

Addressing Labour Market Flexibility in Nepal
A Study for Policy and Regulatory Reform

His Majesty's Government of Nepal
MINISTRY OF LABOUR AND TRANSPORT MANAGEMENT

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ADDRESSING LABOUR MARKET FLEXIBILITY IN NEPAL

RECOMMENDATION FOR POLICY AND REGULATORY

1. INTEGRATING HRD POLICY WITH LABOUR POLICY

The government's human resources development policy must complement the employment environment in the labour market aimed at reducing employment risks for both the employers and employees.

2. INCORPORATING FLEXIBILITY IN LABOUR POLICY

THE LABOUR POLICY MUST INCORPORATE FLEXIBILITY IN AREAS OF EMPLOYMENT RELATIONSHIP AND EMPLOYMENT TERMINATION, AT THE SAME TIME, ADDRESSING THE NEED FOR SOCIAL PROTECTION.

3. PROVIDING FLEXIBILITY IN LABOUR LEGISLATION

With minimal sections in the labour legislation regarding employment agreement and termination, the scope for flexibility in implementation of the legislation must be accorded through labour rules, regulations and by-laws, etc.

4. EMPLOYMENT AGREEMENTS

The employment agreement for a job should be limited to two kinds only, i.e., time-bound employment agreement and tenure or permanent employment agreement.

5. TERMINATION OF EMPLOYMENT

In lieu of the employment agreements, termination of time-bound employment should be made possible through simple advance notification by either party; while simple and specific provisions must govern the termination of tenure or permanent employment

6. CREATION OF SOCIAL SECURITY FUND

A Social Security Fund should be created by transforming the present Labour Welfare Fund into a central fund with matching contribution from the government, and application and monitoring done by a statutory tripartite body.

7. ACTIVATING LABOUR MARKET INFORMATION SYSTEM

A strong and active LMIS should be established under the Ministry of Labour to backstop a healthy and vibrant labour market, and facilitate risk minimization in the employment environment.

8. CONSTITUTING A LEGISLATION UPDATE TASK FORCE

A task force should be set up to update the present labour laws and incorporating the interpretations of labour flexibility made in the legislation.

OVERVIEW

1. Globalization influences all sectors of the economy including the employment and labour market scenario in the country. Among a host of reforms, economic liberalization in the Nepal has, over a decade, prompted changes in the nature of employment and enterprise development. This along with growing unionization of the labour force has poised before the business community, the trade unions and the government the responsibility to strike a balance between national economic development and social justice to the workers. Global economic integration demands all-round competitiveness of goods and services through innovative products, business processes, work modules, and cost cutting measures. Labour flexibility is seen as a potential panacea for employers to improve efficiency, productivity and profitability in their business.
2. Labour market in Nepal is ailed by a number of compelling factors such as large influx of potential workforce annually in the market, low absorption capacity of the organized sector, growth of informal sector, etc. and the endemic mismatch in the demand and supply of appropriate skills. External migration of skilled and semi-skilled workforce has left the domestic market with surplus unskilled workforce. Employment promotion policy and programs are not supported by proper labour market research.
3. Employers seek discretionary power to 'hire and fire'. They see the present legislation as rigid and restricting their flexibility in responding to changes in the business environment and undermining the efficiency and productivity and thus competitiveness of their businesses. In the face of grave unemployment problem in the country and absence of any reliable support during unemployment, seeking protection against loss of employment or some form of social security by the workers and trade unions is but natural. Termination of employment by the employer, interpreted as labour flexibility, is thus one of the most sensitive issues in labour law today because of its serious social and economic implications. Such conflicting concepts of the employers and employees make the issue even more critical and put pressure on the Ministry of Labour to address this issue in a balanced manner.
4. Conceptually, the employment environment is conditioned by the demand and supply situation across different sectors and occupation in the economy. A combination of high and low demand-supply creates conditions of labour deficit or surplus or balance in the labour market. Labour deficit and labour surplus may be interpreted as potential risks for employers and employees respectively, whereas the ideal situation would be a balanced or 'no risk' situation for either social partner. Labour flexibility has to be seen in this framework.
5. The Poverty Reduction Strategy Paper has emphasized on employment promotion among others as one of the important poverty reduction strategies of the government. The Tenth Plan (2002-2007), as with previous national plans, reflects this development priority, and is also the basic objective of all sectorial policies. National Labour Policy 1999 refers to developing harmonious industrial relations, increasing labour productivity, promotion of bipartite and tripartite consultations, training and skill development as demanded by the labour market to increase national productivity etc. Labour flexibility does not figure specifically in the policy, but the Ministry of Labour and Transport Management is intent on taking necessary measures to make its policy complementary with the country's overall 'openness' focus, especially in the context of its impending accession to WTO.

6. The Labour Act 1992 has provisions for 'hiring and firing' in specific sections related to employment agreement, termination of employment, dismissal, procedural safeguards, severance pay, avenues for redress in case of unjustified firing. The legislation does not recognize the 'employer/management prerogative' nor accord discretionary power to terminate employment as sought by the employers' association.
7. Officials in labour administration put much of the blame for the ineffectiveness of the labour laws and slow reaction to the flexibility issue on the ministry itself, and its weak institutional capability including poor logistics at the operational level. There is also a gap in the perception of policy makers and the field inspectors regarding the flexibility issue. Certain provisions in the present labour legislation have elements of flexibility if interpreted in the true spirit. However, the tendency to by-pass the provisions of the law is mainly due to weak labour administration machinery, rigidity in the law, lack of incentive for employers abiding the law, and many times due to little or no knowledge of the provisions of the law among both workers and employers.
8. Employers lament that Nepal has highly protective labour legislation. The name Labour Act and its very preamble also suggest this. They equate the prerogative to 'hire and fire' workers with the right to make decisions regarding the resources they utilize. They thus perceive the legislation as restrictive and hampering labor flexibility and the productivity of their establishments. They suggest differential laws and provisions for enterprises with differential number of workers, nature of business and trade, and category of enterprise investment; distinction between core workers and non-core workers and application of appointment letters and other provisions accordingly. They also point out a number of deficiencies in the present legislation and suggest changes in provisions related to definition of misconduct, disciplinary procedure, reinstatement and compensation, allowances linked to minimum wage etc.
9. The trade unions believe that, contrary to expectations, privatization in the name of economic liberalization, has only resulted in increased job redundancy in the country. They are thus wary of the arguments of employers and policy makers for labour flexibility as a number of concerns have not been addressed satisfactorily. But they also realize that they need to tune in with the changes in the environment. Their concern is for protection against unjustified termination of employment and social security in the event of job losses. In the backdrop of the bleak employment scenario in the country, their concern is naturally for social justice of the average workers for whom employment is the only means of decent livelihood. The trade unions point to the inefficiency and insincerity of the employers as contributing to their demands for labour flexibility or prerogative to 'hire and fire' workers. They see this demand emanating from bad management practices, reluctance to invest on employees' development and treating employees as expendable commodities.
10. Most countries view unfair and unjust dismissal of workers from their employment as an infringement of the workers' human rights to make a decent living. The protection of this right is reflected variously in the legal system of different countries. It is enshrined in the national constitutions of a number of countries and covered by numerous codes and statutes or regulations on employment, thus underscoring its importance. While criticism and opposition to the principle of employment protection is increasing in some countries, most national and international standards (ILO standards) have maintained the principles. In terms of full employment and poverty alleviation, ILO has set its primary goal to 'promote opportunities for women and men to obtain decent and productive

work, in conditions of freedom, equity, security and human dignity'. Since unjustified and arbitrary dismissals have had dire consequences to industrial relations and the economy of many countries, ILO adopted the Termination of Employment Convention No. 158 in 1982 and its Recommendation No. 166 that lays out specific provisions for standards of general application.

11. Discussion on labour flexibility is not merely about prerogative to hire and fire by employers. It brings forth a number of cross-cutting issues that need to be recognized and addressed. The study has identified the following major issues:
 - a) Surplus unskilled labour
 - b) Sector-wise flexibility
 - c) Rapid growth economic sectors
 - d) Unorganized sector
 - e) Absence of social security
 - f) Contract workers
 - g) Part-time workers
 - h) Gender issue
 - i) Rationalization of organizational restructuring

12. The study has made the following recommendation to address the larger issues vis-à-vis labour flexibility debate. (The highlights are given in the Recommendation page preceding this Overview page.)
 - a) Integrating HRD policy with labour policy
 - b) Incorporating flexibility in labour policy
 - c) Providing flexibility in legislation
 - d) Employment agreement
 - e) Termination of employment
 - f) Creation of Social Security Fund
 - g) Activating Labour Market Information System
 - h) Legislation update task force

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1. INTRODUCTION

BACKGROUND

Since the country embarked on the path of economic liberalization more than a decade ago, a host of policy reforms have been introduced to push the country toward global economic integration. Globalization has influenced or is likely to influence all sectors of the economy including the employment and labour market scenario in the country. The new economic order characterized among others by deregulation of foreign exchange and manpower, and decontrol in establishing most enterprises has prompted changes in the nature of employment and enterprises. With the reinstatement of democracy, right to organize was reinstated as a basic right of the people including the labour force. This right has poised before business community, the trade unions, the civil society and the state the responsibility of striking a balance between economic development and social justice to the workers.

Globalization and micro-economic reforms have ushered in a horde of challenges as well as opportunities before the country's trade and industry sectors. In the ensuing proliferation of products and services from all over the world in the local market, the country's own products and services may have to face stringent competition. Quality as a major determinant of competitiveness of a product considers the cost of the goods and the contribution of the labour as one of the cost components of a product. Employment has thus assumed new dimension in the new economic world order as employers are practicing various forms of labour flexibility in the competition game. A lot of discreet discussions have been making rounds in the country too in this regard.

LABOUR MARKET AND FLEXIBILITY

Employment is a great challenge to and the major concern of policy makers in the country where unemployment and under-employment are persistently at alarming levels. Employment is seen as a vehicle for poverty alleviation in the country. It is the essence of the Tenth Plan (2002-2007) as has been the priority area of previous development plans of the country. The predominant source of employment is agriculture, which is essentially informal and exhibits high degree of flexibility for the workers. The workers are mostly illiterate and unskilled and consist of increasing number of women and children. The informal sector is largely characterized by micro enterprises, are in the unorganized forms. The flexibility discussion thus revolves around a small proportion, less than 10 percent, of total employment in the organized sector.¹

The labour market scenario in the country defies the normal market behaviours that usually reflect demand and supply principles. The labour market in Nepal reflects 'scarcity among the plenty' and the 'mismatch' between the two forces. The mismatch is

¹ "Labour Market and Flexibility" in *Aajako Shram Agenda* (Today's Labour Agenda), GEFONT, Kathmandu, 2002

prompted by a number of factors such as the growth of economically active population, influx of about 300,000 people annually in the labour market, the growth of informal sector, and the low and decreasing absorption capacity of the organized sector. The rural-urban migration, the employment shift from agriculture to manufacturing industries and external migration of skilled and semi skilled workforce etc. are also been responsible for this. Thus there is wide unemployment while many enterprises are not getting the 'right' people. There is also mismatch in the demand and supply of skills and training. The incongruence in the labour market also highlights the ineffectiveness or the lack of objective labour market research regarding the intrinsic demand and supply characteristics of specific subsectors. Despite decades of 'presence' of the labour market research unit in the Department of Labour under the labour ministry, it has done little to monitor and present the realistic labour market positions, shifts in the trends, analysis of demand and supply, and contribute toward proactive labour market policies.

POLICY AND REGULATORY MEASURES

His Majesty's Government of Nepal brought out the Labour Act 1992, Trade Union Act 1993 and the National Labour Policy in 1999 with the expressed intention of developing harmonious industrial relations, increasing labour productivity, promoting bipartite and tripartite mechanism, and institutional development of labour market mechanism etc. It is the responsibility of the Ministry of Labour and Transport Management (MoLTM) to deploy this labour policy and enforce the acts. One of the major challenges for the ministry, especially in the changed economic and political context in the country, is to address the broader issues of labour flexibility together with other employment and labour issues. The National Labour Policy refers to training and skill development as demanded by the labour market to increase the national productivity. It also refers to the institutional development of labour market mechanism to develop the capacity to research national as well as international labour markets.

The labour legislation is largely viewed as being rigid, very discriminatory and overly protective of the workers' employment. The employers cite a number of provisions such as the ones that deal with appointment of workers, contract work, job security, redundancy, disciplinary action procedures etc. There is very little scope for addressing the employers' concern for optimizing organizational efficiency when it comes to streamlining the human resources in the organization. Most of the procedures are seen as being quite cumbersome, which in practice, are harassing when employers have to do numerous rounds of labour offices, the department and the ministry. Termination of employment is viewed very skeptically.

On the contrary, labour officials and trade unions argue that the legislation, in its present form and content, provides ample scope for flexibility in dealing with employment termination. They cite the provisions for lay-off, pay-off, disciplinary actions etc. as examples. Job security is interpreted as social security, which is the overriding concern of the government and a means of ensuring social justice to the workforce in the country. Social security measures in the forms of provident fund, pension, insurance, social welfare fund etc. are in force, and there is a standing policy to establish some form of social security fund although the modality of the latter is yet to be formulated. Unlike

developed countries, Nepal does not have unemployment benefit schemes. Since it also does not have successful strategies to address the bleak national employment situation, it is less inclined to create an enabling environment for labour flexibility.

Contemporary global scenario and the campaign for Nepal's accession to the World Trade Organization have brought the labour flexibility issue to the fore. The business community, with the lead of Employers' Council of the Federation of Nepalese Chambers of Commerce and Industry (FNCCI), is demanding for the right to 'hire and fire'. Setting aside the correctness or otherwise of the terminology used, the essence of the voice of the business community is for the recognition of the employers' prerogative to terminate the employment of their workers as and when necessary. This is a 'managerial' decision they would like to make as of other factors of production. The contention of the employers is that of competitiveness in the global market. Labour flexibility was an issue during a preliminary bipartite social dialoguing exercise at a forum provided by the International Labour Organization (ILO) Nepal office.² However, lately, the FNCCI has not been able to take up the advocacy for labour flexibility so strongly.

JUSTIFICATION OF THE STUDY

There is no doubt that the large-scale unemployment and underemployment situation in the country demands greater job security as one of the main constituents of social security for the labour force. The fear that the move toward increased labour flexibility in the formal sector may result in less security to the workers is not totally unfounded. A balance, therefore, has to be struck between flexibility and security for sustainable economic development and employment growth. It is essential to understand that this balance differs according to the socio-cultural value systems, politico-legal bias, and economic environment of individual countries. In this context, it is important to conceptualize the mode of flexibility appropriate to Nepalese employment environment. Only then can the country be prepared to meet the challenges brought about by the trends and practices of globalization and the path of economic reforms that the country has chosen. Foreign investors are already complaining of rigidity of the labour laws and this is one major issue that is scaring away potential investments in the country. Unless a congenial environment is created, leave alone the foreign investors, even the local business community will find it difficult to implement effective human resource development principles in their respective enterprises. On the other hand, if the concerns of the workers are not adequately addressed, then there is the possibility of resistance to any moves of the employers perceived to threaten their employment.

In this context, the study of the present provisions and practices in labour flexibility, the concerns of the trade unions, employers and the government, and the role and functioning of the Ministry of Labour assumes great importance. It has become all the more urgent to establish a realistic legislation in the spirit of the National Labour Policy and current economic reform policies of His Majesty's Government of Nepal.

² Bipartite social dialogue between associations of employers and workers held on 17 and 19 January 2003 at Hotel Himalaya, Kathmandu. Labour flexibility was one of the seven core issues discussed.

2. STUDY METHODOLOGY

OBJECTIVE OF THE STUDY

The objective of the study is to suggest measures for labour policy improvement in Nepal on labour flexibility issues by conceptualizing the flexibility framework conducive to Nepalese employment environment.

APPROACH

Policy recommendation has been made after conceptualizing a labour market flexibility framework appropriate to Nepalese employment environment. For this, a detailed study has been done on the following topics:

- Situation of labour flexibility environment in terms of existing legal, policy pronouncements and framework, and existing practices in the country
- Opinions and voices of the two complements – associations of the workers (trade unions) and employers (FNCCI) – regarding their concerns and campaign toward labour flexibility
- International scenario – international trends and practices as well as ILO conventions and provisions

METHODOLOGY

Secondary information collection and literature review have been carried out. Relevant Nepalese laws and policy documents specifically the Labour Act, Trade Union Act, Industrial Enterprise Act, National Labour Policy, Industrial Policy and the Tenth Plan have been reviewed to identify the government's pronouncement or accommodation of labour market flexibility. Various ILO conventions having implication on flexibility issue have been studied. Likewise, previous research and study publications and discussion papers on the subject by individual researchers as well as institutions such as the trade unions and FNCCI have been studied.

Interviews were carried out with associations of workers and the employers to get their objective views and assess the opinion being built up on labour flexibility. The interviews covered all three trade union federations namely General Federation of Nepalese Trade Unions (GEFONT), Nepal Trade Union Congress (NTUC) and Democratic Confederation of Nepalese Trade Unions (DECONT). Likewise, members of Employers Council of FNCCI and representative employers of different industries including representation from multinational company were also selected for interview.

A focus group discussion was held with the close participation of labour officers and relevant officials of the Department of Labour and MoLTM to get their views as well as their experiences in dealing with cases related to the issue. The information was utilized

to design a conceptual framework of labour flexibility appropriate to Nepalese labour environment, and to develop policy recommendations for His Majesty's Government in the light of the framework.

SCOPE AND LIMITATION

Termination of employment has economic and social implications and is a sensitive issue in the labour legislation. The study on a sensitive issue such as labour flexibility has been carried out in a very short period of time and is based on assessment of secondary information and largely on interactions with only a select people representing the three social partners. The study has been confined to central level organizations located mainly in the capital.

3. LABOUR FLEXIBILITY FRAMEWORK

GLOBALIZATION AND LABOUR MARKET FLEXIBILITY

Nepal embarked on the economic liberalization as the major force to trigger the country's economic development. Economic liberalization, as a process toward globalization, is seen in two forms: domestic market liberalization and external market liberalization. On the domestic front, Nepal has already deregulated its capital and labour markets, removed price control, and launched the privatization drive. At the same time, it has dealt with the external market through flexible exchange rates, liberalization of foreign exchange, promotion of direct foreign investment, provisions of export incentives and removal of trade barriers. In creating an enabling environment, the government has put major emphasis on enhancing the competitive strength of the private sector. The benefits of liberalization are quite apparent in a number of sectors especially in the manufacturing and financial sectors.

The process of integration of Nepal's economy into the world economy has been gathering pace. This is evident from the fact that from the current observer status, Nepal is likely to enter the WTO sometime during this year. Indeed, there are fears that least developed country like Nepal with small scale of economy would be falling into a trap by joining the WTO. It is argued that Nepal's poor performance in a number of economic indicators compounded by its geo-physical condition, lack of competitiveness in the trade regime, and inability to shed the Indian domination are factors that impede the country from gaining the fruits of globalization. Finding a place in the global market may not be comfortable, but with so much going, Nepal cannot afford to slow down the pace of economic liberalization either.

Conceptually, globalization would mean unhindered movement of capital and other resources including human resources as determined by the dynamics of economic environment. People movement will be determined by global employment market, transcending national boundaries. Nepal has deregulated the labour market per se, which is evident from the fact that large numbers of skilled and semi-skilled youths are migrating for foreign employment in the Gulf countries and South-east Asia. As a matter of fact, one of Nepal's major labour policy imperatives is to promote foreign employment by identifying potential foreign labour markets, training and exporting Nepalese workers. Employment exchange service has been well institutionalized in the private sector with a highly lucrative business in place, as there seems to be no end to people wanting to go abroad. India has always been the traditional and biggest destination for employment for the Nepalese, and the open border between the two neighbours has made this easier. Likewise, a significant number of Indian nationals have gained grounds in the Nepalese labour market.

Unfortunately, despite the labour ministry's deemed responsibility for instituting dynamic labour market information system (LMIS) and a sustainable national labour exchange market, this never developed in the country. A dynamic labour market information system is the backbone of a healthy and vibrant labour market, a means to monitor the

elasticity of demand and supply of employment, the requirements of specific subsectors, the movement of people etc. The LMIS would be a strong basis in the discussion on labour flexibility.

Nepal’s liberalization of the labour market has enabled highly skilled human resources in the technical fields to work in the country. A large number of expatriates are present in the hotel and tourism sector as well as in the infrastructure development projects. Special provisions in the labour laws govern this. But it is the employment of Indian nationals from bordering districts in the formal (manufacturing) sector that has been a concern of trade unions and labour regulatory bodies. Prerogative to hire any people (including non-Nepalese nationals) is being demanded by the employers.

CONCEPTUALIZING FLEXIBILITY FOR NEPAL

The employment environment in any economic level is by and large conditioned by the labour demand and labour supply scenario across different sectors and occupations in that economy. A simple demand and supply matrix at high and low levels (Figure 1: Employment Environment) reveals four employment positions. Quadrant A shows high supply low demand (surplus labour market) and Quadrant B shows high demand low supply (deficit labour market). Quadrant C with high demand high supply and Quadrant D with low demand low supply both exhibit balanced labour market.³

Fig.1: Employment Environment

Labour Supply	High	A Labour surplus	C Labour balance
	Low	D Labour balance	B Labour deficit
		Low	High
		Labour Demand	

The labour market policy should have the capability to analyze such scenarios and intervene with targeted policies to address distortions and imbalances and improve the functioning of the labour markets. The four employment positions more or less represent different sectors in the Nepalese economy such as the public and governmental sector, the high tech information and communication technology sector, the agricultural and construction sectors, and industries in the private sector respectively.

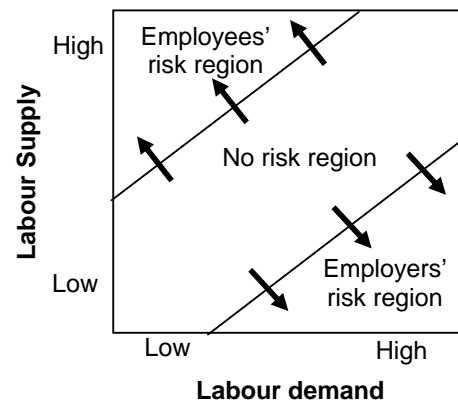
Ideally, the market forces in any economy should balance labour supply and labour demand. In a competitive economy labour market, the market forces determine wage rates and employment levels among various sectors, occupations and regions. On the demand side, employers make choices concerning the levels of output, the use of technology and the mix of resources. On the supply side, workers have the freedom to choose their occupations, the kind of job they would like to take up and the location or region they would want to work in. The workers also expend their resources to acquire more education and training. The employers and workers weigh the costs and benefits of the choices they make while making decisions. Employers seek to produce at the least cost while workers look for the highest earnings.

³ “Alternative Thinking on Labour Market Flexibility” by Prof. Dinesh P. Chapagain in *Business Vision*, Journal by MBA Students, Kathmandu University School of Management, 2003

In practice, however, the labour market forces do not behave exactly that way. A lot of economic, social and political factors make the process of adjustment in the market slow and inefficient. For example, there is a gross imbalance in the demand and supply situation in the Nepalese labour market. On the one hand, there is acute shortage of employment opportunities, while on the other hand, existing industries and enterprises are not getting appropriate manpower required by them. Ironically, there is shortage of labour in the market while almost 300,000 new workers enter the labour market annually. A well-conceived labour market policy to deal with such distortions and imbalances is lacking. Economic crisis, structural changes, political uncertainty and armed conflict give rise to unemployment and underemployment. Nepal is indeed suffering from such maladies on all major fronts, leave alone the employment sector.

With reference to the demand and supply matrix, it becomes necessary to identify the positioning of different economic sectors to understand the strengths of the employers and the workers in the argument on labour flexibility. The strength of the employers in demanding 'hire and fire' is based on the premise that there is surplus in the labour market. In an about turn to that situation, the workers also can equally demand for 'join and leave' prerogatives in the event of high labour deficit. In the surplus supply position, the workers are at 'risk' while the employers are at 'risk' in the deficit supply position. However, the best situation would be a 'no risk' one in which neither side has the upper hand. As equal social partners in the labour market, both the employers and the workers must have the opportunity to make their choices to function in terms of efficiency, growth, equity and social justice. So the labour market smoothing strategy should be to minimize the risks to both the employers and the workers, that is, to enlarge the 'no risk' region in the matrix. (Figure 2: Labour Market Strategy)

Fig. 2: Labour Market Strategy



For this, the capacity of LMIS must be strengthened to collect and better analyze information and understand the critical nature of different employment situations in different economic subsectors, and different social and demographic situations. Active and targeted labour market policies are required to encompass the unskilled and skilled labour force, the women, the youth and vulnerable (socially backward) groups, including the very poor. Economic fluctuations affect employment differently for different people, and women and backward groups are the vulnerable ones in many cases. Appropriate labour market policies sensitive to Nepalese employment environment have to be framed using such information.

4. THE ROLE OF THE STATE

OVERVIEW

The termination of employment by the employer is one of the most sensitive issues in labour law today. For a country like Nepal that suffers from grave unemployment, termination has serious economic and social implications. However, labour flexibility is considered to be essential for the employers in the larger interest of industrial growth and competition. Most workers and trade unions see protection against dismissal as crucial since its absence can lead to serious problems. Employers view the present laws as being rigid and restricting the latter's flexibility in responding to changes in the environment and undermining an enterprise's productivity and efficiency. Such conflicting concepts of the two social partners make this issue all the more important. MoLTM has the responsibility to assess the reality of globalization, Nepal's position in that context, the socio-economic reality at home and the need to balance various other issues to ensure social justice as well as the economic growth of the nation. Labour flexibility is a subject only recently broached upon by the government, but it has already assumed great prominence on the international and national socio-political landscape. As the voices of the two social partners get louder, the government is pressed to review the labour legislation to adequately address the issue.

In the context of high rate of unemployment and underemployment, the discussion on termination of employment may sound insensitive in the face of larger national concern for employment promotion. The present labour flexibility dialogue by and large incorporates only a very minor proportion of the working population considering that more than 90% of workers are in the informal sector whose employment is always in flexible regime. However, the MoLTM is already pressed to address the broader issues of labour flexibility especially since the largest association of employers, the FNCCI, has raised the issue on various occasions.

POLICY FRAMEWORK

Poverty and lack of employment opportunities are perceived to be largely responsible for the present social disorder and violence affecting many parts of the country. Employment promotion among others is one of the important strategies pursued by the government in its Poverty Reduction Strategy Paper (PRSP). The government's Ninth Plan failed to achieve its targeted GDP growth and in a number of other parameters including employment. The Tenth Plan (2002-2007) based on the PRSP obviously revised the targets to more optimistic levels making its own growth assumptions. Both the ninth and tenth plans highlight the need for employment generation in a strategy of poverty reduction.

Though belated, His Majesty's Government of Nepal brought out the National Labour Policy in 1999 with the expressed intention of developing harmonious industrial relations, increasing labour productivity, promoting bipartite and tripartite consultations, and institutional development of labour market mechanism etc. The National Labour

Policy refers to training and skill development as demanded by the labour market to increase the national productivity.⁴ The Labour Act 1992 in the present form addresses a host of concerns of the labour force such as job protection, social protection, fair wages and welfare, working conditions, right to redress in the event of unjust dismissal etc. The present act is an improvised development over the previous Nepal Factory and Factory Workers Act. The Trade Union Act 1993 is the first of its kind that protects the inherent right to organize as enshrined in the Constitution of the Kingdom of Nepal 1990. It is the responsibility of MoLTM to deploy this labour policy and enforce the acts.

The Nepalese labour legislation does not have direct provisions for ‘hire and fire’ as practiced in developed western countries, and probably envisioned by advocates of prerogatives for such actions. The present Act provides ample scope for employers to ‘fire’ an employee. The problem lies in the non-implementation of the Act. The spirit is there, but the flesh is weak – the system for hiring and firing is adequately covered in the spirit of ILO conventions to ensure social justice to workers and opportunity for employers to operate their enterprises by maintaining healthy industrial relations. However, somewhere down the line, the spirit is lost and the government comes under pressure from either or both the social partners to address the problem of hire and fire.

THE LABOUR ACT, 1992 AND ITS IMPACT

The Labour Act applies to establishments having 10 or more workers or employees. The important provisions for hiring and firing, i.e., employment agreement and termination of employment are spelled out in Sec. 4, 7, 10, 12, 15, 23, 37, 51, 52, 53 and 73.⁵ It is estimated that only 7% of the total workforce is covered by the legislation. Out of 11 million economically active population, only about 0.8 million falls within the jurisdiction of this legislation. Although there has been no authoritative empirical research to estimate the number of employees hired in different categories of employment, a pessimistic estimate is that there are only about 300,000 workers in Nepal who come under the purview of the Labour Act.⁶ The mechanism of hiring and firing in the Nepalese legislation can be best understood by looking at specific areas like employment agreement, termination of employment, dismissal and procedural safeguards, severance pay and avenues for redress.

a) Employment agreement

All workers, including those engaged in piece rate or contract work, must be granted ‘permanent’ employment status on the completion of one year (240 days) of uninterrupted service and if their performance, honesty, discipline, dedication to work, attendance etc.

⁴ *National Labour Policy 2056: Programme for Implementation*, Democracy, Development and Law, Kathmandu, 2001

⁵ Section 4: Appointment/ Permanent tenure; Section 7: Contracting jobs; Section 10: Job security; Section 12: Lay-off/ Pay-off/ Reinstatement; Section 23: Wage period; Section 37: Welfare fund; Section 51: Misconduct; Section 52: Disciplinary action; Section 53: Termination procedure on misconduct; Section 73: Avenues for redress.

⁶ “Recruitment and Termination of Employment by Employers: A Managerial Perspective”, seminar paper by Prof. Dinesh Chapagain, 2002

are satisfactory. Providing appointment letter is mandatory. Likewise, when there is the need to increase production and service, or the need to recruit new workers, they may be appointed on a contract basis for a fixed term. Probationary period for permanent employees is generally for one year.

Employers feel that once employees become 'permanent', the latter's efficiency decreases and liability of the former increases. So there is the tendency to keep workers on probation even after 240 days. Besides, there is also increased outsourcing of regular jobs in areas such as security, internal material handling, packaging and finishing. This minimizes the employment relationship and also the tension associated with firing employees. On the other hand, poor corporate culture has bred workers who are not psychologically aligned with the objective and philosophy of the enterprise. Such workers tend to seek 'permanent' employment status so that nobody can fire them even if they work less and demand more benefits. Not surprisingly, most trade unions activities are concentrated in pressing employers for providing appointment letters to all employees. This conflict is clearly observed when industrial dispute arises in the country. This is largely responsible for the increasing tendency to hire skilled manpower and professionals from India.

b) Termination of employment

The law provides for the retirement of a worker at the age of 55 years. It also provides for the service period of the worker to be extended up to another five years if his or her service is indispensable to the operation of the establishment. Besides, the Department of Labour/HMG may dismiss a worker who illegally engages in rioting, or directly or indirectly instigates others to do so in an establishment other than the one in which he or she is working. The employment of workers, however, may not be terminated on the discretion of the employer.

It is a common practice to extend the service period of workers even beyond 55 years of age. Obviously, retaining experienced and valuable workers even after attaining the age limit is beneficial for the establishment unless they are considered mentally or physically unfit or possess some negative behaviours or character. In fact, most workers themselves exhibit willingness to have their employment extended for a longer period unless they have specific reasons not to do so. Lack of new employment opportunities at the retiring age and post-retirement plans compel most workers to stick to the old employment.

c) Dismissal

Dismissal is the termination of employment at the initiative of the employer. The law debar dismissal of a worker who has not recovered from an occupational accident within a year. All dismissals are governed by specific procedures laid down in the Labour Act or its subsequent rules. The law has provisions for layoff and payoff of employees under special circumstances. The management may also dismiss an employee who has remained absent from the work for more than 30 days without notice. Likewise,

employees infringing disciplinary norms⁷ specified in the Act may be dismissed from the service after following specified procedure. Action for immediate dismissal may be initiated in some cases, while other cases call for dismissal only on repeated infringement after formal warnings.

In practice, firing a permanent employee is a difficult task for most employers. It is easier to fire an employee who is not a 'permanent'. Most profitable enterprises tend to adopt this practice, and thus employers are averse to making workers 'permanent'. The fallout, however, is in the loss of ownership, commitment and affection of the employee towards their companies. This affects the productivity and the inner strength of the establishment to move forward toward sustainability and growth.

d) Procedural safeguards

The law requires for advance notification of any employment termination on disciplinary ground, explicit reference to the alleged misconduct and the punishment to be meted, and a reply period of seven days granted before dismissal of a worker. The worker is liable to punishment if he or she fails to submit an explanation within the prescribed time, or if the explanation submitted by him is not found to be satisfactory.

Since workers are protected against unfair or unjust termination through pre-notification, employers are reluctant to take actions that are likely to summon threats from trade unions. Many cases of disciplinary actions on individual employees have been turned into collective cases by the unions. This is largely due to lack of adequate trust between employers and employees in most establishments.

e) Severance pay

Permanent workers who have served for at least three years and whose employment is to be terminated are entitled to a lump-sum gratuity amount. The calculation for gratuity amount is based on the number of years of service and the basic salary drawn at the time of job severance. However, those dismissed from service by the employer or the Department of Labour/HMG for misconduct are not entitled to this gratuity.

Gratuity is a form of social security for workers and a big support for old age. However, as only the permanent employees get the benefit of severance pay at the time of normal separation from the job, there is the tendency among employers to retain most employees on 'temporary' basis or on daily wage basis. Many regular operations are being outsourced as a measure for cutting down costs and a number of other liabilities. Besides an emerging management practice for enhancing organizational efficiency, outsourcing jobs to a particular *thekedar* or contractor is also a popular way of getting round to avoid severance payment.

⁷ Section 51 of the Labour Act, 1992 specifies 13 categories of misconduct. Immediate dismissal is possible in the cases involving causing of physical injury or harm, tying up or detaining the general manager, or engaging in destructive activities within the establishment in respect of any labour dispute or any other issue, or any criminal offence involving moral turpitude for which the worker or employee is convicted or imprisoned.

f) Avenues for redress

An employee subject to disciplinary measure (including unjustified dismissal) may file a complaint with the labour office within 35 days from the date of receipt of the dismissal notice. He or she can appeal to the labour court against the decision of the labour office within 35 days after receiving notice of the decision.

The information on the cases lodged and settled at the labour court indicates that 27% of the cases, the highest number, deal with reinstatement of workers. There were 64 cases of reinstatement during the year 1999/2000 and 61 cases of the same in 2000/2001. Out of these total 125 cases, 52 cases were settled during the year by cancelling 22 initial decisions and 6 accepting initial decisions⁸. Employees thus exercise the right to appeal and have enough avenues for redressing their grievances. However, employers are finding it difficult to take actions against those employees not performing as per the expected standards.

OPINION OF LABOUR ADMINISTRATION

There is a gap in the perception of policy makers and the field inspectors regarding the issue. It is commonly believed that Nepalese do not work seriously unless pushed against the wall, alluding that the ministry is not serious in the implementation of the laws, and this is probably due to inadequate pressures from the unions and employers' association. Some officers, including factory inspectors, express that the existing labour laws are more in favour of the employers rather than the employees.

The policy makers normally do not fathom the actual problems faced in the implementing the laws at the grassroots levels. It is always the more knowledgeable experts and top-level people – whether they represent the ministry or the workers or the employers – who participate in policy discussions on labour issues. The experts in the unions represent the workers while the experts in FNCCI or other associations represent the employers. The concerns of grassroots level workers and their immediate supervisors get sidelined or do not get represented properly. This makes realistic assessment of the effectiveness of the labour laws quite difficult. Policy formulation exercise should involve the actual workers, their supervisors at the shop floor, and the factory inspectors who actually deal directly with the field problems.

One big problem is that labour laws are regularly violated with impunity. For example, employers get away with evasion of the provision of 240 days continuous work calling for providing 'permanent' status to workers. They prefer maintaining 'temporary' or 'contract' workers who work as the 'permanent' workers. The labour offices established to monitor and enforce labour laws appear powerless. However, this cannot be generalized for all sectors. The hotels in the tourism sector hardly have any labour problem because, according to the ministry officers, most hotels follow the Labour Act word by word. This may be an overstatement, but there is likely to be lesser problems in growing economic sectors with good management track records.

⁸ Records from the Labour Court, 2057/58

The law demands for the creation of labour welfare fund with contributions from the workers and the management. But without a proper monitoring, it is difficult to ensure the creation and the administration of such a fund. The National Labour Welfare Fund having a deposit of about Rs. 15 crore could be transformed into a social security scheme by putting collective provisions regarding social security in one basket so that the social security concerns emerging from employment termination can be addressed. A strong social security scheme could minimize the controversy of flexibility. Again the practicability of this will depend on effective monitoring of the scheme. The government has not been able to present an appropriate proposal for such a scheme. The government wants to involve the trade unions in designing the proposal, but the latter has not made serious effort to respond to this call.

The lack of awareness of the provisions of labour laws among the larger public including the workers and the employers makes the work of field inspectors quite difficult when dealing with the issue of termination – justified as well as unjustified. Most micro-enterprises and even SMEs have little knowledge and experience with the labour laws. Only when controversies arise do they actually learn about the various provisions, and quite often, a lot of damage would have been done which otherwise could have been averted. Appropriate programs to educate workers and entrepreneurs and the general public on the labour laws could change their perspectives to issues such as labour flexibility. At times, exaggerated interpretations of certain legal provisions bely false hope among the largely illiterate and gullible workers by the trade unions or leaders creating difficulties in dealing with issues of wage payments and ‘unjustified’ termination of employment. The unions politicize minor issues to win over the workers by making them believe that the unions can extract large, if not all, benefits for the workers from the Labour Act.

Concerted effort to evolve and implement policies and programs for the labour sector with a proper balance is quite lacking in MoLTM – a reason for its slow and weak reaction to the emerging issue of flexibility. The pattern and work culture in the Nepalese bureaucracy including MoLTM does not encourage specialization and development of institutional expertise. Bureaucrats and officials are wantonly transferred or deputed from the finance ministry to local development ministry to labour ministry etc. This allows little scope to develop core group or groups of people with specialized expertise in, say, the labour administration in MoLTM.

The labour law has provision for instituting a labour relations committee at the enterprise level. Although this is an ideal form to promote participation and harmonious relations between the management and the workers, except for a rare company or two, such committees are virtually non-existent or non-functional. Such a committee with opportunity for social dialogue at the enterprise level could handle the flexibility issue very effectively. Strangely, both the employers and the trade unions are least interested in instituting such committees. A flourishing labour relations committee is inherently seen as a potential threat to the influence of the unions on the workers. Obviously, the unions under contemporary political environment will have little role if there is a healthy bipartite system functional at the enterprise level.

The MoLTM's scope to strengthen the institutional capability and the organization's service delivery capability at the field level has not been adequately addressed. The factory inspectors are handicapped to a large extent by weak logistic and infrastructure supports that are necessary to carry out their responsibilities. Field-based work cannot be dispensed effectively if mobility is hampered especially where one or a couple of individuals are to cover a jurisdiction with wide dispersion of industries and firms. Most labour offices outside the Kathmandu Valley lack adequate manpower support.

The ministry officials agree that the labour legislation should provide for only minimal core provisions, and separate rules and regulations should govern specific provisions for specific sectors. This is very relevant to address labour flexibility issue. These rules and regulations may incorporate amendments, as needed, through simple notifications of amendments and additions by MoLTM itself instead of subjecting the Act itself to a long process of amendment. There should be separate rules for separate subsectors like garments, hotels, transport etc. and also separate ones for multinational companies, companies in export processing zones and industrial estates, joint venture companies etc.

There is a general feeling of nonchalance among those enterprises that are seriously implementing the provisions of the labour laws in spirit and deeds. They feel that no differentiation is made between those that comply with the law and those that do not. For example, what incentives are there for enterprises implementing outstanding policies on OHS, fair wages and social protection, and labour participation, as well as other good personnel policies? Although this has not come out in public discussions, labour officials mention that employers must be substantially motivated to comply with the labour laws. This will make the work of the labour administration more effective and of the labour inspectors easier. One could argue that it is the duty of all to follow the law of the land, but in the contemporary globalization context and debate on labour flexibility and weak labour administration machinery, there is the possibility, as has always been, for bypassing the provisions of labour law.

5. EMPLOYERS AND THEIR ASSOCIATIONS

OVERVIEW

One of the major complaints of employers is about the restrictive nature of some components of labour laws. They believe that the labour legislation is more pro-workers and biased against the employers. The rigidities have contributed to increased non-compliance of the law. Obviously, encouraged by the slackness or ineffectiveness of the regulatory mechanism, employers have ways to avoid or even evade the legislation to suit their interest. The employers are particularly concerned about restrictions on their prerogative to dismiss workers. Regardless of whether the legislation is restrictive or not, they seek to have discretionary power to dismiss workers as and when they deem necessary – the right to ‘hire and fire’ at will. Certain industry subsectors such as the garment and carpet that are affected by international market dynamics and those affected by seasonality demand flexibility in the management of the workforce. They equate this with their prerogative in utilizing other factors of production. This prerogative, they argue, assumes more importance in the context of Nepal’s assimilation in the global economy.

Not all subscribe to this argument, though. There is a general opinion against the prerogative to hire and fire as shown by the result of a recent opinion poll conducted by an English broad-sheet daily on the question “Should labour laws allow firing of labour and hiring on temporary basis?” The result was, 36.5% for YES and 63.5% for NO. This result assumes importance in the sense that the respondents are obviously the urban educated lot coming from upper class that read English newspapers and have access to internet and telephones.⁹

The employers specifically object to the definition of ‘permanent’ employees in the legislation. They see the ‘permanent’ status as being inherently retrogressive to the productivity of the enterprise. These and other provisions in the legislation are partly responsible for adopting such measures as outsourcing and subcontracting jobs, and pushing employers to replace regular employment positions with casual workers – known as temporary, daily wage or contract workers. The expansion of non-regular employment is more prevalent among labour-intensive and SMEs. Different measures adopted for possessing ‘flexibility’ for the employers often raise concerns of job protection and social justice by the workers and their unions. Trade unions see the issue of labour flexibility as a pretext for the employers to impinge on the rights of workers including curtailing union activities.

⁹ The Himalayan Times Opinion Poll (11 July 2003). This opinion poll was conducted through internet and pagers, and consequently, all respondents have access to computers or telephones. It was, therefore, considered that there might be some element of an upper-class bias to this poll.

MAJOR CONCERNS OF EMPLOYERS

The FNCCI is opposed to the very statement in the preamble of the Labour Act 1992 that declares that promulgation of the Act has been necessitated for “ensuring the rights, welfare, benefits and *protection*” of the workers. Their argument is that the law has been designed with the sole purpose of giving ‘protection’ to the workers, which also includes job protection, and therefore, there is no room for flexibility at all. In essence, the Act is anti-employers.

The present labour legislation is perceived to be quite restrictive that hampers the progress of enterprise. It restrains creativity and flexibility in organization redesign, discourages process reengineering through introduction of new technology and methods – overall impacting the productivity and competitiveness of the enterprise. For employers that deal in products or services that depend on export orders or have seasonality nature or are local demand-based have to face with the constraints of maintaining a stable full time workforce even at times when certain numbers are not required. The impact of such constraints on productivity is quite obvious.

The restrictive legislation has deferred a number of multi-national companies and potential joint ventures from investing in Nepal. This does not complement with the economic liberalization and the foreign investment policy that Nepal is pursuing. The employers are concerned about the restrictive labour laws, and wonder how the country can expect outsiders to bring in investment where labour flexibility is not assured, and from the labour perspective, exit is made difficult.

Since the majority of the workforce in Nepal is illiterate and unskilled or semi-skilled, the employers perceive them as undeserving to be given permanent status. As soon as they are made permanent, they start being slack in the work and become self-centered around their rights. It becomes more difficult to ‘handle’ them in and outside work even at times of indiscipline. The employers need the discretion to protect their enterprises from such consequences. At present, the management is virtually helpless in dealing with unruly and undisciplined workers who are ‘protected’ by the unions. The procedure for dismissal of workers on infringement of disciplinary norms is restrictive and impractical. There are cases when the management has had to reinstate workers who had voluntarily resigned who later change their minds claiming that they were forced to resign by the management. The management becomes victims of pressure tactics of the unions.

VOICES

The Employers’ Council of FNCCI made an elaborate proposal to include certain provisions regarding labour flexibility in January 2003.¹⁰ To start with, FNCCI proposes the change in the name from ‘Labour Act’ to ‘Labour Relations Management Act’. It also suggests that the preamble of the Act incorporate a more appropriate statement “to promote balanced employer and employee relations” that emphasizes on promote industrial relations rather than mere labour protection.

¹⁰ Bipartite social dialogue between associations of employers and workers held on 17 and 19 January 2003 at Hotel Himalaya, Kathmandu.

Labour market flexibility demands flexibility in labour legislation. The employers believe that amendment in the laws should be made to incorporate flexibility in appointment of workers, social security, working hours, wages etc. Labour flexibility is directly related to social security. A good social security system ensures flexibility in the labour market. People have something to fall back to during times of unemployment or to plan for self-employment. Since a strong scheme is not available, there is resistance to termination of employment even when such a case is necessitated. People try to hang on to available job by any means at the cost of erosion of organizational efficiency.

The scope of the present labour law covers enterprises having 10 or more workers. In the present context of industrialization in the country, that number is too small for the application of the present law. The number of workers should be increased and only viable enterprises should come under the purview of the labour law. Differential laws should be framed for enterprises with differential number of workers and the salaries/wages and benefits should be determined accordingly.

The management should have the prerogative to distinguish the core workers and non-core workers. Appointment letter will be given to these core workers whose levels will be classified. Workers outside the core group will be employed as temporary, part-time, wage, contract etc. as necessitated by the market demand for production or service or other reasons. The management should have the prerogative to employ such temporary or casual workers on professional contract with a contractor who will be made responsible for ensuring the minimum rights and facilities for the workers. The management shall be liable for such minimum rights only if the contractor does not assume that responsibility. Otherwise, the management should be free of any legal liabilities toward the casual workers.

Multinational companies should be allowed to employ foreign nationals in the management of such companies. They should take necessary measures as mentioned in the present labour legislation to train Nepalese manpower in such special skills required by the companies, however, over a period of 10 years instead of five years as stipulated by the Foreign Investment Act.

The employers agree that a worker who is given the permanent status should be given job security up to the age of 55. However, this job security should be made contingent to the worker's capability and efficiency and his or her disciplinary conduct. Likewise, the job security should not stifle the need to terminate his or her employment if it is genuinely necessitated by the operation of the enterprise.

There should be provisions to dismiss workers of the core group under following conditions:

- Failure to achieve standard performance three times consecutively in a year as revealed by performance appraisals
- Workers contract some communicable disease
- Physically and mentally unfit to work as certified by medical doctor
- Need to reduce production or service in response to market environment

- Need to streamline manpower under due to organizational restructuring or organizational merger or amalgamation
- Loss of confidence by the management over a worker due to dishonesty or other reasons
- Lack of capability or failure to enhance capability by the worker to perform as per the demand of his or her position
- Refusal to undergo training designed to enhance capability to perform as per the demand of his or her position
- Refusal to work as assigned by the company or refuse to be transferred or accept temporary deputation
- Found to have lied or produced false testimonials to show ones qualification for a job position
- Non-fulfillment of other conditions required for the operation of the enterprise as specified by the management
- Not maintaining disciplinary conduct or norms as required by the enterprise

Quite often, a worker who has been dismissed for various reasons appeal to the court, and has the dismissal decision revoked or reversed, and seeks reinstatement in the job. The management finds it difficult to work with such people. The management should have the discretion to accept or not accept him, and if not to accept, then offer him necessary compensation. In such a case, the court should have the authority to decide on this and ask the worker to accept the management's decision. Likewise, in case the court reinstates a dismissed worker, then the management should not be compelled to reimburse his or her wages unless the court determines that the management had purposely misused or misinterpreted the law in terminating his or her employment.

The employers feel that present law that limits overtime working hours should be amended to allow the management to employ workers for longer hours when necessary. While maintaining the existing provisions regarding four hours of overtime per day, the law should have the provision to allow management to fix longer hours through collective bargaining.

The present practice of specifying allowances and facilities while fixing the minimum wages should be discontinued. There must be provisions to fix production-based wages, allowances and facilities, without undermining the minimum wages determined by the law for the purpose of productivity enhancement of the enterprise. Likewise, it is not fair to compel enterprises dispensing wages and salaries at higher levels than the minimum wages fixed by the government to revise their wage structure every time the government fixes the minimum wages.

The employers strongly feel that there should be provision for 'no work no pay' to justify labour costs. Paid and sanctioned leaves could be considered as part of work. Such a provision should also apply for days lost due to legal or illegal strikes or legal lockouts. There must be a provision to terminate the employment of workers engaging in illegal strikes or blockading the management or workplace. The labour court should determine

the legal or illegal status of strikes and lockouts within 24 hours if the decision of the court is sought for this. Likewise, if determined as illegal, then the court should immediately direct the lockout or the strike to be stopped.

There should be provisions to allow piece-rate work for permanent workers for the purpose of productivity enhancement. Allowances and facilities to be given to the permanent worker should be based on the minimum wage fixed for that particular position of the worker. That means, besides ensuring a minimum wage and facilities based on that minimum wage for the permanent worker, he or she will be paid on piece rate basis. This will allow the worker to earn more but not less than a minimum amount. Likewise, the wage fixation committee should be made a permanent board and empower it with monitoring authority. Differential minimum wages should be fixed based on geographical regions and rural urban sectors.

The present legislation defining indiscipline and disciplinary actions should be removed. The management should have the prerogative to define indiscipline of workers and disciplinary actions to be meted for infringement. These should be defined through rules and not through the act. The rules should be included as annex in the act, and the management will follow the rules until it formulates its own in-house rules.

The employers also state that the present Labour Act should not incorporate matters relating to the management staff. It would be better if there were a separate law to cover them. Likewise, there should be separate provisions to govern enterprises of special nature such as export-oriented enterprises.

6. WORKERS AND TRADE UNIONS

OVERVIEW

A perception exists among the trade unions that the benefits of globalization have gone to the employers, while the workers have to bear the cost contrary to the expectations that globalization would expand opportunities and raise the standards of the workers. The volume of redundancy created by privatized state enterprises has had a negative impact on employment in Nepal and a reason for trade unions to be wary of liberalization efforts and the country's moves toward global integration. Privatization, for example, is seen as being more responsible for job losses and marginal or no gain for existing workers in privatized enterprises.

A look at the average number of workers per unit enterprise in Nepal over a decade in the 1990s, reveals a decline from 135 workers to 99 workers. The growth of workers does not match the corresponding growth in the number of enterprises. In the pursuit of efficiency and competitiveness, contemporary management practices have led to shrinking core work force, increased casualization of work through temporary, part-time, home-based and casual workers, increased subcontracting and outsourcing etc.¹¹ There are two ways of looking at this. One, more and more workers are already working in different forms of labour flexibility. Second, this affects the unions in terms of their membership and difficulty in the coverage of informalized workers.¹²

There is a general aversion for the term 'hire and fire' brought up by employers. It bore autocratic connotation. Prerogative to hire and fire is just one part of labour flexibility and does not constitute the whole story. Indiscriminate application of this discretion does not ensure flexibility. Interestingly, the unions are not quite sure what the employers actually want in bringing up the issue. They have raised a host of questions that they seek answers to. The unions claim to recognize the need to respond to demands of global environment and to improve economic efficiency of enterprises. But the prevailing cool relation between the two social partners naturally makes the unions wary of the intentions of the employers.

MAJOR CONCERNS OF WORKERS

The biggest concern of the workers and the unions is ensuring job security and social justice. They fear that in the entire flurry of chasing liberalization and global economic integration, basic labour welfare policies would be undermined at the cost of diluting social justice for the workers. How to ensure that a person who has had his job terminated will get the opportunity for another job or self-employment? In an underdeveloped

¹¹ "Labour Market and Flexibility" in *Aajako Shram Agenda*, GEFONT. A number of subsequent references are made from this work.

¹² Since membership volume is a traditional determinant of union strength, amidst inter-union rivalry based on general politicization, any move that leads to potential decline in workers in the organized sector will definitely be faced with resistance.

country like Nepal, an average worker cannot afford to be unemployed since there is hardly any provision for unemployment benefits or functional social security system as in developed countries. The unions claim they recognize the need to be in tune with the changes in the global environment and an emphatic 'no' to flexibility would be quite irrational. The concern, however, is ensuring that dismissal of a worker is justified and the last resort to other considerations. In a corporate culture where transparency is grossly lacking, it is very difficult to 'justify' termination of an employment, and to convince the unions as well. The unions are wary of ad hoc use of the prerogatives by the management to fire anybody the latter does not fancy – in other words, they seek protection against unjustified dismissal.

The workers are concerned that employers are demanding flexibility to minimize the cost of labour – not by investing on training and promoting efficiency, but by default. The employers are averse to making workers permanent even after 240 days of service because they want to 'profit' by avoiding conditions for paying higher wages, higher benefits including social security benefits. Temporary and casual workers may be hired by dispensing the minimum wages and bare facilities.

The possibility of misuse of discretionary power by employers cannot be totally ruled out. The unions are concerned that labour flexibility may be used as a pretext to dismiss or threaten to dismiss employees that are involved in union activities or that seek assistance of unions to settle their personal grievances. In the face of politicization of trade unions in the Nepalese corporate regime and the leverage these unions try to gain from this, employers are averse to unionism. Thus, management prerogative may be used against workers more on personal grounds than rational grounds. Flexibility may undermine union activities or the strength of a particular union at the enterprise level.

Workers cannot be compared with other resources in the organization. Rather than take a mechanistic view that perceives workers as expendable resources, management should consider its unique feature of possessing the potential to generate more output than other non-human resources with appropriate skill development and motivation techniques. The employers have the social responsibility for the socio-economic well being of the population as well as the development of the country at large.

VOICES

According to the trade unions, the Labour Act which covers only the workers in the organized sector comprising of barely 10% of the total workforce, has not been effectively implemented to ensure the legal regime of the workers' rights, duties, securities, benefits, welfare and other provisions therein. The majority of the workforce in the larger unorganized and informal sector does not even come under the purview of any such regulations. In such a situation, the demand for flexibility in the sector with limited employment would be less rational and would probably benefit only a handful of employers. For the trade unions, labour flexibility is thus not an issue at all.

The argument of competitiveness sounds less realistic when it comes to demand for discretion for unilateral decisions to terminate employment. Management good practice

that takes the workers in confidence with transparency and fairness is probably a rare bird in Nepal. The trade unions for example cannot be expected to accept that 'firing' will lead to competitiveness when transparency is hardly an established norm in most enterprises. Many a times, situations for unjustified firing arise out of inefficiency or bad management practices of the employers. The employers also suffer from lack of scientific skills, knowledge and resources on increasing productivity, efficiency and competitiveness of the enterprises. They try to compensate all this by seeing workers as expendable and the easiest way to cut down costs.

If there is a general resistance to the issue of flexibility, they show some resilience too. For instance, one union is against the application of blanket discretion for the employers. However, it also advocates flexible employment in those subsectors that have direct interaction with and are likely to be affected by the global market provided the terms and conditions of employment are agreed upon right at the time of recruitment. Flexibility should not be only for the exit of the workers but should be spelled out right at the time of their entry or at the hiring phase. The case of garment subsector that is totally dependent on the US or European market can be taken here. The present woes of this sector have led to retrenchment of large number of workers. Specific regulations should be established that spell out the nature and conditions of contract work.

The trade unions understand that the changed national economic situation and the globalization context demand practical dispensation of labour laws. Rigid stances cannot stand. After all, the survival of enterprises and industrial growth and healthy economy are precursors to employment growth and their stake. However, they have their own contentions and reservations. The strained relations between the two parties have made the trade unions look at the approach of the employers with suspicion and possible excuses to gain extra discretion in labor matters and to sideline the issues of justification, the spirit of bipartism and the concern for social justice.

The industry or business sectors have to be identified and classified as local level, national level and international level in terms of implications of labour market flexibility. The local level enterprises manufacturing products or services purely for local consumption has no basis to seek labour flexibility. Such enterprises may be a bakery, noodle or iron mill in the MSE or the SME subsectors. The enterprises and subsectors producing goods such as toiletries, textiles and paints having wider national market and having to compete in the same market with products from other countries may, but not necessarily, have the scope for flexibility discussion. Exportable products or services catering for international markets or consumers or development projects with specified mandate and time frame may strongly come into the purview of labour flexibility. The case of garment or the tourism subsectors or infrastructure development projects may appropriately define the context.

The strong contention of the unions is that those sectors that demand flexibility must develop certain modality for employment that clearly explains the procedures of recruitment and termination right at the beginning. Flexibility should not be for termination only. For example, if a garment enterprise operates on the premises of export market under conditions of seasonality or bulk order or quota system, the enterprise could hire people on contract for specific periods with appropriate compensation

package to consider the lean period. In doing so, the enterprise should not impinge on the minimum wages provisions and basic labour rights issues such as rights to partake in union activities.

Flexibility should not be sought to terminate employment of workers to curtail union activities, to unjustly punish for personal reasons, and more important, as a pretext to avoid paying competitive compensation packages, fringe benefits, incentives and other benefits. The Kali Gandaki hydel project is accused of firing a number of workers because they were involved in union activities. Organizing and union activities are basic rights of workers, and therefore, employers should not see the unions as trouble mongers.

According to the unions, employers prefer having temporary workers, workers on contract, and have only minimum number of permanent staff for the sole purpose of paying minimum salaries and wages and only basic facilities. Quantitatively, the total salaries, facilities and fringe benefits given to permanent workers and the total salaries/wages and other benefits, if any, given to temporary or contract workers differ by almost 45% -- meaning, the temporary and contract workers get that much less than the permanent workers. This emanates from the desire to profit wittingly or unwittingly at the cost of the workers, that is, profiteering from the wages of the workers rather than increased management efficiency. This sort of *baniya* mentality, as someone referred to, is a strong statement from the unions. And that is precisely why they have reservations about this issue of labour flexibility.

In this context, the unions lament at the wrong mentality of the employers specially regarding their casual attitude about the workers. Their integrity is questionable. Many a times, employers want to fire certain people, and are more likely to recruit some others at wages lower than what the persons being fired were getting. Other times, employers fire people for personal reasons and recruit people who are more 'loyal' and who will humour them. Besides, quite often, it is not because the employer is going through some organizational restructuring or business reengineering that some jobs have been made redundant which calls for firing certain employees, but because of inefficient management and lack of long term vision that ails the enterprise. And the employer sees the only way of getting out of the crisis is to go for employee redundancy plan. However, in genuine grave cases where employers are pitted against the wall due to unfavorable macro-economic or other environmental factors, the unions do show understanding. As a matter of fact, the existing labour law has provisions for lay-off/pay-off those adequately address such a situation.

The unions also lament at the lack of the state's concern toward social security for the labour force in the country. If there was a comprehensive social security policy and this was taken care by the government, then flexibility would not be a big issue. The state should be clear about flexibility. What kind of flexibility is the state looking for and for what? Is it merely to appease a handful of employers; is it because some donor agencies are putting pressure to the government; is it one of the precursors to Nepal's impending entry into WTO? What positive aspects does the government foresee would happen if labour flexibility were implemented – in terms of increased employment generation, increased quality of life of workers, increased productivity of the nation, increased FDI,

enhanced micro economic indicators and social development indicators etc.? These are a number of questions that the unions seek answers for. Otherwise, they feel that flexibility is a non-issue. The government is probably seeking investment flexibility whereas the employers are seeking labour flexibility.

So the concern is rooted at the social security of workers. It is only natural that anyone at a disadvantage always seeks security. They want flexibility for labour rather than labour flexibility. They would like to see a national plan evolve regarding social security that addresses this concern for long term in the future, say 10 years from now. The responsibility for social security cannot be thrust solely on the employers, but the employers should be willing to give a handsome employment severance package that compensates the job loss and the time to look for other means of earning including enough to take up self-employment.

While concurring with the existing labour law that adequately addresses the flexibility issue that the employers are seeking, the unions express that separate regulations under the law for separate labour sectors would be more appropriate to address labour issues specific to individual sectors. The present labour law trying to incorporate all different sectors becomes unwieldy at times. They agree that individual sectors differ in their nature not only in the products but also in terms of labour intensive or capital intensive, the operational periods and the nature of market behaviour.

The unions also feel that enterprises should have their own by-rules and the procedures for termination and other employment service matters including compensation, incentives leaves and social security. Transparency on the part of the management is of utmost importance for deliberating on the flexibility issue. The unions cannot accept the need for unplanned termination of employment of workers without rationalization in the larger perspective of the enterprise good as well as the workers benefit.

7. INTERNATIONAL ENVIRONMENT

TRENDS AND PRACTICES

Most countries view unfair and unjustifiable dismissal of workers from their employment as an infringement of the workers' human rights to make a decent living. Barring a few economically developed countries such as the United States of America, Denmark, Austria and Belgium, most countries in general recognize this basic right, and have different forms of national legislations to protect such a right of the workers. The protection of this right not to be unfairly and unjustifiably dismissed is reflected variously in the legal systems of different countries. Some countries have incorporated this in their constitutions¹³, while others have reflected this as a statute, as an outcome of court order, or simply as a policy secured by collective agreements. Whatever the form of its reflection, the legal regulation is based on following justifications:¹⁴

- Prohibition of arbitrary and unjust dismissal decisions by employers (individual justice);
- Minimizing the cost of collective dismissals for economic reasons to the employee (market intervention and economic regulation rational);
- Protection of public rights to join a trade union and right not to be discriminated against on grounds of gender and race;
- Protection of employers from excessive litigation costs that might otherwise arise from employment termination; and
- Promotion of employment security by encouraging employers to invest in the training and development of workers.

Protection against unfair dismissal is seen as an essential element of human rights promotion. The right to employment is recognized by the Universal Declaration of Human Rights¹⁵ (1948) and the International Covenant on Economic, Social and Cultural Rights (1966)¹⁶. It is enshrined in the national constitutions of a number of countries and covered by numerous codes and statutes or regulations on employment, thus underscoring the importance of the recognition.

Termination of employment has economic and social implications, and the implication is even higher for developing countries that are ailed by employment deficits. For such countries loss of employment results in lack of means to earn decent living. Most of them lack appropriate system of protection against unemployment or other forms of social security. This makes termination of employment one of the sensitive issues in the

¹³ Latin American countries such as Argentina, Brazil, Colombia, Honduras, Mexico, Peru, Venezuela etc.

¹⁴ *Termination of Employment Digest*, ILO, Geneva

¹⁵ Article 23 recognizes the right of all persons "to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment"

¹⁶ Article 6 recognizes the right of all to gain their living by work of their free choice and obliges the States to take steps "to achieve steady economic, social and cultural development and full and productive employment".

legislation. As a consequence, national legislations normally incorporate protection against dismissal, which is seen as very crucial by workers. However, employers and their associations see such regulations as restrictive and counterproductive to welfare of enterprises in the contemporary competitive environment. Such conflicting views have put pressure on the governments and the social actors to address the issue of labour market flexibility, which has assumed prominence everywhere. For example, the proposed reform of standards on dismissal to increase labour flexibility caused widespread general strikes, work stoppage and demonstrations in South Korea. This underscores the gravity of the issue and the urgency for the related social actors to address the issue with caution.

The regulation of employment termination has been in place since the introduction of labour laws whose contents have undergone modifications according to developments and economic changes. The initial standards on employment termination in the civil code in European countries (in the nineteenth century) provided for absolute freedom in hiring and dismissal but, at the same time, prohibited contracts on “for life” which was tantamount to slavery. This legislation also regulated fixed-term contracts, and provided for terminating the employment relationship without cause requiring only prior notification of such an intention. The latter provision became the basis for “employment at will” (as exists in the US), which conferred the employers discretionary power to hire and fire. The “at will” powers of dismissal of the employers were, however, restricted to prevent the occurrence of “unfair” and “unjust” dismissal.

In the early twentieth century, the provisions of employment termination in the legislation began to be modified to respond to the need for protecting workers in the wake of rising labour movement. Dismissal based on valid reasons was established by Mexico in 1917, and gradually this concept spread to the European countries and the United States, which by the 1940s, enacted legislation on the justification of dismissal, providing advance notice and the payment of severance allowance. By the 1960s and 1970s, which were marked by rapid economic expansion, standards on employment security were incorporated and strengthened in the legislation of most countries. However, the global economic crisis of the 1980s started the voice against the protective approach to employment. The present debate and conflict on employment termination prevailed since then. However, while criticism and, even opposition, to this protectionist principle is increasing in some countries, most national and international standards (ILO standards) by and large have maintained the principles.

As mentioned earlier, the debate over the protective approach is not new. However, studies on the issue of labour flexibility have yet to establish the causal relationship between employment security protection and the overall level and structure of employment and unemployment in a satisfactory manner. Some relations have been perceived in the sense that adequate employment security and protection reduces unjustified dismissals and restricts redundancies for technological and economic reasons, thereby contributing to increased levels of employment. On the other hand, it has also been observed that excessive regulation of dismissal restricts functional mobility and training possibilities. It also deters the hiring of new employees, especially the vulnerable and disadvantaged section of the society, and leads to possible stagnation of workers, which, in the long run, is detrimental to the competitive health of the organization and

the nation at large. However, despite arguments against protection regulation, the recent move toward deregulation of labour market and increased labour flexibility through legislative reforms in Europe and some Latin American countries¹⁷ have not resulted in any significant reduction in underemployment and unemployment in those countries nor have they improved employment levels. Analysts have refuted the claim that deregulation of labour market in the 1990s in the United Kingdom had led to decline in the unemployment rate and increase in quality of employment. On the contrary, they maintain that most of the new jobs created were “part-time, poorly paid or of precarious nature” and that would have grave social implication.

The increased unemployment in the 1990s in the UK and other European countries due to dismissals vary in reasons such as termination or non-renewal of fixed-term contracts, unjustified termination of employment, collective dismissal. The large-scale dismissals in Chile in 1995 were due to “requirements of the undertaking”, a new reason introduced in the labour standard in 1990.¹⁸ In Germany, a large proportion of job losses in the early 1990s was due to economic reasons. There are indications that factors such as wage levels and the macro economic context itself have a greater impact on employment levels than dismissal costs as seen in the case of 12 out of 15 Member States of the European Union where labour productivity grew proportionately faster than average labour costs. It has also been reported that employment security stimulates investment by encouraging employers to invest in training and up-skilling their workers. Thus, international practices regarding employment termination vis-à-vis regulatory legislation exhibit grounds for adopting increased labour flexibility and also caution against excessive protection legislation. At the same time, there are contrasting scenarios to show that increased deregulation of labour market and employment security do not ensure positive economic growth and improved employment levels in the countries.

ILO CONVENTIONS

The World Summit for Social Development unanimously adopted Commitment 3 of the Copenhagen Declaration on promoting the goal of full employment as a basic priority of economic and social policy. In so doing, the international community reaffirmed the special mandate of the ILO, as defined in its Constitution, the Declaration of Philadelphia and the Employment Policy Convention, 1964 (No. 122), requiring member States to pursue the goal of full, productive and freely chosen employment. In terms of full employment and poverty alleviation, ILO has set its primary goal to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity. Within this framework, employment is seen as a key element in promoting the right to employment and is highlighted in many national constitutions and legislation including in Nepal.

¹⁷ This was in the context of simplifying procedures for fixed-term contracts, eliminating administrative authorization for new recruitment and collective redundancies, lowering severance pay etc. in Argentina, France, Germany, Peru, Spain

¹⁸ The 1990 reform allows termination of employment as per “the requirement of the undertaking, establishment or service due to streamlining, or modernization, shortfall in productivity, changes in market or economic conditions which make it necessary to dismiss one or more workers, and the failure of the worker to adjust to the technical requirement of the job”.

Since unjustified and arbitrary dismissals have had dire consequences to industrial relations and the economy of many countries, the ILO adopted the Termination of Employment Recommendation, 1963 (No. 119). This was the first international standard aimed specifically at employment termination. Later, it was felt that another instrument was needed to address new developments and thus led to the adoption in 1982 of Termination of Employment Convention (No. 158) and Recommendation (No. 166).

The Termination of Employment Convention (C158) lays out specific provisions for standards of general application as follows¹⁹:

- Justification for termination: This restricts employment termination by the employer without a valid reason, on discriminatory grounds based on race, colour, sex, religion, political opinion, social origin etc., temporary absences from work due to illness and injury etc. and unsatisfactory performance²⁰.
- Procedure prior to or at the time of termination: The worker must be provided the opportunity to defend himself against whatever allegation made by the employer.
- Procedure for appeal against unjustifiable termination: If the worker feels his employment termination is unjustifiable, he has the right to appeal against the unfair decision to an impartial body²¹. If the termination has been found unjustifiable, then the employer may be liable to restate the worker and or make payment of adequate compensation or other form of relief.
- Period of notice: The worker whose employment is to be terminated is entitled to reasonable period of notice or compensation.
- Severance allowance and other income protection: Severance allowance or other separation benefits and or assistance of other forms of social security should be based on length of service, wage levels etc.

Likewise, the C158 also lays out supplementary provisions concerning terminations of employment by the employer for economic, technological, structural or similar reasons with respect to the following:

- Consultation of workers' representatives: When termination of employment of specific number and categories of workers have to be made, the workers' representatives should be pre-informed in reasonable period of time of the decision and the reasons and the workers likely to be affected.

¹⁹ Although this Convention applies to all branches of economic activity and all employed people, the following categories of workers are excluded from some or all provisions: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; and (c) workers engaged on a casual basis for a short period. Likewise, special considerations have been recommended in the case of workers whose terms and conditions are governed by special arrangements, and certain categories of workers in respect to specific conditions or the size or the nature of the organization that employs them

²⁰ Unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

²¹ Such as the court, labour tribunal, arbitration committee, etc.

- Notification to the competent authority: Likewise, the same has to be informed to the competent authority (according to the national law and practice). The national law or regulation may limit the number or percentage of workers whose employment are to be terminated.

In addition to these specific instruments, there are a number of others, which, to a certain extent, protect employment security. The Right to Organize and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Rural Workers' Organizations Convention, 1975 (No. 141), and Recommendation, 1975 (No. 149), all of which deal with protection against acts of discrimination for trade union membership or activity. The Maternity Protection Recommendation, 1952 (No. 95), and the Workers with Family Responsibilities Convention, 1981 (No. 156) and Recommendation, 1981 (No. 165), also address employment security. The Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) and Recommendation, 1992 (No. 180) include severance pay among the claims to be protected.

A recent additional instrument is the Part Time Work Convention, 1994 (No. 175) that states that part-time workers are to have conditions equivalent to those of "comparable full-time workers" (simply, full-time workers) with regard to termination of employment. In fact, the part-time workers are accorded the same protection as that accorded to full-time workers in all respects²².

Being aware of the importance of flexibility in the functioning of labour markets, a particular instrument, the Private Employment Agencies Convention, 1997 (No. 181)²³ and its complementary Recommendation No. 188 was adopted to address the issue of job flexibility in the context of business competitiveness in the global environment. This convention²⁴ provides that workers having special employment relationships with the agencies (contractors) and user enterprises (principal employers) are to have equivalent rights and conditions including that on termination of employment as that of other workers in general.

²² Protection in respect of (a) the right to organize, the right to bargain collectively and the right to act as workers' representatives; (b) occupational safety and health; and (c) discrimination in employment and occupation.

²³ Adapted from the previous Fee-charging Employment Agencies Convention (revised), 1949

²⁴ This convention applies to all private employment agencies except the seafarers. However, as of mid-2000, this convention had not come into force.

8. CONCLUSION

MAJOR ISSUES

All the partners agree that Nepal needs to move forward pragmatically in its path of liberalization and adopt realistic labour policies to benefit from its integration toward global economy especially since human resource is seen as a major competitive advantage for resource strapped and low economy country like Nepal. Employers and their associations are demanding flexibility in hiring and firing labour citing increased competition. The trade unions are willing to be accommodative to the changing situation, but insist on curbing unjustified termination and ensuring insurance against unemployment. The State realizes the necessity of addressing this contentious and sensitive issue of termination in a balanced manner. The economic and social implications of termination for Nepal is even bigger since the labour market is rife with unemployment; and the country lacks appropriate social security system to compensate for the loss of employment which for most people is the only means to earn decent living. However, the State is looking to adopt labour legislation that complements with its focus on 'openness', increased role of the private sector, poverty alleviation along with employment and social justice as its development prerogatives.

The employers see the present labour law as pro-workers and rigid – not providing the scope for discretionary firing by the employers as demanded by situations. The trade unions feel that the present labour laws have elements of provisions for 'justifiable' termination of employees, and that employers look for pretexts to fire workers to suit their 'fancy' rather than based on good management decisions. This underlines the environment of distrust that prevails between the two partners.

Overall, frank social dialoguing between the two partners could resolve much of the ambiguities on the subject and minimize the underlying distrust between them. However, discussion on labour flexibility is not merely about prerogative to hire and fire by the employers and resistance against such a compelling power by the trade unions. It brings forth a number of underlying issues that need to be recognized and addressed in the proper perspective. This study has identified the following major issues.

1. Surplus unskilled labour

The Nepalese labour market is manifest of large surplus mainly of the unskilled labour. This is the major group among the 300,000 annual entries in the labour market and one that characterizes the underemployment and unemployment scenario in the country. The large scale of agricultural workers, migrants from the hills, school dropouts etc make up this unskilled group. The demand for skilled workers is high but the supply is low. The unskilled workers are absorbed in a number of industries such as construction, mining, manufacturing, and some service sectors such as the tourism and portering. Most of this group work is employed on contract basis without formal contract arrangements, is highly vulnerable to exploitation, and the condition of job flexibility is very high. The flexibility issue of the group has to be addressed the most.

2. Sector-wise flexibility

Some specific economic sector and industry subsector has relatively high labour flexibility than others. Those sectors that have high labour surplus invariably have high flexibility. The agriculture sector, for example, once a dominant surplus sector, is almost in deficit in terms of supply of workers in this sector compared to a decade ago. The sector is a manifest of low paid workers and is suffering from out migration of the labour force. The carpet subsector in the manufacturing sector, on the other hand, has more or less balanced demand and supply of labour force. The flexibility issue should be addressed separately in surplus and deficit areas.

3. Rapid growth economic sector

The labour flexibility issue assumes significance in those sectors that have rapid economic growth and make significant dent in the national economy. Such sectors tend to bypass or nullify major provisions of the labour legislation to achieve their growth. Despite regulatory restrictions on employing foreign nationals, garment industries prefer to employ Indian nationals. These sectors prefer to hire workers on more flexible terms to deal with rapid market growth demanding increased manpower and, during lean time, reducing the manpower without much fuss. The *pashmina* industry, once a booming export industry, is on the slide. The hotel industry is also facing difficult times. Likewise, the multi-national companies, joint venture companies and other companies under FDI, in general, fall under this category that demand greater labour flexibility.

4. Unorganized sector

The unorganized sector of the economy comprises of more than 90% of the total labour force in the country. The workers in this highly informal sector, for all practical purposes, work in highly 'flexible' working conditions. They are out of the purview of any labour legislation, and the present trade unions have not been able to reach them to address the flexibility issue. Workers in the construction, agriculture or mining industries come from the unorganized sector, but these sectors nevertheless operate properly.

5. Absence of social security

Termination of employment has serious economic and social implications for Nepal where loss of employment invariably means loss of means to earn decent living. Labour flexibility has become big issue because of the absence of any dependable form of social security system to tide during the time of unemployment. That is the major reason why trade unions are averse to termination of employment for any reason.

6. Contract workers

There is a growing practice of contracting specific services from individuals or organized groups (companies) and doing away with such activities that once were integral parts of organizational activities. Professional security service companies have rapidly growing business in Nepal with increasing number of industries, commercial and office complexes including residential houses acquiring the services of such companies. Interestingly, there is a peculiar situation here where the 'user' of the 'labour' is not the 'employer' per se. For example, a commercial bank is not the actual employer of the

security guards who guard the premises at any given time. The guards are actually employed by the company who is under contract with the bank. In that respect, the bank has maximum scope for labour flexibility when it comes to dealing with the security guards in the bank. This is one area where neither the government nor the trade unions have taken any serious stance regarding the special employment agreements.

7. Part-time workers

There are certain enterprises that require the services of part-time workers for jobs such as accounting, data entry in computers, office cleaning/sweeping, and servicing customers in restaurants, etc. They require only limited hours of service per day for the particular enterprises. Likewise, jobs in tea plantation and trekking services are seasonal. The issue of labour flexibility here brings forth concepts of flextime work, work modules, multi-skilling, etc. How to design wage and compensation package for the limited time work needs to be addressed rationally.

8. Gender issue

It becomes important to address the gender issue when dealing with labour flexibility. Voices are being raised for gender equality at the workplace in terms of wages and facilities and work opportunity. The women are entitled to specific rights such as maternity leaves and refraining from doing certain type of work or working beyond certain hours (for security reasons) etc. In terms of their empowerment, women should be provided with equal (or more) opportunity for their personal development in the organization. In this context, the issue of labour flexibility will assume a special meaning for having to give special treatment to women in a mixed-sex workforce.

9. Rationalization of organizational restructuring (manpower redundancy)

The issue of labour flexibility assumes importance when it comes to dealing with situations of decisions regarding corporate merger/amalgamation, investment shifting, induction of new technology, lay-off and pay-off due to corporate failures or otherwise, or simply streamlining etc. Good management practices such as organizational restructuring necessitated by various forces in the business environment demand rationalization of an organization's manpower in qualitative as well as quantitative terms (possibly with manpower redundancy plans).

RECOMMENDATIONS

The above discussion has raised a number of issues that need to be addressed in some way if employment flexibility is to be made functional and mainstreamed on the liberalization path that the country has chosen as a development prerogative. The reality of having to deal with large-scale underemployment and unemployment, unskilled workers, the unorganized sector is a big challenge to the country. Nevertheless, a few policy and regulatory recommendations are made to address the larger issues vis-à-vis labour flexibility debate.

1. Integrating HRD policy with labour policy

The State's human resources development policy must facilitate the development and promotion of education and training through universities, colleges and vocational education centres. The specific subject and areas of training and education must complement the labour market in the country. The HRD policy must, therefore, be integrated with the labour policy to reduce the employment risks for both the employers and the workers. Proper strategy needs to be formulated for different economic sectors depending on the employment region these sectors are operating in, the purpose being to enlarge the no-risk region both the two partners.

Employment promotion activities must be carried out in deficit areas through awareness building programs to attract manpower, training for required skills, incentives to industries to train people etc. On the other hand, activities must be carried out to transfer workers in surplus sectors to areas of deficit. For this, appropriate HRD programs for re-skilling, multi-skilling, incentives to shift to new sectors etc. must be developed. This will provide the needed flexibility in employment to enable workers to shift from one sector to another. This will also address loss of employment due to collective redundancies.

2. Incorporating flexibility in labour policy

There is no doubt about the need of certain degree of labour flexibility in the context of globalization and highly flexible contemporary market. Competitive business environment that dictates economic prosperity of the country also demands that the labour policy of that country incorporate flexibility in the areas of employment and termination of employment. At the same time, the policy should also address mechanism to protect workers from exploitation by employers especially in the environment of labour surplus. The social security should be an integral part of the flexibility issue in the labour policy.

3. Providing flexibility in legislation

The labour legislation should provide for flexibility without much complication basically in two areas – employment agreement and termination of employment. The present provisions regarding these two areas are covered in a number of clauses such as sections 4, 7, 10, 11, 15 etc. in the Labour Act 1992. These numerous sections are quite rigid, confusing and, at times, are bones of contentions during employment and dismissal from employment. As both labour surplus and labour deficit exist in the employment environment, flexibility terms should be covered by only a few sections in the Act. Flexibility in implementation of the legislation should be accorded through labour rules, and further down, through by-laws at the enterprise level.

4. Employment agreement

The employment agreements that are in practice are verbal agreement, formal contract, and appointment letter and probation period employment. There are merits and demerits of each kind depending on the interest of each party. These numerous classifications cause confusion and, in many cases, conflict between the two partners. The form of employment agreement should be simple and clear, whereby all terms and

conditions of work are clearly understood by both parties under agreement. The employment agreement for a job should be limited to two kinds only, i.e., time-bound and tenure/permanent. Their application will be determined by the nature of the job, the longevity of the particular business, the supply-demand situation in the labour market for individual employment environment, and the bargaining power of the either party. This provides a lot of scope for flexibility for both the employer and the employee.

- **Time-bound employment agreement:** This could be for a short-term or a longer period (say, from one day to two to five years) depending on the nature and life of business and other factors discussed above. This agreement would be drawn on mutual negotiation on the terms and conditions of the job specifying the compensation package, facilities, benefits, work conditions, as well as employment termination etc. The agreement could be renewed on mutual assent. This form of agreement will possibly cover a large number of workers in the formal as well as the informal sector.
- **Tenure/permanent employment agreement:** This is for long term employment which would be governed by the employees service rule (by-laws) of the particular enterprise, which among others specifies conditions such as salaries/wages, benefits, facilities etc. and termination of employment. Appointment letters will be issued to all employees under this type of agreement and may include provision for probationary period.

5. Termination of employment

The time-bound employment agreement should include specific clause entitling either party to terminate employment if employment needs to be terminated before the expiry of the agreement tenure on any ground. Specified advance time notice and specified severance payment should be included in the clause.

Likewise, in the tenure/permanent employment, except for normal employment termination conditions of retirement or resignation, two situations of employment termination may arise that involve an individual or a group/groups of employees.

- a) **Individual termination:** In this category of termination of employment or dismissal from employment, the following provisions need to be applied.
 - The dismissal has to be justified by the employer and must be preceded by consultation with the authorized enterprise-level workers' union or bipartite committee. The local labour administration will simply be notified of the employment termination.
 - The affected employee should be allowed to exercise his/her right to appeal in the labour court if he/she wants to.
 - In case the court deems the dismissal unjustified and rules in favour of the employee, the employer should pay necessary compensation to the individual.
 - Reinstatement of the employee in the enterprise should not be obligatory, but should be on mutual agreement/negotiation. The employer should make the severance payment.

- b) **Collective redundancy:** Such a situation which arises due to the need to respond to various environmental factors including the need for organizational development and restructuring may call for short term to indefinite lay-off or permanent pay-off of a small group or large groups of employees in the enterprise. The following provisions should apply in the termination of employment in such a condition:
- Consultation with the authorized enterprise-level workers' union
 - Authorization of labour administration must be required in case of pay-off only
 - Statutory redundancy payment

6. Creation of Social Security Fund

At present there is no dependable means (social security) for a worker to fall back on during the period of unemployment in the event of dismissal from employment. This is a major reason for the workers and trade unions to resist employment termination even in justifiable cases. With some ingenuity, a Social Security Fund could be created by utilizing the existing provisions in the legislation regarding Labour Welfare Fund. The largely unutilized Labour Welfare Fund could be transformed into a central fund with matching contribution from the government. A statutory tripartite body should be constituted for the application and monitoring of the fund thus established.

7. Activating Labour Market Information System

The strategy for labour flexibility should involve, first, identifying the specific sectors and subsectors with labour market surplus, deficit and balance as per the employment environment, and then determining the conditions for employment relationship and employment termination either by the employers or the workers, as may be the situation. For this, the LMIS should play an active role to gather market information, analyze them and ensure their timely dissemination. A dynamic LMIS is the backbone of a healthy and vibrant labour market, a means to monitor the elasticity of demand and supply of employment, the requirements of specific subsectors, the movement of people etc. The areas of no risk must be enlarged with appropriate strategies to identify the risk areas by analyzing the reasons for surplus or deficit. The LMIS should be governed by a statutory provision in the Act entrusting the MoLTM with this responsibility.

8. Legislation update task force

The realities of the changed employment environment and vibrant economic order in the context of globalization must be reflected in the employment policies and labour legislation. The National Labour Policy accommodates interpretations of employment flexibility to some extent. However, the Labour Act 1992 must be amended to incorporate the recommendations discussed above. This has to be done by a task force constituted with a minimum representation of the following people:

- Representative of Ministry of Labour as convenor of the task force
- Labour law expert
- Labour relations management expert

The task force shall forward the updated legislation to the Central Labor Advisory Committee for initiating necessary actions to amend the Act.

ANNEX – 1

Checklist for Interview

1. Employers' discretion for termination

Termination of employment protects enterprise well-being and is an operational right of employers. Enterprises cannot be burdened/penalized at the cost of efficiency/productivity and competitiveness. Just as an employer has the discretion to decide on the best use of various factors of production of goods/services, he should have the discretion to make 'hire and fire' decisions.

How much discretion should employers have or be given regarding termination of employment in the enterprise?

How to balance this discretion with social justice – protection of workers' right to earn a living, safety nets to workers, cooperation with workers?

2. State's role in termination regulation

Regulation of termination of employment is necessary for a number of reasons:

- prohibit employers from making arbitrary dismissal decisions for the sake of individual justice
- minimize the costs of such dismissals to the employees
- protect public rights such as the right to join trade union and the right not to be discriminated against on grounds of gender, race etc.
- protect employers from excessive litigation costs that may otherwise arise from employment termination
- promote employment security through investment on training and development of workers

How to incorporate flexibility issue in legislations and at the same time ensure that employers are not making arbitrary dismissal decisions and impinging on the job security of the workers?

3. Outsourcing/subcontracting

Outsourcing for supportive functions like house-keeping, electrical and plumbing maintenance, security, advertising and subcontracting of critical jobs like packaging, delivery of goods, have allowed employers to reduce their number of employees, extra liabilities and capital investment on services acquired through such means. Such flexibility provides the opportunity to employers to concentrate their time and effort on core tasks and competencies.

4. Job flexibility

As a feature of modern approach to management and productivity enhancement, organizations are going for flexible operating systems that include flexible work schedules, innovative work modules, multi-skilled functions allowing job rotation from administration to accounting to marketing etc.

How can employer adopt management approaches such as outsourcing/subcontracting and job flexibility without endangering the job security of employees in the organization?

5. HRM and flexibility

Many cases of tussles and confrontation during exercise of flexibility and at the time of employment termination arise due to weak human resource management and low priority of employers for human resource development. As a consequence of low investment on worker training and development, and motivation, employers blame the workers for low efficiency and productivity, and decide to go around it through other resources – human as well as technology in the name of flexibility.

What needs to be done to ensure that workers are motivated through HRD and they improve their saleable features/employability in the labour market?

6. Minimum provision in Labour Act

One cannot have all flexibility provisions of different sectors addressed by one labour act. Flexibility issues will be different for different subsectors, e.g., tea estate, TV assembly, agro processing, hotels etc. It would make sense to have specific differences addressed by indigenous by-laws/in-house service rules formulated under bipartite mechanism. Trade union and employers' association at the local/ district/ central level may do monitoring of the termination activities as the case may require.

What is your opinion regarding this?

What needs to be done to encourage employers to formulate their in-house rules and follow them?

7. Risk minimization

Labour flexibility minimizes the risk of redundancy in its operations and insolvency, and allows the enterprise to keep up with the changes in the environment and remain competitive. The welfare of workers remains in the security of the enterprise. The employer must be given the freedom to take those measures that minimize risks to the enterprise.

How can labour management cooperation be enhanced in this?

ANNEX – 2

List of Persons Met

EMPLOYERS

Prakash Sharma	Member, Employers Council, FNCCI
Narendra Bajracharya	President, Hotel Association of Nepal (HAN)
Basant Lal Shrestha	President, Federation of Industries in Nepalese Industrial Estates (FINIE)
Bijay Bahadur Shrestha	Chairman, Productivity and Quality Committee, FNCCI

TRADE UNIONS

Rajendra Bahadur Raut	President, DECONT
Khilanath Dahal	DECONT
D. P. Aryal	DECONT
Puskar Acharya	Senior Vice-President, NTUC
Ramjee Kunwar	Vice-President, NTUC
Bam Bahadur DC	Vice-President, NTUC
Bhakta Bahadur Karki	Vice-President, NTUC
Rajendra Acharya	Deputy General Secretary, NTUC
Ganesh Niraula	Treasurer, NTUC
Manju Bhattarai	Member, NTUC
Tejendra Jung Karki	Member, NTUC
T. P. Khanal	Member, NTUC
Mohan Basnet	Member, NTUC
Ramesh Chalise	Member, NTUC
Tulasi Siwakoti	GEFONT

ANNEX – 3

List of FGD Participants

Officials of MoLTM, Department of Labour, Labour Offices:

Lalit Bahadur Thapa	Joint Secretary, MoLTM
Sita Ram Uprety	Under Secretary, Labour Section, MoLTM
Yuvaraj Sharma	Under Secretary, Occupational Health and Safety, MoLTM
Rohini KC	Under Secretary, Occupational Training Centre, MoLTM
Kumar Raj Joshi	Under Secretary, Planning Section, MoLTM
Basudev Pokhrel	Factory Inspector, Labour Office, Kathmandu
Suresh Kumar Shrestha	Factory Inspector, MoLTM
Khagendra Basnet	Factory Inspector, MoLTM
Seema Luitel	Sociologist, MoLTM
Sanat KC	Section Officer, MoLTM
Rajesh Gautam	Section Officer, MoLTM
Keshav Koirala	Section Officer, MoLTM
Shanker Nepal	Section Officer, MoLTM
Radha Krishna Shrestha	Section Officer, DoL
Gopal Adhikari	Section Officer, DoL

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