Exclusion of Managerial Employees from Ethiopian Labor Law in Light of Some ILO Standards

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Introduction

Ethiopian labor law applies to employment relations emanating from contract of employment concluded between a worker and an employer as defined by the law in question. However, it is not all employment relations that are governed by the law. For some policy considerations certain category of workers are excluded from its ambit. These include, among others, domestic workers, public servants and management personnel.

This essay centers on the exclusion of the managerial employees of private sector that comprises workers vested with powers such as to lay down and execute management policies, to hire, transfer, suspend, layoff, to take disciplinary measures against employees or to recommend measures on managerial issues.

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For the purpose of Ethiopian labor law individuals entrusted with one or more of the above activities are managerial employees and hence denied labor law protection of basic work rights as enshrined under the law in question. Thus, there are no legal protections *inter alia*, to their right to organize, collectively bargain and the right to strike. Consequently, they are viewed as employees –at- will, who can be disciplined or dismissed with out good cause. Such a problem is not unique to least developed states like Ethiopia. In advanced nations alike, particularly in USA and Canada concerns pertaining to exclusion of management staff are being voiced. In the US, for instance, from 33% of the private work force excluded from the coverage of National Labor Relations Act, managers and supervisors account half[1]

The purpose of the essay is, therefore, to explore the main reasons underlying such exclusions and critically assess whether it is justifiable when seen in light of the

[1] Paula B. Voos, Expanding voice for Professional and Managerial Employees, Paper for Labor and Employment Relations Association Annual Meeting, Dec 2005, p 2

relevant ILO Conventions which are binding on Ethiopia, and see whether such exclusion constitutes violation under the aforementioned instruments. In assessing the compatibility of the exclusions with relevant international norms, we will confine ourselves on the most fundamental rights of workers –the right to organize and collectively bargain, in recognition of which they form part of ILO Declaration on Fundamental principles and Rights at work which is binding on any ILO member states regardless of ratification of specific conventions on freedom of Association and collective bargaining. The paper contains 3 sections. The first section deals with major arguments for exclusion. Here, we will briefly and critically evaluate major arguments forwarded in support of exclusion of the managerial employees from the ambit of labor law.

The second section is devoted to the discussion of the issue whether the exclusion constitutes breach of international obligation assumed by Ethiopia. In particular, attention will be paid to the conformity of such exclusions with the Right to Organize and Collectively

Bargain as recognized under ILO Conventions NO.87and NO.98.

Finally, the last section windups the paper with conclusions and recommendations.

Section One: Justifications for the exclusion of Management Employees from Ethiopian Labor Law

1.1 Who are managerial employees?

Under part one of the Ethiopian labor proclamation No.377/2003 the term employee' is understood in such a way that some workers are granted the protection of the proclamation while others are either out rightly or conditionally excluded from scope of the law under consideration. Managerial employees are among those who are out rightly excluded. Before directly embarking on the exclusion of managers under Ethiopian labor law, it is imperative to define managerial employees- which employees are considered as managerial employees under Ethiopian labor law?

In order to establish who qualifies as managerial employee under Ethiopian labor law at least two approaches, which have long been employed by Ethiopian parliament while excluding same, can be identified-namely the structural approach and the functional approach. The structural approach, as the name indicates defines managerial staff by focusing on the structure of a given enterprise. Here the center of attention is on the post, as opposed to the functions (job descriptions) attached to it. This approach was typical of previous Ethiopian labor proclamations and particularly the one during the dergue regime.[2]

The functional approach, on the other hand attaches importance to the activities one is entrusted with, irrespective of his position in the structure of an enterprise. Thus, a person exercising any or many those activities listed by law as managerial functions will be deemed as managerial employee.

[2] See Article 2, Proclamation 64/75.

The current Ethiopian labor law, proclamation No.377/2003 and its amendment proclamation No 494/2006 adopt the functional approach. Consequently, the law lists those activities the engagement of which qualifies one as managerial employee.

Article 2(1) of the labor amendment proclamation provides that:[3]

This proclamation shall not be applicable to the following employment relations arising out of a contract of employment:.....c) managerial employee who is vested with 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 legal service head who recommend measures to be taken by the employer regarding managerial issues by using his independent judgment in the interest of the employer.

According to this provision, any worker who engages in one or more of the enumerated activities is a managerial

[3]Article 3 (2), Proclamation No 337/2003, cum Article 2(1) of the Labour Amendment proclamation No 494/2006.

employee and will no longer receive the protection of the proclamation. Nonetheless, determining the elements of the above provision so as to draw a line as to who is and/or is not a managerial employee may not be a simple task. This is not only because the way the provision drafted is extremely vague but also because of lack of jurisprudence. Consequently, we will try to show possible interpretations. From the close reading of the above provision three categories of workers may qualify as managerial employees and hence excluded from the coverage of the law These are:

1) Individuals entrusted with the power to lay down and execute management policies short of those described here in under category two. Under this group is any worker who is responsible for not only the formulation of management policies but also execution of same. In other words, the power to formulate management policies alone is not conclusive to establish who managerial employee is. Thus, mere set up of management policies may not qualify one as a managerial employee provided however that this is not related to recommendations communicated to the

employer on managerial issues (see category three below)

In doing so, one may say the law seems to limit the scope of this provision so that workers who are vested with the responsibility to set up managerial policies without the power to execute them would not be regarded as managerial employees and hence remain protected. Yet, when one stresses on the meaning of `management policies , it is easy to imagine that quite a lot of workers can be excluded. The law does not define what constitutes management policy' thereby opening a room for broader interpretation that may eventually leave more workers unprotected. In other jurisdictions such as the US while excluding managers (supervisors) the relevant law , instead of using catchall phrases like 'management policies' appropriately opts for enumeration of specific activities. Thus, US National Labor Relations Act (NLRA) lists ten supervisory

(managerial) activities the engagement of which qualifies exclusion from the NLRA.[4]

2) Individuals with authority to hire, transfer, suspend, layoff, assign or take disciplinary measures against employees. Here the law provides six activities the engagement of which denies a person the benefits of the labor proclamation. Under this category it suffices that a person is vested with either of these activities. Thus, if an individual is entrusted with one of the aforementioned tasks, he is no more the subject of Ethiopian labor law.

Nonetheless, the question who exactly is covered under such exclusion is compounded with several problems. Among these are: should independent judgment be a requirement while exercising the aforementioned tasks?

[4] The Taft-Hartley Amendments to NLRA defines a supervisory as: any individual having authority ,in the interest of the employer ,to hire ,transfer, suspend ,lay off, recall ,promote ,discharge, assign, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action ,if in connection with the forgoing the exercise of such authority is not of merely routine or clerical nature but use of independent judgment.

If so, what degree of independent judgment be exercised for one to qualify as managerial employee? Is the list exhaustive particularly when seen against the phrase `....with or with out the aforementioned power....`in the above quoted provision?

Though the purpose here is not to comprehensively discuss what constitutes managerial employee, it would be appropriate to say few words on the preceding questions. To begin with, the labor proclamation seems, unlike legal service heads whose discussion is the subject of category three below, to attach no qualification as to the exercise of listed activities. The proclamation with respect to legal service heads requires that the later, to qualify exclusion should, among others, exercise independent judgment.

Under Ethiopian labor proclamation individuals who exercise one of the listed activities even with detailed management guidelines limiting the exercise of managerial authority can still be considered as managerial employees. Consequently, it can be seen

that broad range of workers can be excluded as managerial employees and therefore denied the benefits of the proclamation.

3) Legal service heads who with independent judgment and in the interest of the employer recommend measures regarding managerial issues. The exclusion under this category pertains to legal service heads as opposed to managers proper. Managerial status here depends on whether an individual possess authority to recommend in matters and in manner provided by the labor proclamation. In particular, to determine managerial status at this point, four basic questions can be posed. First, does a worker head the legal service of the undertaking?, second , does he have the power to recommend on managerial issues? Third, does he exercise such power in his independent judgment? Fourth, does he hold it in the interest of the employer? Should the answer to the preceding questions be all in the affirmative, such an employee is a managerial employee and there fore is not entitled to receive any protection under the proclamation. Thus, those who use

independent judgment in effectively recommending discipline qualify under this category[5]

Despite the above guidelines (questions), determining whether a worker exercises the power to recommend in his independent judgment and in the interest of the employer seems open to varied interpretations and should be seen on case-by-case basis. In the US for instance, while the Labor Relations Board ruled that employees did not use independent judgment when they exercise ordinary professional and technical judgment in directing less skilled employees to deliver service in accordance with employer's specified standards; the Supreme Court rejected such interpretation of the Board by saying that the nature of judgment whether professional or technical or experimental doesn't determine whether a judgment is independent [6]

[5] Statutory exclusions, outline of law and procedure 2005, p.11 available at www.nlrb.gov/nlrb/legal/manuals/, visited on 12/07/06

[6] NLRB v. Kentucky River community care, Inc,532u.s 706(2001)

In a nutshell, workers that fall in either of the above discussed categories, i.e. those who have the authority to exercise those managerial activities in a manner defined by the proclamation may not claim labor law protection. However, since such statutory definition or guidelines may not be adequate to establish the question who qualifies managerial employee secondary indicia that can serve as complimentary evidence in determining the question of managerial status have been developed. These include the ratio of managers to employees, differences in terms and conditions of employment, attendance at managerial meetings.[7]Thus, the fact that an employee has better terms and conditions of employment ,that he /she attends managerial meetings though not conclusive ,indicate some thing as to the managerial status of such worker.

[7] Supra at note 3,p.211-212

1.2 Why exclusion?

Freedom to form and join a union has been recognized as a basic human right by UN and its member states since the adoption of UDHR. The international significance of freedom of association and the right to collectively bargain which was recognized by ILO, has been reaffirmed as one of the four work place rights so universal and fundamental that they must be honored by all states irrespective of ratification of relevant ILO Conventions.[8]

Yet, it is not uncommon to observe sizable number of workers being denied protection of their right to organize and collectively bargain. Most often, excluded from labor law coverage and consequently denied the guarantees provided under same law are public servants, domestic workers, managerial personnel, agricultural workers.

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[8] Block, Richard, and others, *Justice on the Job: Perspectives on the erosion of Collective bargaining in the United States*, W.E Upjohn Institute for Employment Research,Kalamazoo,Michigan,2006, p.1

In Ethiopia, all of the above exclusions but agricultural workers apply. Here one may wonder why these categories of workers are excluded from receiving labor law protections. Advocates of exclusion by advancing several arguments try to justify such exclusions. Under this contribution, however we will first briefly deal with arguments propounded in support of exclusion of one of such categories of workers-the management personnel. Then we shall evaluate the plausibility of such arguments.

To begin with, several arguments have been forwarded in support of exclusion of managerial employees from the scope of labor law. Nonetheless, we will focus on the glaring and frequently advanced ones.

1. Dual loyalty impossible

The argument that relates to the duty of loyalty of managers can be viewed from two angles-from perspective of the employer and the union (workers). From the employer perspective, supporters of exclusion vehemently argue that managers, 'as part of their job

owe undivided loyalty to the employer [9] Extending managerial employees same labor protection as an ordinary worker implies, among others, that they can join trade unions which eventually `may take away or divide that loyalty` in the event where the union and the management have different interests.[10] The whole argument here boils down to the idea that since it is not practicable for the manager to put on` two hats` at the same time-one for the employer and the other for the union, it would be both logical and a matter of necessity to exclude managers from labor law and joining trade unions. This argument, which seems the main justification for Ethiopian parliament to deny the guarantees of labor law to managers, is mainly advanced by employers.

From the union angle, it has been maintained that managers lack homogenous interest with other workers.

[9] Voos,Paula, Expanding Voice for Professional and Managerial Employees, Paper for Labour and Employment Relations Associations Annual meeting, Rutgers University, Dec .2005,p.3

[10] Ibid

They, as representatives of the employer, the argument goes, are closer to the employer than to the workers. As a result, providing those labor law protections and letting them join trade unions would adversely affect the interest of the union. Advocates of this argument claim, affording labor protection to managerial employees not only runs counter to the autonomy of the union but also would render the union a `toothless dog`

2. Managerial employees have strong bargaining power

It has been said that unlike ordinary workers, Managerial employees posses strong bargaining power. They are not only well paid but also allowed to enjoy wider autonomy and discretion as regards to their work. Historically, the advocates of the argument say, labor law has been there to protect the weak. For them labor law is an affirmative action to the weak-(i.e. the ordinary workers). From this it follows that, Managerial employees who indeed possess strong bargaining power should not be afforded the same protection with ordinary workers and hence their exclusion is justifiable. This argument assumes that individual Managerial employees can

effectively bargain with the employer concerning terms and conditions of employment thereby rendering the need to collective bargaining insignificant. Related to this is the argument that says since Managerial employees can avail themselves of general protections by law, there is no need to establish special labor law guarantees.

Such was the position of the Canadian government when Managerial employees challenged their exclusion from the labor code before the Committee on Freedom of Association: the Government states: [11] the legal provisions and the procedures applicable to the complainant associations are in conformity with Conventions Nos. 87 and 98; that, although managers are excluded from the general system in place established by the Labour Code, they are nevertheless covered by a structured system allowing them to exercise their freedom of association, i.e. the recognition of the right to associate and to establish their employment conditions; that they enjoy adequate

[11] Committee on Freedom of Association Report, Report No.335,Vol.LXXXVII,2004,SeriesB,No.3 para.458

protection against acts of domination and interference by employers; and that it is not necessary to establish a special disputes settlement procedure for the managers concerned.

So far, we have discussed major arguments advanced in support of exclusion of managerial employees from the scope of labor law. At this juncture, the central question that warrants close scrutiny pertains to the plausibility of such arguments. To what extent are the above arguments tenable? As has been discussed in the preceding section, one of the justifications for exclusion of Managerial employees relates to the duty of loyalty. It has been said that Managerial employees if allowed to benefit from labor law and join trade unions it would be impossible for them to deal with two conflicting interests –the interest of the employer, on the one hand and the interest of the union ,on the other hand. Such argument is, however, open to several criticisms:

First, the argument seems to ignore the realty in that no manager is entirely loyal to the company and the

company alone[12] In this regard, it has been said that: ` [managers] are also loyal to themselves, to their families and often to a variety of others like their workgroups, or department, community, religion, and so forth. All of us juggle multiple commitments in complex lives`[13]

Second, it fails short of recognizing the fact that decisions in trade unions are made by majority and are not left for Managerial employees which in turn renders managers` perceived pressure on workers less likely. After all, managers share so much with workers than with the employer.

Third, practice in developed nations particularly in Western Europe shows that managers not only enjoy labor law protections but also are allowed to join same trade unions with other workers. According to one study, almost in all Western Europe, managers enjoy the right to organize and collectively bargain. In Scandinavian countries such as Sweden managers are covered by

[12] Supra at note 8,pp. 3
[13] Ibid

collective bargaining agreements and it is only top executives that are not eligible for union representation.[14]

Fourth, research disapproves the allegation that managers are not capable of discharging` dual loyalty` As has been shown by Angle & Perry managerial employees are capable of `dual loyalty` and often they are committed to the union and the company[15].Represented managers, `in strike situations crossed picket lines with the blessing of the union when their labor was essential [and] they continued to discipline subordinates when it was necessary, even up to the point of participating in grievance arbitrations...`[16]

From this it follows that the assertion that managers are not able to perform their `double loyalty` ,which often advanced as a major justification to exclude them from Ethiopian labor law doesn't hold water. Here one may

[14] Ibid
[15]Harold, Angel and James, Perry,Dual Commitement and Labor–Management Relation ships Climates,Acadamy of Management Journal,Vol.29,No1,1986,pp31-50
[16] Ibid

argue that the experience in Western Europe will not work for countries like Ethiopia with different economic, political, social contexts. However, such assertion would not be compatible with the underlying concept of universality of human rights. Work rights such as the right to organize and collectively bargain are among those basic human rights so universal that all states irrespective of differences in level of development must observe. More over, the experience is not just limited western Europe; in Africa alike such as in South Africa and Namibia managers get protections of labor law.[17]

Finally yet importantly, even if one admits the assertion that managers may not discharge double loyalty, this may in no way justify their total exclusion from the benefits of labor law. Rather it may lead one to apply what I call `purposive exclusion`-exclusions made in the event where the perceived conflict of interest is likely to arise -more specifically exclusion for union /collective bargaining purposes.

[17] Readers are advised to refer the respective Labor laws with their amendments.

The second justification for exclusion of managers from the scope of Ethiopian labor law has to do with the bargaining power of managers. As has already been noted, advocates of exclusion maintain that managers, since they possess strong bargaining power based on which they can assert their rights, should not benefit from the protection of labor law. This, however, does not seem plausible. In the first place, the fact that Managerial employees can help themselves without the protection of labor law appears to be highly theoretical. In practice, it is not uncommon to see managerial employees at the mercy of the employer; being subjected to arbitrary dismissal and discipline. Here there seems to exist misconceptions and generalizations as regards to manager's powers.

Secondly, contractual arrangements, in particular individual bargaining, as it entirely depends on the will of the employer cannot be relied upon. The effectiveness of individual bargaining depends not only upon the willingness of the employer but also on the bargaining

power of the individual manager. Consequently, without protection of the rights of the manager by law, it would be hardly possible to enforce basic work rights of managers such as the right to organize and collectively bargain.

The Committee on Freedom of Association in handling complaints of managerial employees of Canada enunciates that:[18]

As regards the recognition of the associations and of their right to bargain collectively, the Committee notes that, under the current system, the complainant associations do enjoy a real form of recognition by their respective employers and participate in the elaboration of their members' employment conditions. These contractual arrangements, therefore, constitute an embryonic form of legal recognition, but one which is not enshrined in a legislative text. The examples given by the complainant associations demonstrate that this recognition is precarious, that it varies among different employers and workplaces, and that working conditions are not codified in real collective agreements accompanied by the relevant rights and guarantees. The precariousness of this

[18] Committee on Freedom of Association ,Supra note 10, Para.465

situation and the uncertainty which it creates in labour relations result from the absence of real legal recognition, within the meaning of the Labour Code, of managerial personnel as "employees" and of their associations with all the rights that would accompany such recognition.

Most important of all, leaving basic human rights such as the right to organize and collectively bargain exclusively to contractual arrangements would be at odd with the notion of universality of human rights. In criticizing, US labor relations one writer says:[19]

The concept of human rights has never been an important influence in making US labor law or policy. Workers are considered to have only those rights set forth in specific statutes or collective bargaining contracts, [which] are subject to shifting political and bargaining power. That contrasts sharply with the understanding that human rights are a species of moral rights, which all persons have equally simply because they are human, not because these rights are earned or acquired by special enactments or contractual agreements.

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[19]www.american**rights**atwork.org/docUploads/grosspaper, A Logical extreme: proposing human rights as the Foundation for Workers rights in the U.S,pp.3,visited on 12/7/06

From the forgoing discussions it follows that none of reasons forwarded to exclude managerial employees from the scope of Ethiopian labor law seem adequate to justify denial of labor law protection.

Of course, on the other side of the story, it may be claimed that managers are not left unprotected for their case is being entertained as per the provisions of the 1960 Civil Code of Ethiopia. For lack of any up-to-date law governing Managerial employees, Ethiopian courts often have recourse to the provisions of the Civil Code. For instance, in one case[20] the Cassation Bench of the Federal Supreme Court whose decisions are made to bind the lower courts[21], handed down a judgment that entirely denies managers reinstatement or reengagement where their contract of employment is terminated unlawfully- with out good cause. The Cassation Bench grounded its decision on the obsolete provisions of the Civil Code (Articles 2573 and 2574),

[20] *Arsi Agricultural Enterprise vs Solomon Abebe*, File *No. 15815, Tahsas 10 ,1998.*

[21] Article 2(4) of the Federal Courts Proclamation Reamendment Proclamation No.454/2005.

which in effect authorize the employer to dismiss workers without good cause just by paying a maximum of 6 months wage. Here, the court endorses the position of this law even at a reduced protection (it fixes the amount due to managerial employees at three months wage) and binds lower courts to do the same. From the forgoing, it can be seen that managerial employees made at-will employees who can be dismissed with out any good cause. As such, the provisions of the Civil Code under discussion, which are far behind the developments of labor law, not only fail short of alleviating problems managerial employees are facing but also put employment security of such workers at the employer's whim, which ultimately encourages the employer to dismiss managers arbitrarily and unlawfully.

Section 2: Compatibility of Exclusion with some ILO Standards

2.1 General remarks

Before directly embarking on the compatibility of exclusion of managerial employees from Ethiopian labor law with some international standards it is believed that spending few words on the domestic legal order would give proper insight into the problem of exclusion. At this juncture, it seems quite appropriate to see whether the exclusion of managers from Ethiopian labor law has some constitutional basis.

The Constitution of Ethiopia not only guarantees every one freedom of association[22]but also makes specific mention of the right to form trade unions and collectively bargain including the right to strike[23] Under the constitution, every worker has the right to organize and collectively bargain, including the right to strike. The only qualification one can find under the constitution as

[22] Constitution of the Federal Democratic Republic of Ethiopia, Fed-Nega gazette, No.1, 1995, Article 31.
[23] Id., Article 42(1)

regards to the right to organize and collectively bargain is with respect to workers `whose work compatibility doesn't allow the exercise of the right and who are [beyond] a certain level of responsibility`[24].What does this qualification refer to? Would managers fall under such exception? , are central questions that deserve attention. The qualification though fluid seems to recognize the exclusion of certain categories of workers from enjoying the right to organize and collectively bargain. In particular the phrase ` [beyond, *a contrario* reading of the term `below`] certain level of responsibility `has much to do with managers. Obviously, managers are workers whose level of responsibility forms among the top in an enterprise. Accordingly, it can be said that managers are among those workers whose right to organize and collectively bargain has been curtailed by the constitution. It seems based on this construction that the Ethiopian parliament enacted labor law that out rightly excludes managers from its ambit. Indeed the

[24] Ibid

constitution further authorizes law be enacted so as to implement the right as recognized under it.

Accordingly, part eight of the labor proclamation lays down procedures for the implementation of the rights under consideration. The proclamation under Article 113 guarantees the right to establish and form associations for both the employer(s) and the worker(s). More importantly, Article115 defines the functions of trade unions and thus trade unions are entrusted with functions ranging from collective bargaining to initiation of law and regulations regarding labor issues[25]

On this account, one may hope that affording such broad functions to workers organizations would play a pivotal role in insuring broader participation of workers in all matters affecting their interests so that workers interests would be adequately protected. Unfortunately, however, such hope diminishes when one comes to learn the fact that several categories of workers including managers

[25] Ethiopian Labour Proclamation, Labour Proclamation No.377/2003,Art.115

are precluded from enjoying the benefits of Ethiopian labor law. In our previous discussion, we tried to show the underlying justifications advanced in support of exclusions of managers and their sustainability thereto. Now let attention be turned to the compatibility of such exclusions with some international standards. The exclusion of managers from the ambit of Ethiopian labor law denies them two highly essential rights: the right to organize and the right to collectively bargain. Under this section, attention will be paid to discussion of the compatibility of exclusion of managers with the right to organize and collectively bargain as recognized by relevant ILO Conventions- Convention No.98 and No.87

2.2 ILO Convention No.87

The major source of Ethiopia's international obligation with respect to labor law lies on ILO Conventions. Ethiopia by ratifying ILO Convention concerning Freedom of Association and Protection of the Right to Organize (ILO Convention No.87) assumed the obligation to ensure that every worker enjoys the right to form and join trade unions. Article 11 of ILO Convention

requires Ethiopia as a ratifying state to give effect to the convention by taking all appropriate and necessary measures to ensure the free exercise of the right to organize by every worker. The obligation arising from the convention is two fold:[26]

Firstly ,the obligation established by international law, according to which the addressee of the convention ,the ratifying state, is obliged to make the provisions effective within its territory. This obligation calls for national legislations, where necessary, to make the provision effective. Secondly, the contents of this convention calls for legislation again where necessary, concerning restrictions on the activities of the state it self; [which] ...aims at the creation of a state-free sphere, a reserved attitude of the state in matters concerning industrial relations.

The obligation here relates both to negative and positive obligations of a state. The state not only should refrain from interfering in the exercise of the right to organize but also should take positive measures such as enactment of legislations that guarantee and ensure the right fully

[26] ILO Principles ,p.71

Yet the option of employing the appropriate method of implementation is at the disposal of every state. With respect to this the Chairman of the Committee on Freedom of Association and Industrial Relations noted that ``the convention was not intended to be `code of regulation` for the right to organize but a concise statement of certain fundamental principles-the member states are free to decide on the method according to which the content of its provisions are guaranteed, either by means of legislation or by non intervention, as long as provisions are guaranteed ``

Though the method of implementation is left for states to choose, it does not mean that such choices are mutually exclusive. Thus, a state may be required to take both negative and positive obligations. One of the regular reports of committee of independent experts on European social charter is instructive regarding the obligation of states concerning the right to organize. The committee explained the obligation of states in this

regard to constitute two separate forms, one negative and one positive:[27]

The implementation of the first obligation requires the absence, in the municipal law of contracting state, of any legislation, regulation or any administrative practice such as to impair the freedom of employers or workers to form or join their respective organizations. By virtue of the second obligation the contracting state is obliged to take adequate legislative or other measures to guarantee the exercise of the right to organize, and in particular to protect workers' organizations from any interference on the part of employers.

Even though the above report was addressed to parties to the European social charter the nature of obligations of states indicated there remains valid for all, the difference lies on the sources such obligations. The source of such obligations for Ethiopia is the ILO convention, in particular Convention No.87 Ethiopia, as a state party to this convention assumes both positive and negative obligations discussed above. Thus, it must

[27] Prondzynski, Ferdinand, *Freedom of Association and Industrial Relations: comparative Study*, Mansell Publishing Limited,London,1987, p.21

ensure that her laws (including the constitution), regulations or administrative practices, among others, are compatible with the convention. Nonetheless, the question whether Ethiopia complies with such obligations remains questionable as one encounters the exclusion of certain categories of workers, including managers from the protections of labor law.

As has been discussed in Section one, for various alleged policy reasons, management staff are not entitled to receive Ethiopian labor law protections. Article 2 of the Convention under consideration provides that `workers and employers without distinction whatsoever, shall have the right to establish.....to join organization of their own choosing without previous authorization.` And, the only possible limitation on the right to organize can be found in Article 9 which stipulates that `the extent to which the guarantees provided for in this convention shall apply to the armed forces and the police shall be determined by national law or regulations`

Although the convention guarantees the right to organize /freedom of association for both workers and employers `without distinction whatsoever` ,it at the same time does allow exclusion of the armed forces and the police which has been justified on the ground that `most countries would not ratify a convention which require absolute freedom of association and organization (with possibly the right to strike) to be granted to those workers ,regarding the responsibility of governments defending the law and assuring the maintenance of public order`[28]

The Committee on Freedom of Association in handling allegations of violations of the right to organize and collective bargaining of managerial employees in Canada observes that: [29]

with regard to the exclusion of managerial personnel from the scope of the Labour Code, the Committee notes that the restrictive definition of the term "employee" effectively prevents managerial staff from forming trade unions in the sense of the Code, with all the strict rights that flow from it, in

[28] ILO Principles . p 65

[29] Committee on Freedom of Association, supra note 10,para.459

particular the right to negotiate collective agreements within the framework of the Labour Code. While noting that managerial personnel can form associations, which enjoy significant prerogatives..., the Committee recalls that the only exceptions permitted by Convention No. 87 concern the armed forces and the police, and emphasizes that this exclusion must be defined restrictively.

Here one can see that the exclusion of workers other than members of armed forces and the police from enjoying the right to organize has no recognition under the convention. Accordingly, the exclusion of managers from Ethiopian labor law particularly in the absence of any similar legal protection to their right to organize and collectively bargain denies them the right to organize and collectively bargain, and is by no means compatible with ILO conventionNo.87 (On the contrary, it can be maintained that in the presence of Article 31 of the Ethiopian constitution that guarantees everybody the right to freedom of association, managers remain protected. Nonetheless, as we have shown earlier, Article 42 of the constitution, the pertinent provision that guarantees labor rights seems to exclude managers from

benefiting core labor rights such as the right to organize, collectively bargain and the right to strike.) Yet, the Committee on freedom of association seems to hold the view that the exclusion of managers from the scope of labor law, which denies them the right to belong the same trade union as other workers, does not necessarily offend the provisions of convention No.87

The Committee in handling complaints of managerial employees of Canada enunciates that:[30]

....noting that the national case law has provided an extensive interpretation of the concept of managerial personnel, the Committee recalls that it is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to form their own associations to defend their interests and, second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a

[30] Id,para.460

substantial proportion of their present or potential membership.

The Committee seems to emphasize on the end in that in so long as managers can form their own associations that enjoy same rights and privileges as other workers' union, exclusion of managers from labor is allowable. However, this construction is open to criticisms.

First, it has little practical significance for the protection of mangers interests. Since the very purpose of exclusion is to limit the right of managers, states may not accord managers` association same rights and privileges as other workers organizations do. Even if, accorded with similar protections as other workers organizations, managers being minorities in an enterprise would not be as effective as they would otherwise be by joining workers organizations (trade unions). Thus, managers union would turn out to be mere associations with no effective right to collectively bargain, strike etc. In particular, such would be the case under Ethiopia law where it recognizes and attaches legal personality only for a trade union with 50% +1 majority of workers.

Obviously, as minorities, managers associations will not receive such recognition and hence have no right to collectively bargain with the employer, among others.

Second, the construction is not consistent with article 9 of Convention No.87, which allows exclusion only to armed forces and the police. Insofar as managers from public sector are concerned, the relevant ILO Convention seems to take different approach. The ILO convention concerning the right to organize and procedures determining conditions of employment in the public service, while generally strengthening the association rights of public service employees, does permit the exclusion of high- level policy making or managerial employees or those whose duties are of a highly confidential nature.[31] Here the fact that while the ILO explicitly authorizes the exclusion of managers of the public sector, refrains from making such authorization as regards managers of the private sector strengthens the

[31] Labor Relations(Public service)Convention, No.151 , 1978 ,Art.1(2)

assertion that the exclusion of the latter is not compatible with the ILO norms.

2.3 ILO Convention No.98

ILO Convention No.98 was intended to supplement and complete the guarantees accorded under Convention No.87 by dealing with two different aspects of freedom of association[32] `` First, it seeks to protect workers` exercise of their right to organize vis-à-vis employees and to protect workers` and employers` organizations against interference by each other. Second, it seeks to ensure the promotion of collective bargaining. The convention, by providing guarantees and procedures protects the right to collective bargaining.

The Convention further requires states parties to take appropriate measures so as to ensure the right to organize and collectively bargain.[33] Ethiopia, a ratifying state to the convention undertakes to ensure that

[32]ILO Principles supra at note ,pp.73

[33] Right to Organise and Collective Bargaining Convention,No.98,Article 3

workers and employers enjoy their right to freedom of association as guaranteed under the convention.

Yet, Ethiopia by denying managers such guarantees as the right to organize and collectively bargain fails to live up to the requirements of the convention. Such failure is detrimental to not only managers but also to employers and the industrial relations in general. With this regard, the committee on freedom of association while expressing its concerns over Canada's interference in collective agreements notes that ` repeated recourse to statutory restrictions on collective bargaining can in the long run only prove harmful and destabilize labor relations ,as it deprives workers of a fundamental right and means of defending and promoting their economic and social interests`[34] Denial of workers' rights such as the right to organize and collectively bargain can have its repercussions on productivity. Productivity is greatly affected by social relations of production. Naturally, workers will endeavor to productivity only where they feel

[34]Philip, supra at note 27, p.67

that their interests are fully protected. In connection to this, it has been noted that:

Work rights embodied in an industrial relations system that promotes collective bargaining and employment and income security encourage more cooperative labor management relations in which workers participate both in decisions about how to improve their firms economic performance and in the rewards in doing so.[35]

The problem would obviously be intensified as regards to the curtailment of the rights of managers who have a leading role in the overall performance of an enterprise.

Section 3: Conclusion and recommendations

The scope of labor law depends on how a particular jurisdiction defines the term 'employee' The way a legal system defines such concept generally determines who does or does not receive the protection of the labor law. The Ethiopian labor law defines the term in such a way

[35]Buchele,Robertand Christiansen Jens "Labor Relations and productivity Growth in Advanced Capitalist Economies", *Review of Radical political Economies*,Vol.31 No.1,,1999, p.2

that certain categories of workers, including managers are precluded from its coverage. This Article sought to address the exclusion of management staff from the scope of Ethiopian labor law. Discussed are the underlying justifications for exclusion and their plausibility thereto, and compatibility of such exclusion with ILO Conventions No.87and No.98, with particular reference to the right to organize and collectively bargain.

The importance of freedom of association of workers in particular the right to organize and collectively bargain as human rights can be evidenced from not only the work of UN Treaty bodies and ILO committees but also from the 1998 ILO Declarations on fundamental principles and rights at work which is binding on any ILO member states. The rights out lined under the Declaration which encompass the right to organize and collectively bargaining are not workers rights *per se* but rights at work ,meaning that they are rights that all persons

possess by virtue of being human and they are rights with particular applicability at work[36]

Similarly, UN treaty bodies particularly Human Rights Committee (HRC) and Committee on Economic, Social and Cultural Rights (CESCR) stressed on several occasions the importance of the right to organize and collectively bargain. For instance, the HRC in its 1999 concluding comment on Chile's periodic report on compliance with ICCPR expressed its serious concern over a Chilean law that imposed a general prohibition on the right of civil servants to organize trade unions and collectively bargain, as well as the right to strike.[37]

More over, the CESCR in its concluding comment on Korea reminded the later that the provisions of article 8 guarantees for all persons the right to freely form and join trade unions for the protection and promotion of their

[36]Devinatz, Supra at note 7
[37]Philip, Supra at note 27, p.68

economic and social interests, as well as the right to strike.[38]

The right to organize and collectively bargain, including the right to strike are central facets of the right to freedom of association and should be honored by states so that workers can defend their interests. Hence, the right should be enjoyed by all, except those limitations permitted under relevant conventions.

Yet, in Ethiopia, manager's freedom to form trade union and collectively bargain has been curtailed by excluding them from benefiting labor law protections and thereby denying them legal protections.

As has already been indicated in section two, the exclusion of managers from Ethiopian labor law and restriction of their right to organize and collectively bargain thereto, cannot be justified by any of the limitation clauses recognized under relevant ILO

[38] Id,p.71

conventions. Consequently, the total exclusion of managerial employees from Ethiopian labor law, in the absence of full protections of their freedom to association – in particular right to organize and collectively bargain runs counter to norms of freedom of association guaranteed under relevant international instruments (ICESCR, ILO Conventions No.87&98). Such exclusion, which prohibits managers from participating in collective bargaining, infringes not only the rights of managers but also the unions' freedom to decide who might be a member. The exclusion, beyond infringing the rights of managers and the freedom of the unions may have its repercussions on productivity of an enterprise. This is precisely because industrial peace, bedrock for productivity, cannot be achieved unless workers' rights are fully respected.

Mindful of the problems of exclusion of various categories workers across the world ILO commissioned a series of country studies on the need of labor law protections and concluded that there has been a world wide decrease in workers' protection. As a result, it

proposed the adoption of promotional instrument, which requires states to clarify which workers are covered by labor law and adjust these definitions in response to changes in employment relations.[39]

Such measure of ILO is blossoming in terms of ensuring the rights of unprotected workers such as managers and Ethiopia needs to welcome such gesture so that those forgotten workers including managers enjoy the benefits of labor law and endeavor for productivity. In particular, it needs to revisit her labor policies. The primarily purpose of labor policy should not be just to increase labor productivity and employer competitiveness; rather` finding a moral basis for human dignity, solidarity and justice for all at work place`, which at the same time guarantee development, must dictate it.[40]

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[39] Benjamin,paul,`Who needs labor law? Defining the scope of labor law protection` ;in :Conaghan,Joanne(eds),Labor law in an Era of Globalization Transformative Practices and Possibilities, Oxford University Press, United states,2002,p.81

[40] www.american**rights**atwork.org/docUploads/grosspaper, A logical Extreme: Proposing human Rights as a foundation for workers Rights in the U.S ,p11,visited on 12/07 /06

Accordingly, to alleviate such problems associated with exclusion of managerial employees under Ethiopian labor law, four options with varying degrees of importance, in order of their importance in terms of guarantying managers' rights, can be identified:

1. To amend Ethiopian labor law so that managerial staff receive the full protections of the labor proclamation as other workers. Thus, managers by joining same trade union as other workers would enjoy all the benefits of labor law as any worker, including the right to collectively bargain and the right to strike. The perceived conflict of interest between employer's interest on the one hand and union's interest on the other , which allegedly may result following managers joining of same trade union with workers is ,as shown in section one ,less likely to happen for managers are capable of effectively discharging `dual loyalty `, among others.

2. As a second option comes the` partial exclusion` of managers from labor law whereby managers maintain

their right to join trade unions and enjoy the benefits thereto, but banned from joining `workers` council` which is entrusted with defined functions that complement but not replace the role of trade unions. This approach typical of many countries such as Germany, South Africa and Namibia has been proved successful. So, recourse can be had to such an arrangement.

3. Related to the second option is the recognition of `purposive exclusion` Managers will remain protected by labor law and could only be excluded for union purposes. They will not be represented in the workers union and yet remain beneficiary of the minimum protections of labor law.

4. The fourth option pertains to maintaining the exclusion but allowing managers to form their own organization that enjoys same rights and prerogatives as organizations of other workers so that they may freely associate, collectively bargain on terms and conditions of employment etc. This option seems consonant with Article 31 of the Ethiopian constitution, which guarantees

every one freedom of association for any lawful cause. Yet, in the absence of implementing law, and most importantly, in the presence of Article 42 of the constitution as it is now (which doesn't guarantee managers rights to organize and collectively bargain, among others), this guarantee (option) will remain less important. Moreover, such an option, given the fact that exclusion of managers under Ethiopian labor law aims at limiting their labor rights in particular- the right to organize and collectively bargain has less practical significance compared to the first option. (See our discussions on section 2.1). Above all, managers` associations even if accorded similar protections as other workers` organizations, would be less feasible for two reasons:

First, even if accorded with similar protections as other workers` organizations, managers being minorities in an enterprise would not be as effective as they would otherwise be by joining workers organizations (trade unions). In particular, under Ethiopia law where it recognizes and attaches legal personality only for a trade

union with 50%+1 majority of workers, managers associations will have less practical significance. Obviously, as minorities, managers associations will not receive such recognition and hence have no right to collectively bargain with the employer, among others. Therefore, managers union would turn out to be mere associations with no effective right to collectively bargain, strike etc.

Secondly, even if one can imagine the situation where managers associations (being minority) got recognition to collectively bargain, this may not work since they constitute insignificant minorities (compared with the task force of an enterprise) whose collective pressure may remain less important and ineffective.