevention procedures in the undertaking.

As can be seen from the above provision, the exercise of the right to take industrial actions needs to pass through different procedural requirements, just like many other collective rights. Before initiating a strike or lock-out, the party who likes to initiate the action must make sure whether the above requirements are fully satisfied. In addition, the party who initiates the action must refrain from engaging in prohibited actions or activities during the strike or lock-out. As provided under article 160 of the labour proclamation, a strike or lock-out initiated after a dispute has been referred to the Labour

Relations Board or to the court is unlawful unless, and until 30 days have elapsed before any order or decision is given by the Board or the court. In other words, this means a strike or lock-out taken after the prescribed period of time will remain lawful if the Board or the court fails to give any order or decision within 30 days. A strike or lock-out is also unlawful if a party refuses to obey, or continues to strike or lock-out against or in conflict with the final order or decision of the Board or the court disposing in whole or in part of labour dispute proceedings. In addition, delaying unwarrantedly in obeying the order or decisions of the Board or court is also unlawful. However, the strike or lock-out, which is not against or in conflict with any such order or decision, but seeks to compel the other party to comply with such order or decision, shall not be deemed illegal or prohibited. More over, it is prohibited to accompany strike or lock-out with violence, threats of physical force or with any act which is clearly and officially unlawful.

In general, before initiating a strike or lock-out the party who wants to strike or lock-out must make sure that the requirements mentioned earlier are satisfied. Besides, parties must refrain from engaging in prohibited actions. Failure to observe the preconditions provided under the proclamation as well as engaging in prohibited actions or activities would, otherwise, make the strike or lock-out unlawful. But, the question that could be raised in this regard is: what would be the legal effect of unlawful strike or lock-out? Dear

distance learner, there are no clear provisions under the labour proclamation which tell us the legal effects of unlawful strike or lock-out. Obviously, lawfully held strike or lock-out can not have the effect of termination of contract of employment between workers and employer (see Art 26 of the Labour Proclamation). But, the question is what if a strike or lock-out is unlawful. Taking disciplinary or other measures as provided in a collective agreement seems un-doubtful in case where a strike or lock-out is unlawful. But, does it have, particularly, the effect of termination of contract of employment? Can, for instance, the employer terminate workers who engage in unlawful strike? According to article 27(1) (b) of the proclamation, unless otherwise determined by a collective agreement, absence from work without good causes for a period of five consecutive working days may serve as a good ground for termination. Do you think this provision is helpful in case where workers become absent from work for such period due to unlawful strike? Try to express your opinion on the space provided below.

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Dear distance learner, so far we have seen the paramount importance of, as well as preconditions to be fulfilled for, industrial actions. Finally, you need to note that there are exceptions whereby workers and/or employers of certain undertakings are excluded from enjoying the right to take industrial actions. As per article 157(3) of the Labour Proclamation the right to strike or lock-out shall not apply to workers and employers of “essential public services undertakings”. Article 136(2) of the proclamation, on the other hand, has come up with exhaustive list of such undertakings. According to this provision “essential public services undertakings” means:

those services rendered by undertakings to the general public and includes the following:

a) air transport;
b) undertakings supplying electric power;
c) undertakings supplying water and carrying out city cleaning and sanitation services;
d) urban bus services;
e) hospitals, clinics, dispensaries and pharmacies;
f) fire brigade services; and
g) telecommunication services

As can be seen from the above list, such undertakings are known for providing very essential services constantly to the public at large. In our previous discussion we have seen the various impacts of industrial actions on the parties as well as the public at large. And, obviously, the impact would get graver and deeper when it comes to such essential public undertakings. In short, allowing strike or lock-out in such undertakings would bring sever impact or damage on the general public as well as the national economy. As a result, the law does not allow workers and employers of such undertakings to take strike or lock-out as a means of settling their dispute. Therefore, the only available machinery left for workers and employers of such undertakings is to settle their dispute by taking their case before a conciliator, or the Labour Relations Board (particularly the adhoc Labour Relations Board), or the Labour Division of the Federal High Court.

Review Questions

1. Suppose that the ministry of Labour and Social Affairs has refused to register trade union “A" of a certain undertaking. Dissatisfied by the decision of the ministry the workers who have agreed to form trade union "A" have now brought the case before the labour division of the Regional Appellate court. Do you think this case involves a labour dispute? Why?

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2. Industrial actions, in general are recognized as self help measures to be taken only as a last resort to resolve labour disputes. To this end, the law provides various preconditions (most importantly making an effort to resolve the Zispute through conciliation) to be observed by a party before initiating a strike or lock-out. What could be the possible legislative rationales behind making such conditions precedent to industrial actions?

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3. Let us say that workers of undertaking "B" and its management have a dispute related to the reduction of working hours in which the parties reached in a dead-lock during the process of collective bargaining. As a result, both parties agreed to submit the dispute for conciliation. But, the conciliation, too, ends without a result. At this point, the management has submitted the dispute to the Labour Relations Board. Can the workers take a lawful strike at this time? Explain your reason supported by the relevant provisions of the law.

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4. From the preceding hypothetical case let us further assume that forty (40) days have lapsed without any decision of the Board after the dispute has been submitted to the

labour Relation board. Can the workers legally take a strike now at this time while the case is pending? Explain.

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5. Suppose that Ato "A" and Ato "B" are workers of the same undertaking. Once upon a time Ato “A" and at "B" fought each other while they were performing the usual activities of their office. As a result, Ato "A" sustained severe bodily injury. Now if Ato "A" decides to take the case before a court of law, do you think that the case between Ato "A" and Ato "B" will involve a labour dispute? Why? Explain your reason.

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6. What are the essential elements (features) of the definition of labour disputes under our law?

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7. Discuss the most widely accepted classification of labour disputes in general, and the kind (s) of classification recognized under our law in particular.

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8. Classifying labour disputes in to different categories is one of the common features of Employment and Labour laws of many countries. Like wise, the Ethiopian labour proclamation classifies labour disputes in to individual and collective labour disputes. Do you think that making such a classification has its own purpose? What purpose does it serve (if any)? Explain your reasons.

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UNIT – SEVEN

DISPUTE RESOLUTION MECHANISMS

Introduction

Dear distance learner, as you have seen in the previous unit dispute is unavailable phenomenon in every aspect of human life so long as social and economic relations / transactions keep going with the continuity of any society. For this same reason a dispute may arise in employment relationships, too. And, obviously, the central concern of Employment and/or Labour Law is to create industrial peace. Industrial peace, on the other hand, can hardly be achieved unless and until labour relationships are supported by the appropriate and efficient dispute resolution machineries. As you remember from the previous unit, industrial actions are self-help measures which are recognized as desperate means of labour dispute resolution. Industrial actions, thus, are one sort of dispute resolution mechanisms whereby parties may use it only after making the possible efforts

to resolve their dispute in a peaceful process. As you have also seen in unit five, collective bargaining is one of such peaceful processes of dispute resolution.

Nonetheless, industrial peace may not be firmly built unless sufficient and efficient dispute resolution mechanisms are established in addition to those discussed before. Therefore, the law provides various dispute resolution mechanisms. For you have thoroughly discussed about industrial actions in the previous unit, you are going to see the other dispute resolution mechanisms under this unit. The recognized dispute resolution mechanisms under our law, in general, could be classified into two as “Amicable” and “Judicial” settlement mechanisms. Accordingly, this unit is divided into two broad sections. Under the first section that talks about the amicable settlement mechanism, you will see the different ways of dispute resolution where parties may mutually seek to find solution to their dispute through the help of a neutral third party such as conciliator, mediator or arbitrator. The second section deals with the judicial dispute settlement mechanisms which come, often, after where both parties fail to find solution through the amicable process. As the section deals particularly with the role of courts and the Labour Relations Board in resolving labour disputes, it will help you acquire the basic knowledge and skills which are of paramount importance in the labour dispute resolution process.

Learning Objectives of the unit

At the end of this unit you will be able to:

- list down the different modes of dispute settlement mechanisms
- explain the importance of amicable dispute settlement procedures
- define conciliation/ mediation and arbitration
- explain the role of a neutral third party in the amicable settlement procedures
- describe the role and power of various institutions in the judicial dispute settlement mechanism
- identify a labour dispute susceptible to a particular dispute settlement procedure
- distinguish the varieties of dispute settlement procedures
- sort out the strong and weak sides of the different modes of dispute settlement procedures

7.1 THE AMICABLE DISPUTE SETTLEMENT MECHANISMS

Dear distance learner, as indicated in the introductory part of this unit, by the name “Amicable settlement mechanisms” we are referring to procedures in which the parties to a dispute make mutual effort to resolve their dispute with the assistance of a neutral third party--mediator, conciliator or arbitrator. The amicable settlement procedures are recognized widely as the most important and effective modes of labour dispute resolution systems. They are considered as effective and meaningful alternatives to litigation through judicial mechanisms for settlement of labour disputes through the guidance and assistance of a neutral and impartial third party. More over, the amicable procedures provide both parties a great deal of advantage in terms of saving time, money and labour of the parties as well as creating and maintaining smooth relationships between the parties. As a result, many countries make legislative provisions that may make the amicable settlement mechanisms as compulsory or voluntary procedures depending upon the impact that the dispute may have on the parties or the public at large. This is to mean that legislative provisions may provide certain types of amicable settlement mechanisms as compulsory so that parties must exhaust them before resort to other modes of dispute settlement mechanisms such as industrial actions or judicial settlement mechanisms. Besides, a dispute can be submitted to such compulsory amicable procedures with the initiation of one of the parties to the dispute even if the other party is not comfortable to that end. In case where a certain amicable procedure is provided by law as voluntary, this

means the parties to a dispute are left free either to exhaust the amicable procedure or else to resort to other modes of dispute settlement mechanisms. In any ways, the amicable settlement procedures come into picture often when the effort of the parties made to resolve their dispute through the process of negotiation ends without a result. In other words, the amicable settlement procedures are to be employed when negotiation between the parties fails. Negotiation in short is a process in which both parties attempt to reach a joint decision on matters of common concern in situations where the parties are in actual or potential disagreement or conflict. Dear distance learner, as you have deeply seen under unit five of this module, collective bargaining is the primary means of peaceful dispute resolution through the process of negotiation. Therefore, our discussion on the coming parts of this section will focus on the amicable dispute settlement mechanisms / procedures/ such as mediation, conciliation and arbitration.

7.1.1 Conciliation / Mediation

Among other procedures within the amicable dispute settlement mechanism, conciliation and mediation are recognized as the most important and effective modes of dispute resolution procedures. But, it is not very clear as to whether the two concepts of

conciliation and mediation would have different connotation or they would refer to the same mode. Dear distance learner, what you must note regarding these two concepts is that there is no remarkable agreement between scholars and or authorities as to whether conciliation and mediation refer to the same mode or whether they refer to two distinct modes of dispute settlement procedures. Though many agree as to the fact that both conciliation and mediation have a great deal of characteristics they commonly share, some authorities still recognize them as two different modes with slight differences. In view of the later authorities, mediation may be regarded as a halfway house between conciliation and arbitration. This is because, in view of them, the role of the conciliator is to assist the parties to reach their own negotiated settlement and he may make suggestions as appropriate. The mediator, on the other hand, proceeds by way of conciliation but in addition is prepared and expected to make his own formal proposal or recommendation which may be accepted as a solution to the dispute.

Dear distance learner, have you seen any clear distinction between the two concepts? Perhaps, you may not. In short, what those writers try to say is that the role of the neutral third party is more active in mediation than conciliation. However, according to most of the authorities conciliation and mediation are highly overlapping. As a result, many writers as well as legislative documents of many states use the two terms interchangeably.

In other words, both the terms conciliation and mediation are interchangeably used to refer the same mode of dispute resolution. Accordingly, for those authorities both conciliation and mediation refer to same process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator or mediator), identify the disputed issues, develop options, consider alternatives and endeavor to reach on agreement. The conciliator or mediator may have an advisory role on the content of the dispute or the out come of its resolution, but not a determinative role. Dear distance learner, whether these two concepts refer to the same or different modes of dispute settlement, you need to note two important points, among others. Firstly, just like other modes of amicable dispute settlement, conciliation / mediation requires the consent of both parties to a dispute. This means both parties must agree to settle their dispute through mediation/conciliation. Unlike the judicial dispute settlement mechanisms, conciliation /mediation cannot be held with the desire or initiation of a single party only, unless it is provided by law as compulsory. The conciliator/mediator/ as such is to be appointed by the mutual agreement of both parties. Secondly, in mediation/conciliation the solution or the out come of the resolution is not decisive or binding on the parties. The fact that conciliation/mediation/ may be provided as compulsory or voluntary does not mean the out come of the process is binding on the parties. As such, either of the parties may accept or reject the proposed solution without the need for appeal. Therefore, at the end of the process of conciliation/

mediation parties are free to accept the proposed solution or reject it and resort to other modes of dispute settlement.

Dear distance learner, so far we have seen the concepts of conciliation and mediation in general terms. Coming to see such procedures in particular under our law, it is conciliation and arbitration only among the amicable settlement mechanisms which are expressly recognized by the Labour Proclamation. This does not, however, mean that parties are not at liberty to use other modes of amicable dispute settlement mechanisms to resolve their dispute. So long as both parties agree, they can use other modes of amicable settlement, too. Any ways, let us now see the concept of conciliation as provided under the labour proclamation. As defined by article 136(1) of the proclamation, "conciliation" means:

> *"the activity conducted by a private person or persons appointed by the ministry at the joint request of the parties for the purpose of bringing the parties together and seeking to arrange between them voluntary settlement of a labour dispute which their own efforts alone do not produce."*

As can be seen from this definition, conciliation requires the consent of both parties. And it is conducted by a private person appointed by the agreement of both parties or by persons appointed by the ministry. In addition, the solution proposed by the conciliator(s) is not binding on the parties. In general, the most important elements of the above legislative definition are also contained, with slightly different wordings, in the definition referred to both conciliation and mediation earlier within this topic. As such, herein after we may use the terms “conciliation” and “mediation” interchangeably to refer to the same mode of dispute settlement procedure.

Dear distance learner, due to the great deal of advantage it provides to both parties, in principle conciliation / mediation/ is preferred to other modes of dispute settlement for resolving all kinds of labour disputes. So long as both parties agree, all kinds of labour disputes, individual or collective, are susceptible to be resolved through conciliation / mediation. However, as indicated earlier conciliation / mediation/ may be provided by law as compulsory for certain kinds of labour disputes and voluntary for others. There are also cases where conciliation / mediation/ may be provided by law as a precondition which parties to any kind of labour dispute must initially exhaust in before they resort to other modes of dispute settlement mechanisms, particularly industrial actions. It is the later approach which is clearly reflected under the labour proclamation.

As a matter of principle conciliation/mediation/ is provided under our law as a voluntary procedure for all kinds of labour disputes. This is to mean that both parties are free to settle their dispute either through conciliation/mediation/ or other modes of dispute resolution mechanisms. In short, using conciliation/mediation/ as a means of settling their dispute is dependent upon the willingness of both parties. But, there are exceptions to this general rule. Dear distance learner, as you remember from the discussion on unit six of this module, conciliation is provided as one of the preconditions to be fulfilled before taking industrial actions. This is, of course, reaffirmed by article158(2) of the labour proclamation which states that before initiating a strike or lock out, partially or wholly, both parties should make all efforts to solve and settle their labour dispute through conciliation. As can be seen from this provision, conciliation is provided as a compulsory procedure for only parties who seek to resolve their dispute by taking industrial actions. Dear distance learner, the reasons for providing conciliation as a condition precedent to industrial actions is discussed under the previous unit. As you remember from that discussion, industrial actions may have detrimental impacts in various ways on both parties to a dispute as well as the public at large. And, this requirement is also legitimate under the ILO principles governing freedom of association and the right to strike, as it encourages the negotiation of differences.

As indicated earlier, one of the main justifications for compelling the parties to labour disputes to use conciliation/mediation/ is to prevent industrial action, and in particular the adverse social and economic effects it may have in the public at large. Thus, the interest of preserving industrial harmony and saving the broader community from the adverse effects of industrial action needs to be reflected in a legislative obligation which demands for exhausting peaceful process. Therefore, the law requires that conciliation / mediation/ procedures must be exhausted before a strike or lock-out may be called.

The other instance where conciliation may be regarded as compulsory under our law is when a dispute / only collective labour dispute/ is submitted to the Labour Relations Board (permanent or adhoc Labour Relations Board). As can be seen from the provisions of the labour proclamation allocated for the power and functions of the Labour Relations Board, any party involved in a collective labour dispute may submit the case to the appropriate Labour Relations Board (Permanent or adhoc) if the conciliator appointed by the Ministry or the Private conciliator failed to resolve the dispute within the prescribed time. Or, a case involving collective labour dispute may be submitted to the Labour Relations Board by the initiation of any of the disputing party even if the case had not been referred to conciliation before. In any of such cases where a dispute is submitted to the Labour

Relations Board, the Board as per article 147(1) of the proclamation is empowered to make an attempt to resolve the dispute initially through conciliation. This means, before adjudicating the dispute and / or rendering binding decisions, the Board shall first make effort to conciliate the parties where it appears to be appropriate. In other words, the parties are expected to exhaust the conciliation effort of the Board before seeking for its decision, though they are still at full freedom to accept or reject the outcome of the conciliation conducted by the Board. Thus, if a dispute as such can be submitted to the Board with the initiation of even a single party to the dispute, and since the parties are required to exhaust the conciliation effort of the Board once the dispute is submitted to it, then the conciliation function of the Board can be taken as compulsory conciliation.

However, since cases are submitted to the Board often after where the effort of the parties to reach on a voluntary settlement through conciliation either arranged by the Ministry or Private conciliator becomes futile, compelling the parties to recourse to another conciliation can be said to be next to meaningless for no different result acceptable to both parties can simply be achieved. Besides, the conciliation effort of the Board is to be tried where the Board thinks it appropriate, not always. For such reasons, one may, therefore, say that the conciliation function of the Board may not be considered as compulsory conciliation in the strict sense of the term. Dear distance learner, the role

and/or functions of the Labour Relations Board as a labour dispute resolution machinery will be deeply discussed in the forth coming sections of this unit.

Except for the cases mentioned above, conciliation/ mediation/ in general is provided under our law as a voluntary mode of dispute settlement. And, this is true regardless of the kind of labour dispute concerned, be it individual or collective labour disputes. The sole difference between individual and collective labour disputes regarding conciliation is as to the procedures for the appointment of the conciliator(s). In cases of individual labour disputes, if both parties agree, they may seek to settle their dispute with the assistance of a private third party (conciliator) appointed by their mutual consent. But, in cases of collective labour disputes, the neutral third party conciliator /conciliators) who will assist the parties to a dispute to reach agreement on the disputed issues may be appointed by the Ministry at the request of either of the disputing parties. However, in both cases, the solution proposed by the conciliator(s) is not binding on the parties, and the parties at any stage are free to settle their dispute either through conciliation or to resort to other modes of dispute settlement mechanisms, except, of course, industrial actions which demand the exhaustion of conciliation/mediation.

7.1.2 Arbitration

Dear distance learner, in the previous topic you have seen conciliation / mediation/ as one mode of the amicable labour disputes resolution mechanisms. Arbitration is the other mode among the amicable dispute settlement mechanisms. Arbitration, in short, refers to a procedure by which both parties to a dispute agree to submit their dispute to a neutral third party (called arbitrator) for a final and binding decision, which may be called an “award” or “decision”. As can be seen from the above definition, arbitration, just like the other amicable dispute settlement mechanisms, requires the consent of both parties to submit their dispute to a neutral third party arbitrator for a binding decision. Of course, one of the central features that make the amicable settlement mechanisms different from the other dispute settlement mechanisms is the fact that the consent of both parties is necessary to resolve labour disputes through the amicable procedures.

However, in the case of arbitration, unlike conciliation /mediation, the award or decision given by the arbitrator is binding on the parties. This means, once the parties have given their consent to be bound by the decisions of the arbitrator, none of the parties to a dispute are free to reject the decision passed by the arbitrator. As such, the party in whose favor the decision is passed may take the decision of the arbitrator before a court

for judgment execution. The other party aggrieved may, however, appeal to a competent authority with judicial dispute settlement power. The binding nature of the decision given by the arbitrator makes arbitration similar with the judicial dispute settlement mechanisms. In addition, arbitration is similar with the judicial settlement mechanisms, for the arbitrator often passes decisions on the basis of laws and the facts of the case. Nonetheless, arbitration is endowed with distinct features that would make it different in many aspects from the judicial dispute settlement mechanisms. For instance, though arbitration procedures are usually more formal than those which apply to conciliation / mediation/, rules of procedure for arbitration generally seek to ensure that cases are dealt with speedily and to keep conduct of proceedings simple, especially by avoiding the formalities, technicalities and legalism of judicial proceedings. Arbitration, thus, avoids the delays usually associated with judicial settlement mechanisms. Obviously, this helps the parties to a dispute in terms of saving time, money and so on. Such features would make arbitration preferable to the judicial dispute settlement procedures.

Dear distance leaner, like conciliation /mediation, submission of a labour dispute to arbitration may be provided by law as voluntary or compulsory. Arbitration is considered to be voluntary when it can be set in motion only on the basis of the consent of both parties, and compulsory when either of the parties or the government can invoke it on its

own initiative. As such, some countries make their laws to provide arbitration as compulsory particularly for certain kinds of collective labour disputes.

In countries where arbitration is provided as compulsory the law requires certain kinds of labour disputes to be submitted to either a private arbitrator(s) or arbitration boards established by a government. In such cases, a particular labour dispute can be submitted and thereby resolved through arbitration at the request of either of the disputing parties or the government. In other words, the agreement of both parties is not necessary to settle the dispute through compulsory arbitration. Dear distance learner, this is foreign countries' experience. Unlike the laws of such countries, arbitration under our law is absolutely provided as voluntary. This is true regardless of the kind of labour dispute involved. As can be seen from article 143 of the labour proclamation, the law typically requires the agreement of both parties to submit their dispute to arbitration. However, except stating that arbitration is purely voluntary, our law is not clear enough as to whether the decision of the arbitrator is binding on the parties once they have given their consent to settle their dispute through arbitration. Dear distance learner, what is your opinion on this point? Do you think that one of the parties can reject the decision of the arbitrator once both parties have agreed to settle their dispute through arbitration? Why? State your reasons on the space provided below.

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7.2 THE JUDICIAL SETTLEMENT MECHANISMS

Judicial settlement mechanisms in short refer to the modes of dispute settlement procedures in which either of the disputing party may submit a dispute to a legally

competent authority with judicial power for a binding decision. Unlike many of the amicable settlement procedures, the agreement of both parties is not necessary to submit a dispute to judicial settlement mechanisms. This means a dispute can be submitted to judicial settlement authority at the initiative or request of any one of the disputing parties. And the decision passed by such judicial settlement authorities is binding on the parties. Unlike conciliation mediation, once a dispute is referred to judicial settlement authority, parties are not free to reject the decision of such authority.

Dear distance learner, unlike the case for many other disputes, courts are not the only organs with judicial authority to settle labour disputes. As you have seen in the previous units, the distinct features of labour disputes and the impacts they may have on the broader community demands labour disputes to be treated with especial preference. If it is sought to maintain smooth relationship between the workingmen and the employer and there by keep industrial harmony, the establishment of especial organs with judicial authority is a necessary step, in addition to ordinary courts. This is mainly because courts, unlike such especial organs, are utterly rigid in resolving disputes through the usual adjudication procedure, rather than employing the varieties of dispute settlement modes including the amicable ones such as conciliation and arbitration. Thus, in addition to

ordinary courts, our law has established the Labour Relations Board endowed with judicial power to resolve labour disputes.

In general, the recognized judicial dispute resolution organs under our law can be classified into two as the labour relations board and courts. To this end, this section is further divided into two sub- sections. In the first sub-section, you will see the role and jurisdiction of the Labour Relations Board. The subsequent sub-section similarly deals with the role and jurisdiction of courts established at various levels across the country to resolve labour disputes.

7.2.1 Labour Relations Board

As it has been mentioned above, the need for maintaining smooth relation ships between the workingmen and the employer--and thereby keeping industrial harmony--calls for the establishment of a special organ that should be endowed with judicial power to settle certain kinds of labour disputes by using the verities of procedures ranging from the amicable to the judicial settlement procedures. Due to the intensity of the impact that certain kinds of labour disputes (collective labour disputes in particular) may have on the

broader community, apart from the parties themselves, a special forum where such disputes cold be preferentially treated is necessitated.

Therefore, the labour proclamation recognizes for the establishment of such a special organ called the Labour Relations Board. As per article 144 (i) of the Labour Proclamation, one or more permanent labour relations boards may be established at regional level. The board is established so as to assume first instance jurisdiction only over collective labour disputes. Thus, the power to assume appellate jurisdiction over collective labour disputes and over all jurisdictions to hear individual labour disputes remains for courts. The role and power of courts in resolving labour disputes will be discussed in the next sub- topic.

Dear distance learner, as you see the composition of the Labour Relations Board from Art. 145 of the labour proclamation, the board is established so as to encompass representatives from both the workers and employers side as well as other individuals appointed by the Ministry from those who have good knowledge and skill on labour relation. This enables the Board, as a labour dispute resolution machinery, to keep the interest of both parties in harmony without affecting the future relationships of the workingmen as a class and employers. When we come to see the power and functions of

the Labour Relations Board, it is established to have two divisions-namely the permanent and the adhoc Board. The permanent Labour Relations Board has first instance jurisdiction to entertain all cases of collective labour disputes other than matters of wages and other benefits which are exclusively left for the adhoc Board. As per article 147(1) (a) of the labour proclamation, the permanent Board has the power to see collective labour disputes on matters enumerated under article 147(1) of this same proclamation, except, of course, disputes related to wages and other benefits. This power of the Board includes the jurisdiction to hear collective labour disputes submitted to it by any of the disputing parties when an effort to settle their disputes through conciliation appointed by either the Ministry or the parties themselves ends without a result. In addition, the permanent Board also assumes jurisdiction to hear cases involving prohibited actions within the meaning of article 160 of the proclamation. In other words, the Board assumes jurisdiction over cases connected with the initiation of or taking part in unlawful industrial actions. As mentioned earlier, the adhoc Board, on the other hand, has the power to assume jurisdiction over disputes only related to wages and other benefits. This power of the adhoc Board is provided under article 147(2) of the proclamation which read as:

> *"the adhoc Board shall have the power to hear labour disputes specified in sub-article 1(a) of article 142, to conciliate the parties and to give any decisions and orders."*

As can be seen from these and other provisions of the labour proclamation, the adhoc Board, as compared to the permanent Board, has very limited role and/or power in the resolution of labour disputes.

Dear distance learner, though the functions of the Labour Relations Board is predominantly taken as the features of judicial settlement mechanisms, the Board is established so as to resolve disputes using the combination of various procedures ranging from the amicable ones, such as conciliation, to adjudication. In short, the Board has been given power to resolve disputes through conciliation and adjudication. To this end, the Board has its own rules of procedure distinct from that of ordinary courts. In this respect, both the permanent and adhoc Board have their own rules of evidence and procedure to be followed in the process of dispute resolution. Accordingly, we are now going to see briefly some of the procedures mainly relating to hearing of cases and rendering decisions to be followed within the functions of both the permanent and adhoc labour reactions

boards. To this end, the term “the Board” herein after refers to both the permanent and adhoc Labour Relations Boards.

In its role as a labour dispute resolution machinery, the first step to be taken by the Board is to make a strong effort to help parties to reach on mutually agreed settlement of the dispute. To this end, when a dispute is submitted to the Labour Relation Board, the primary function and /or responsibility of the Board is to make an effort of settling the dispute through appropriate amicable means such as conciliation in particular. This is clearly stated under article 150(1) of the labour proclamation which read as:

> *“the permanent or the adhoc Board shall endeavor to settle by agreement labour disputes submitted to it, and to this end it shall employ and make use of all such means of conciliation, as it deems appropriate.”*

As can be seen from the aforementioned provision, whenever a dispute is submitted to the Board, the board shall attempt to resolve the case through conciliation before recourse to adjudication. In other words, before passing any decision on a given case the Board is expected to encourage and assist the parties to reach on a voluntary settlement. However, the disputing parties are not obliged to accept the out come of the conciliation conducted

by the Board. Though the conciliation function of the Board may be regarded as compulsory conciliation, any solution proposed by the Board at this stage is not binding on the parties. This means either of the disputing parties may refuse to accept the outcome of the conciliation if they find it to be less protective of their own respective interests. Thus, when the effort of the Board to conciliate the parties becomes futile, the Board proceeds to resolve the dispute through adjudication. By adjudication we are referring to the role or power of the Board to render a final and binding decision on the disputed issues. The adjudication role of the Board at this stage can be assimilated with compulsory arbitration for having its own procedural rules distinct from that of ordinary courts.

As indicated earlier, the Board is endowed with its own rules of evidence, hearing of cases and rendering decisions to be observed throughout the whole process of adjudication. The law, however, imposes a duty on the Board to assure the observance of some of such rules. As such, the Board must primarily conduct hearing of cases before rendering decisions. Accordingly, as per article 149 (1) of the labour proclamation the Board is under duty to notify the parties involved and afford them an opportunity to be heard before rendering decisions. To this end, at least three (3) days advance notice of hearing shall be given to the parties and the notice shall contain the date, hour and place of hearing. According to sub article 4 of this same provision all hearings of the Board shall

be conducted publicly unless the chairman of the Board for good cause decides it to be held in camera.

In the process of finding the facts of a case the Board is left with wider freedom not to be bound by the rules of evidence and procedures applicable to courts of law. This fact is well explained under article 149 (5) of the proclamation as follows:

> *"the permanent or adhoc Board shall not be bound by the rules of evidence and procedure applicable to courts of law, but may inform itself in such manner as it thinks fit."*

Such feature of the Board represents the major characteristic that makes the Board distinct from courts of law but similar with arbitration tribunals. Obviously, such departure from courts of law is recognized, perhaps, in order to adapt the Board for more flexibility and expediency as well as the need to take into account the continues relationships of the parties by keeping their interest in harmony, which would otherwise be destroyed by strict application of the law. The effort made to keep the Board for greater flexibility can be inferred from the power of the Board to decide on or limit the kind or nature (such as oral or documentary) as well as the number of evidences to be

admitted before it. For that matter, this power of the Board to issue its own rules of evidence and procedure is clearly recognized under article 148 of the labour proclamation.

As mentioned earlier, when the effort held to conciliate the parties fails, the Board has the power, and is expected, to give decisions after, of course, conducting hearings of the case, finding the relevant facts, and examining evidences presented before it. In giving decisions on the disputed issues, the Board ought not to lose sight of considering the national economy and the interest of the broader community than restricting itself to the immediate interest of parties to a dispute. To this end, the Board may even grant a motion for government intervention when it thinks appropriate. The Board shall also take into account the substantial merits of the case, and need not follow strictly the principles of substantive law followed by civil courts. The law, under article 151(1) of the proclamation, provides fixed time limit through which decision of the Board shall be rendered. Accordingly, the Board shall give decision within 30 days from date on which the claim is loged. As can be seen from article 152 (2) of the labour proclamation, any decision of the Board shall have immediate effect, unless an appeal is made against such decision as per article 154 of this same proclamation. This means, any decision of the Board shall have binding effect on the parties so that it is enforceable in the eyes of the law since the date

on which the decision is made. In addition, where a decision of the Board relates to working conditions, the decision of the Board may also have the effect of establishing terms of contract of employment or collective agreement which will remain binding on both the employer and workers. Such effect of a decision of the Board is clearly stated under article 152 (2) of the proclamation as follows:

> *"where a decision of the permanent or adhoc Board relates to working conditions, it shall be a term of the contract of employment between the employer and the worker to whom it applies, and the terms and conditions of employment to be observed and the contract shall be adjusted in accordance with its provisions."*

Dear distance learner, as you remember from the previous discussion on this topic, the Labour Relations Board in general assumes an exclusive first instance jurisdiction over all cases of collective labour disputes. And, obviously, claims in collective labour disputes often (not always in fact) relate to working conditions, as it affect the collective interest of workers as a class. Thus, as can be understood from the aforementioned provision of the proclamation, the Board's decision on such matters will have the effect of constituting terms of contract of employment and/or collective agreement which will also govern the

future relationships of the parties. Accordingly, the law requires the existing contract of employment or collective agreement (if any) to be readjusted in accordance with such decisions of the Board.

Dear distance learner, finally there is one worth noting point as far as all decisions of the Board is concerned. In all cases within the jurisdiction of the Board, you must note that all findings of facts made by the Board are final and conclusive as per article 153 of the proclamation. This means any decision of the Board based solely on the facts of the case is not appealable. Appeal against the decisions of the Board lies only as to the question of law. Therefore, in any labour dispute cases entertained by the Board, appeal against the decision of the Board may be taken by an aggrieved party only where he is dissatisfied with the Board's interpretation or application of the law, not with respect to findings of facts. However an appeal may be taken to the Federal High court by an aggrieved party on questions of law, within thirty (30) days after the decision has been read to or served upon, the parties whichever is earlier.

7.2.2. Labour courts

Dear distance learner, in the preceding topic we have tried to see the role and jurisdiction of Labour Relations Board as a judicial established to entertain and resolve cases of labour disputes. As indicated earlier, by the term “judicial dispute settlement authority /organ” we are referring to organs established by law to entertain cases of labour disputes and thereby render binding decisions on the disputed issues. Since courts are inherently empowered to adjudicate disputes of all kinds, so too, for labour disputes. By no means should courts be utterly deprived of adjudicating disputes of any kind, as letting them otherwise would defeat the very purpose and reason which they are established for. Though the special nature of labour dispute and the need to deal with then according; calls for the establishment of a special organ like the Labour Relations Board, the resolution of certain kinds, and level, of labour disputes through court adjudication remains to be effective in everywhere else having a sound labour relations policy.

Our law, thus, recognizes for the establishment of labour courts within civil courts at various level across the country. Accordingly, we have three levels of labour courts established at regional and federal level through out the country. These are

i) Labour Division of Regional First Instance (woreda) court
ii) Labour Division of Regional Appellate Court (high Court)

iii) Labour Division of Federal high Court (Regional Supreme Court)

Now we are going to see briefly the rule and jurisdiction of those three levels of labour courts in the resolution of labour disputes.

I) Labour Division of Regional First Instance (woreda) Courts

The labour divisions of regional first instance courts are deemed to be established at woreda level throughout all the regional states of the country. So that we can have many labour courts of this level in every regional state depending upon the number of woredas a region is comprised of. Coming to matters of jurisdiction, as per article 138(1) of the Labour Proclamation a labour court established at this level shall have an exclusive first instance jurisdiction to see and thereby render binding decisions on all cases of individual labour disputes, in particular disputes relating to matters such as:

- Disciplinary measures including dismissal
- Claims related to the termination or cancellation of employment contracts
- Questions related to hours of work, remuneration, leave and rest day
- Questions related to the issuance of certificate of employment and release
- Claims related to employment injury

- Unless otherwise provided for in this proclamation, any criminal and petty offences under this same proclamation.

As can be seen from the above provision, any party involved in a dispute regarding one of such matters or all other matters of individual labour disputes may take his/her case before the woreda court for a binding decision. The woreda court is expected to render decisions within sixty (60) days from the date on which the case is loged. A party who is not satisfied with the decision of the woreda court may, however, appeal to the Labour Division of the Regional Appellate /high/ Court within thirty (30) days from the date on which the decision was delivered (as per article of 138(3) of the labour proclamation). Unlike decisions of the Regional High Court, any decision given by the woreda court is appealable. To sum up, the labour division of the woreda court exclusively assumes first instance jurisdiction over all cases of individual labour disputes. This does not, however, mean that the law requires all cases of individual labour disputes to be resolved only through courts. As indicated earlier within this unit, all kinds of labour disputes, with no exception to individual labour disputes, can be resolved through the amicable settlement mechanisms such as conciliation, mediation or arbitration so long as both parties agree to that effect. Thus, individual labour disputes may be resolved through the woreda court where one of the parties to a dispute wishes to that end. But, unlike certain cases of

collective labour disputes discussed earlier, there is no condition precedent to take any individual labour disputes before such a court. This is to mean that any party to such a dispute who seeks for court adjudication is left free to take his /her case before the woreda court whether or not other voluntary settlement mechanisms have been tried before.

II) Labour Division of the Regional Appellate /High/ court

As the name by itself implies, the Labour Division of the Regional Appellate /high/ Court primarily assumes jurisdiction to hear and decide on appeals submitted from the labour division of the regional first instance /woreda/ courts in accordance with article 138 of the labour proclamation. In addition, the regional appellate court is empowered to entertain dispute with respect to objections on questions of jurisdiction as per article 139(1) (b) of the proclamation. In other words, the court has jurisdiction to hear and decide on a case brought by any party on the basis of objections on jurisdiction assumed by any of the labour dispute resolution machineries (such as the labour Relations Board, the regional first instance courts or the conciliation machinery appointed by the Ministry) which are empowered to entertain labour disputes by virtue of the labour proclamation.

Moreover, the regional appellate /high/ court is also empowered to here and decide on appeals regarding certain matters decided by the Ministry and other organs as enumerated under article 139(1)(c-f) of the proclamation. Just like the woreda court, the regional appellate court is required to give its decisions within sixty (60) days from the date on which the appeal is loged. But, unlike the woreda court, all the decisions of the regional appellate court are final and not appealable further more.

III) Labour Division of the Federal High Court

Dear distance learner, as you remember from the previous discussion on the role and functions of the Labour Relations Board, the Board is exclusively empowered with judicial settlement authority to entertain all cases of collective labour disputes. As you can also remember from that discussion, appeal against the decision of the Board on such matters is permitted only where an aggrieved party has objection with respect to the Board's interpretation or application of the law that could materially affect the ultimate decisions of the Board. As per article 140(1) of the proclamation the Federal High court is, therefore, empowered to hear and decide on appeals only against the decisions of the Board on questions of law materially affecting the final decisions of the Board. Thus, you

must note that the Federal High Court has the power to hear and decide on appeals against decisions of the Board only on questions of law materially affecting the decisions of the Board, and not on other matters such as findings of facts made by the Board. The court is required to give its decisions, any ways, within thirty (30) days from the date on which the appeal is loged. And, the decision of the court is final and not appealable furthermore, like that of the regional high court. As opposed to its predecessor (i.e. proclamation No. 42/93) that deprived the court of the power to uphold, reverse or modify the decision of the Board, the current labour proclamation empowered the Federal High court to uphold, reverse or modify the decision rendered by the Board. Hence, after examining the decisions of the Board in which questions of law are claimed to exist, the court can uphold, reverse or modify the decisions of the Board.

Review Questions

1. As you remember from the previous discussions the recognized labour disputes resolution mechanisms under our law can be broadly categorized in to the amicable and judicial dispute settlement mechanisms. Though industrial actions can also be taken as one sort of labour dispute resolution mechanisms, we have treated them separately due to its peculiar features. And the question here is what are the distinctive features or criterions to categorize the labour dispute resolution mechanisms in to the amicable and judicial settlement mechanisms?

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2. What do you understand about the concepts of conciliation and/or mediation from the previous discussions on these concepts? Are they referring to the same mode or two distinct modes of dispute resolution?

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3. What are the differences and similarities between arbitration and adjudication through the judicial settlement organs? Make a brief list of the two.

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4. From the discussion under the last unit of this module, you have seen that legislative provisions may provide conciliation as compulsory procedure, particularly to resolve certain kinds of labour disputes. Similarly, by making conciliation as condition precedent to some other modes of dispute resolution, the labour proclamation provides few instances where conciliation may be regarded as compulsory. For what kinds of labour disputes and or instances may conciliation be regarded as compulsory under our law? Or, when do we say conciliation can be considered as compulsory under our law?

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5. Dear distance learner let us take you back to question No.5 of the review questions provided at the end of unit five. In the hypothetical case mentioned under this part, who do you think, shall be the appropriate organ legally empowered to adjudicate the dispute in the case?

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6. As you remember from the discussion in the last unit, certain dispute settlement organs (mechanisms) are taken to be efficient and effective to resolve a particular

kind of labour dispute. Accordingly, among the judicial labour dispute settlement organs (mechanisms) discussed before, which organ is deemed to be efficient and effective for individual labour disputes? And what about for collective labour disputes?

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7. In the process of labour disputes resolution, what are the major procedures to be followed by the Labour Relations Board? Discuss the functions of the Board briefly beginning from case hearing to decision making.

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8. “As compared to the federal high court, the labour division of the Regional appellate court has a wider role in the resolution of labour disputes" do you agree with this assertion? Why? Try to answer in particular, by comparing the role and jurisdiction of the two courts as provided in the Labour Proclamation.

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