EMPLOYEES WHO MAY NOT STRIKE

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For most employees in Ethiopia the Labour Relations Proclamation[1] has conferred or preserved the right to strike. This right is not an unqualified one under the Proclamation. Only a union may exercise it,[2] and even a union may not do so unless the dispute has been submitted to the Labour Relations Board at least sixty days previously.[3] Subject to these and other conditions, however, the strike is generally recognized in the Proclamation as a proper weapon on labour's side in labour-management relations.

There are two important groups of employees to whom this general principle does not extend. The first are "public servants," a term defined to include virtually all government employees other than those working in profit-making enterprises. The second are employees of enterprises that provide public services such as transportation and electricity.

Public Servants

The position of public servants can be stated easily: They may not strike under any circumstances. This prohibition raises no apparent legal issues of any importance, but an examination of the legal provisions from which the prohibition results is worthwhile for the light that it sheds on the structure of the Labour Relations Proclamation and on the importance of several of its definitions.

The Proclamation does not itself prohibit strikes by public servants. What it does is to exclude public servants from its definition of "employee." That term is defined generally by Article 2(f) to include any "person bound under a contract of employment as defined in Article 2512 of the Civil Code ...." This general definition is followed by the enumeration of four groups of persons who, although working under a contract of employment, are not to be considered employees for purposes of the Proclamation: management personnel, domestic servants, agricultural employees on farms having fewer than ten permanent employees, and public servants.

The exclusion of these employees (in the ordinary sense of the word) from the Proclamation's special definition of employee has a number of immediate consequences, two of which are of concern to us at this point. First, none of these persons may form a union, since the Proclamation defines a union as "an

1 Proc. No. 210 of 1963, Neg. Gaz., year 23, no. 3. The statute initially was promulgated as an Imperial decree, Dec. No. 49, 1962, Neg. Gaz., year 21, no. 18. It was approved by Parliament the following year, with minor amendments, and redesignated Proclamation No. 210.

2 Art. 2(s)(i)(2)A. All references in these footnotes are to the Labour Relations Proclamation except where indicated otherwise.

3 Art. 2(s)(i)(2)D.

organisation ... in which *employees join*."[4] (Emphasis added.) Public servants and the other excluded groups are not barred by the Labour Relations Proclamation from forming organizations to represent them in their dealings with their employers, but no organization that they might form can be regarded as union for purposes of the Proclamation. Accordingly, because the Proclamation allows only unions to conduct a strike, a strike by persons falling within one of these groups would necessarily be unlawful under the Proclamation.

However, "strike" also is a term specially defined by the Proclamation. It is a "temporary cessation of work by the concerted action of a group of *employees*."[5] (Emphasis added.) Since the excluded groups are not "employees," any concerted cessation of work on their part — what one would ordinarily call a strike — is not a strike within the meaning of the Proclamation, and none of the limits imposed on strikes by the Proclamation is applicable. In particular, there is no basis for applying the provision making it unlawful for anyone other than a union to conduct a strike.

So far as these four excluded groups are concerned, it is for most purposes as if the Labour Relations Proclamation had never been enacted. No provision of the Proclamation that is based directly or indirectly on the status of employee is of any effect for them.

The effect of being thus removed from the scope of most of the provisions of the Proclamation is not the same for public servants as it is for the other excluded groups, however. For the others, the effect is to leave them under the provisions of the Civil Code governing the relations between employer and employee.[6] Of these provisions, only one, Article 2581, places any legal limitations on the right to strike. It provides as follows:

> (1) The participation of the employee in a strike shall constitute for the employer good cause for cancellation where the strike has been instigated with the sole purpose of injuring the employer or has been declared unlawful by law or the public authorities.
>
> (2) It shall in no other case constitute good cause for cancellation.

The limitation imposed by Article 2581(1) is not very restrictive. Of the three cases in which the provision applies, only the third — where the strike has been declared unlawful by the public authorities — is of any practical importance at present. Employees seldom if ever strike for the *sole* purpose of injuring their employer; the injury done to the employer by the strike ordinarily is only a means of achieving such other ends as higher wages. As to the second case — declaration of the strike's unlawfulness by law — there appears not to be any such law at present apart from the Labour Relations Proclamation (which does not apply to these excluded groups of employees) and the special legislation applicable only to public servants.

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4 Art. 2(i).

5 Art. 2(q).

6 There appear not to be any provisions of criminal law dealing generally with strikes as such, although a *particular* strike might be unlawful by reason of its object or the methods used by the strikers (such as destruction of company property). For example, the strikers in *the EAL case*, discussed below, were held by a court to have violated Article 499 of the Penal Code and Article 733 of the Code of Petty Offences. See Tadesse Abdi, *Public Service Strikes in Ethiopia*, (unpublished, Faculty of Law, 1967).

In addition, even where Article 2581(1) does apply, it does not forbid employees to strike. Employees who strike under the circumstances enumerated in it are not, at least by force of that provision,[7] subject to criminal penalties or even to a civil order directing them to return to work. They are merely subject to dismissal without the compensation that would otherwise be due to them and, if the strike constitutes a breach of the employment contract, liable to the employer for the damage caused by the strike.[8]

The case is quite otherwise for public servants. In this and other respects they are governed by special legislation, the 1961 Central Personnel Agency and Public Servants Order and the regulations issued under it in 1962.[9] Article 83 of the regulations flatly forbids public servants to engage in concerted refusals to work. For public servants employed in profit-making enterprises this prohibition probably was implicitly repealed by the Labour Relations Proclamation. Those public servants are not excluded from the Proclamation's definition of employee and therefore may form organizations having the rights given to unions by the Proclamation, apparently including the right to strike.[10] For the great majority of public servants, however, the prohibition still stands.

Employees in Public Services

The right to strike of public service employees is restricted by the Labour Relations Proclamation itself. The controlling provision is Article 2(s)(i)(2)G, which makes it an "unfair labour practice" — and therefore unlawful[11] — for employees or a labour union to conduct a strike that is

7 Article 2581(1) is applicable because the strike has been declared unlawful by law, that law may carry its own civil or penal consequences. However, if it is applicable because the strike has been declared unlawful by "the public authorities," it seems that no civil or penal consequences (other than the application of Article 2581(1)) could follow unless the declaration was made pursuant to a statutory authorization that provided for such consequences. Indeed, it may even be questioned whether it was intended that Article 2581(1) itself should apply unless the public authority making the declaration was empowered to do so by some other legislation.

8 Article 2581 appears also to control for employees who *are* subject to the Labour Relations Proclamation, and for them it gives at least a partial answer to an important question left unanswered by the Proclamation: What are the rights of strikers relative to workers that the employer may have hired to replace them during the strike. Article 2581(2) appears to require the employer either to rehire the strikers at the end of the strike or pay them the compensation due to them for a dismissal without good cause.

9 Order No. 23, 1961, Neg. Gaz., year 21, no. 3, and L. Not. No. 269, 1962, Neg. Gaz., year 22, no. 6. The provisions of the Civil Code governing employment contracts are expressly declared to be inapplicable to public servants by Code Article 2513.

10 Article 20(a) allows labour unions to "engage in all lawful activities." While this could be read to leave standing the earlier prohibition of Article 83 even as public servants who are employees for purposes of the Labour Relations Proclamation, it seems more reasonable to read it as allowing strikes by unions in circumstances prohibited by the Proclamation itself. This issue is largely academic in any event, since most or perhaps all public servants working in the government's profit-making enterprises have been excluded from the category of public servant, and thus from the scope of Article 83, by legal notice. See, e.g., L. Not. No. 285 of 1964, *Neg. Gaz.*, year 23, no. 12, doing so for Ethiopian Airlines employees.

11 Art. 28.

> "likely by reasons of the vital public nature of the enterprise concerned or the essential character of the services being rendered, such, as, without limitation, the provision of electricity, water and other public utility services, telephone and telegraphic communications and transportation services, to produce serious public injury."

The meaning of this provision is in one sense quite clear. Strikes coming within the terms of the provision are unlawful, and a strike comes within the terms of the provision if it is likely to produce serious public injury by reason of the importance of the enterprise or the service rendered. The principal question of interpretation that has arisen is with respect to the central issue of "serious public injury." Or, to be exact, the question has been whether that issue *is* an issue when a case under sub-paragraph G comes before the Labour Relations Board. To this question two answers have been given.

The first interpretation: In this author's view, a conclusion that a strike constitutes an unfair labour practice under sub-paragraph G requires two findings of fact *by the Board*. (The reason for emphasizing the last words will appear shortly.) They are: (1) that the strike is likely to cause serious public injury and (2) that the reason for the likely injury is either the "vital public nature of the enterprise concerned or the essential character of the services being rendered." Th second finding is unlikely to cause much difficulty, since almost any strike that would be likely to cause serious public injury would be likely to do so for the reasons stated in sub-paragraph G. The essential inquiry for the Board, under this interpretation, is as to whether serious public injury is likely.

The second interpretation: The other view, which probably has been adopted by the Board, centers on the specific enumeration of certain services, such as transportation, in sub-paragraph G. On this view, their enumeration constitutes a determination *by the legislature* that strikes against such services are likely to cause serious public injury. There thus is generally no need for inquiry by the Board as to whether the strike involved in a particular case is likely to do so. So long as the strike is against one of the enumerated services — and nearly all of the cases likely to arise under sub-paragraph G will involve strikes of this kind — the Board can dispose of the case by relying on the legislature's determination.

Probably neither interpretation does really great violence to the language or purposes of sub-paragraph G, and the second interpretation does have the advantage of rendering unnecessary in most cases a factual inquiry that is certain to be complex in some instances. However, the first interpretation appears to accord more closely with the provision's wording.

Perhaps this point will appear more strongly if the clauses of sub-paragraph G are rearranged somewhat, so that it refers to strikes that are

> "likely to produce serious public injury by reasons of the vital public nature of the enterprise concerned or the essential character of the services being rendered, such as, without limitation, the provision of electricity, water and other public utility services, telephone and telegraphic communications and transportation services."

Thus, rearranged, the provision commences by referring to strikes "likely to produce serious public injury." If the provision stopped at this point there could be no doubt but that it required the Board to make a determination of the likelihood of such injury in each case. What then is the significance of the rest of the provision? Apparently, it further *limits* the scope of the provision by restricting it to strikes in which the serious public injury is likely for particular reasons: either the "vital public nature of the enterprise concerned or the essential character of the services being rendered." It is in the context of this *limitation* that the enumeration of particular services appears. The enumeration does constitute a determination by the legislature, but the determination is that the enumerated services are "essential," not that any strike against them would by definition be likely to cause serious public injury.

Let us take, for example, bus service between Addis Ababa and Jimma, a service provided by a number of different individuals and companies. How should the Labour Relations Board deal with a strike against one of these companies? If we adopt the second interpretation the answer is clear: The legislature has determined that strikes against transportation (as one of the enumerated services) are likely to cause serious public injury. The company that has been struck provides transportation. Therefore, the strike is unlawful under sub-paragraph G.

The case takes quite a different course, however, if we assume that the legislature had determined only that transportation is an essential service and has left the question of likely serious public injury to the Board. A strike against an essential service may or may not be likely to produce serious public injury. To determine whether it would be likely to do so in this hypothetical case, it would be necessary to consider the amount of traffic moving by bus between Addis Ababa and Jimma, the proportion of the traffic carried by the company threatened by the strike, and the ability of the other carriers to absorb the traffic.

Although the position of the Labour Relations Board as between the two competing interpretations has not yet become entirely clear — in part because it has not had to deal with a case as doubtful as the hypothetical Addis Ababa - Jimma bus case — the Board appears probably to have adopted the second interpretation. Two cases involving sub-paragraph G have so far come before the Board, Ethiopian Airlines v. Ethiopian Airlines Union (the EAL case) and General Ethiopian Transportation Share Company, v. General Ethiopian Transport Share Company Union[12] (the General Transport case). On October 20, 1964, the employees of EAL went on strike, stopping the airline's domestic but not its international service. On the same day the Labour Relations Board met in emergency session and gave the following decision:

> "Whereas the employees of EAL did not submit their grievances to the Board in accordance with the Labour Relations Proclamation 210/1963; whereas the EAL's activity is public transportation services; whereas the stopping of such activity produces serious harm to the public; and whereas under Article 2(s)(i)(2)(g) the EAL employees have no right to go on strike under any circumstances; therefore the Board orders:

12 The account of the two cases is taken from Tadesse Abdi, work cited above at note 6.

(1) In accordance with the authority vested in it by Article 12(a) (ii), that the EAL employees shall cease striking and return to their work. . . ."

The General Transport Case arose somewhat more than a year later. The General Transport company operates the municipal bus system in Addis Ababa. Its employees staged a two-day strike in December 1965, totally halting bus service within Addis Ababa. In its decision some months later, the Board stated that

> "the Petitioner Company carries people throughout the Governorates-General of Ethiopia and in the capital city; its function is to provide transportation service. Employees in transportation services are forbidden to strike by Article 2(s)(i)(2)(G) . . . ."

Citing the EAL case as precedent, the Board then held that the employees were guilty of an unfair labour practice.

Taken by itself, the EAL case gives conflicting clues as to the Board's position in interpreting sub-paragraph G. The Board expressly found that the strike was likely to cause serious public injury, which suggests that it had adopted the first interpretation. On the other hand, its statement that EAL employees "have no right to go on strike *under any circumstances*" points in the opposite direction, since it indicates that at least so far as EAL is concerned there is no need to consider the likelihood of public injury in each case.

It is in the General Transport case that we find our warrant for concluding that the Board probably has adopted the second interpretation. First, unlike its decision in *EAL*, the Board's decision in *General Transport* contains no express finding that the strike was likely to cause serious public injury. Second, the Board again described the prohibition in "no-exception" terms and this time did not confine itself to referring to the single company involved in the case before it. It stated simply that "employees in transportation services are forbidden to strike. . ." If this statement can be taken at face value, it reflects a full adoption of the second interpretation of sub-paragraph G.

The Significance of the Limitation

Public servants and public service employees stand in similar positions with respect to the right to strike. Public servants may not strike under any circumstances. Neither may public service employees under the second interpretation of sub-paragraph 6, and even under the first interpretation they are forbidden to strike under many, perhaps most, circumstances. The significance of the limitation is not the same in each case, however. Public service employees, even if we assume that sub-paragraph G constitutes an absolute ban on strikes, stand in a considerably stronger legal position in bargaining with their employers than do public servants, and the difference between their position and that of ordinary employees is considerably less.

Although public service employees are, perhaps, absolutely forbidden to strike, they are otherwise free to take advantage of the rights given to employees by the Labour Relations Proclamation. They may organize themselves into unions, and if a union of public service employees includes a majority of the employees in the

enterprise, the employer probably is under a legal obligation to enter into collective bargaining with it.[13]

These rights are important in themselves. They become more so by reason of the broad powers given to the Labour Relations Board. The role of the Board is in part the essentially judicial one of adjudicating legal rights and duties. Its power to consider complaints of unfair labour practice[14] is in effect a power to enforce the duties imposed by the Labour Relations Proclamation,[15] and its power to arbitrate labour disputes[16] apparently includes the power to enforce the duties that employers and employees have imposed on themselves in their collective agreements.[17] Given the Proclamation's broad definition of labour disputes, however, the Board's jurisdiction over such disputes allows it also to settle bargaining disputes — disputes as to what the parties' rights and duties will be in a proposed agreement.

The Board's power to arbitrate bargaining disputes is at least potentially a partial substitute for the right to strike. A union of public service employees can lawfully threaten a strike in order to obtain concessions from their employer in at most a limited number of cases, but in all cases it can submit the bargaining dispute to the Labour Relations Board. Through the threat to submit the dispute to the Board or through actually submitting it, the union has the prospect of obtaining concessions that go beyond those obtainable by mere argument and appeals to the employer's sense of fairness.

A strong union is not likely to regard this right to go to the Board as a satisfactory substitute for an unrestricted right to strike.

It must be remembered, however, that *no* union in Ethiopia has an unrestricted right to strike.[18] The right to strike is subject to a number of restrictions, of which

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13 This obligation perhaps may be inferred from sub-Articles 22(b) and (d), which impose a duty to "negotiate freely" and "to settle labour disputes by peaceful means whenever possible." The point is hardly beyond dispute, however, since these provisions refer to unions and employers' associations but not to individual employers. It should be noted that the obligation cannot be grounded directly on Articles 26 and 27, both of which deal with the duties of the parties once they are engaged in collective bargaining. The question here is whether they are required to engage in such bargaining, not how they must behave if they do so.

14 Art. 12(a) (ii).

15 A violation by an employee, union, employer or employer's association of any duty imposed by the Labour Relations Proclamation is an unfair labour practice. Art. 2(s) (i)(1) and (ii) (1).

16 Art. 12(a)(i).

17 It has been suggested that Art. 12(a)(i) was intended only to allow the Board to arbitrate bargaining disputes and not disputes as to the terms of existing contracts, but it is difficult to find any basis for this limitation in the Proclamation. Indeed, it would appear from the Proclamation that the Board has jurisdiction over disputes concerning the interpretation of *individual* contracts of employment (unless we can infer otherwise from Article 33). Throughout the area of labour relations it is going to be necessary to determine (1) where the Labour Relations Board has exclusive jurisdiction, (2) where it and the courts have concurrent jurisdiction, and (3) where only the courts have jurisdiction. On the face of it, the Courts and the Board have concurrent jurisdiction throughout the area, except in the matter of arbitrating disputes. Bargaining disputes ordinarily cannot be resolved by the adjudication of rights; they therefore are not an appropriate matter for the courts.

18 The closest thing to an unrestricted right to strike may be that possessed by persons (other than public servants) who are excluded from the definition of employee in the Labour Relationse Proclamation.

the most important has proved to be the sixty-day rule — the requirement that a labour dispute have been submitted to the Labour Relations Board for a period of at least sixty days before the union goes on strike. The effect of this rule is to give the Labour Relations Board the opportunity to arbitrate a bargaining dispute before the union may strike to enforce its demands, and if the Board does arbitrate the dispute within the sixty day period,[19] the union may not subsequently strike, since the strike would then be an attack on the Board's arbitral award and therefore unlawful.[20]

In sum, the difference between the bargaining position of public service employees and that of other employees seems to come down to this: A union representing a group of ordinary employees may strike *if* the Labour Relations Board fails to settle the bargaining dispute within sixty days, but a union representing a group of public service employees may not strike even then. In practice, considering the Board's apparent determination to preserve industrial peace, the contingency on which the former union's right to strike depends is not likely to occur in many cases.

When we turn to public servants we are again immediately confronted by the fact that they stand outside the Labour Relations Proclamation. Because they are excluded from the Proclamation's definition of employee, their employer, the government, is under no legal duty to bargain with them,[21] and the Labour Relations Board has no jurisdiction over their disputes with the government.[22] In place of individual or collective bargaining the Central Personnel Agency Order has provided for the promulgation of uniform pay scales for the entire public service,[23] and in place of the Labour Relations Board the Order has created the Central Personnel Agency, which is jointly responsible with the Minister of Finance for establishing the pay scales.[24]

Superfically the establishment of pay scales by the Central Personnel Agency may not appear too dissimilar from the resolution of bargaining disputes by the Labour Relations Board. In each case a specialized government agency is determining the pay or other labour conditions for certain employees. In the case of proceedings before the Labour Relations Board, however, the legal framework is that of an adversary proceeding. There must be a hearing, of which the parties must be notified and in which they must have an opportunity to be heard.[25] The Board is placed in the position of an impartial arbiter of the dispute between the employer and union.

19 Where the Board is performing a quasi-judicial function, it presumably is under an obligation to hand down a decision: Legal rights are of no value unless the appropriate body is willing to enforce them. It is not clear that it is under any similar obligation where it is called on to arbitrate a bargaining dispute. Arguably in the latter case it might simply tell the parties to work out their own solution.

20 Art. 2(s)(i)(2)E.

21 This conclusion can be reached by several different lines of argument. For example: (1) the government is not an employer for purposes of the Labour Relations Proclamations so far as public servants are concerned, since an employer is defined as "any person who has work done by an employee." (2) Bargaining between the government and an organization representing public servants would not be "collective bargaining" because it would not be between the proper parties for such bargaining (Art. 23) and it would not concern "labour conditions" (Art. 2(c), (d) and (k)).

22 The Board has jurisdiction over "labour disputes" and "unfair labour practices." (Art. 12(a). Both of those terms are defined so as to concern only employers and employees.

23 Central Personnel Agency Order, cited above at note 9, Art. 28(2).

24 *Ibid.*

25 Arts. 14-15.

No hearing is required before the Central Personnel Agency takes action with respect to the labour conditions of public servants.[26] Nor can it be said that the Agency is placed by the law in the position of an impartial arbiter. Its responsibilities in many respects make it more akin to the personnel department of a private employer.

The importance in practice of these differences in law between the Labour Relations Board and the Central Personnel Agency has yet to be seen. The first schedule of pay scales has not yet been officially promulgated by the Agency and Minister of Finance. More important, there appears not yet to have been any serious attempt on the part of public servants to form an organization to represent their interests before the Agency. Until such an organization is formed, it would be virtually impossible to hold a useful hearing on such matters as pay scales even if the Agency wished to do so.

26 A hearing is required in some instances before disciplinary action is taken against an individual public servant. Public Service Regulations No. 1 of 1962, cited above at note 9, Arts. 92 ff. However, none is required for actions affecting public servants generally.