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Omed Aziz Ismail

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**UNFAIR TERMINATION OF EMPLOYMENT
CONTRACT IN LIGHT OF INTERNATIONAL AND EU
STANDARDS: AN APPROACH TO REVIEW IRAQI
LABOUR LAW**

Candidate:

Omed Aziz Ismail

Supervisor:

Dr. Henriett Nádasné Rab
PhD

Doctoral Program: Changes in State and Law in Central and Eastern Europe
Head of the Doctoral School: Prof. Dr. József Szabadjfalvi, DSc, Professor of Law

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While I was discomposed to complete this dissertation as being the most challenge academic step in my life so far, several persons inspired me and paved my way to achieve this mission. Those who I want to give them a warm thank and indicate to their excellent assist. At the outset, I would like to show my warm appreciation to my family members whom their encourage and support always gave me a relax and refresh during my study journey. After the family members, my supervisor Dr. Henriett Nádasné Rab, who guided me and constantly corresponded with me to accomplish my dissertation in a right way, is the most deserved person to be thanked. I would also like to mention the Secretary of Doctoral School, Dr. Márton Leó Zaccaria, for his cooperation and prompt answers regarding our inquires.

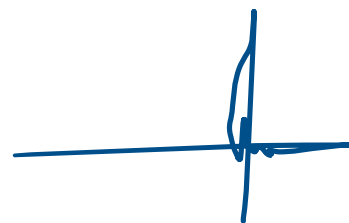
NYILATKOZAT

Alulírott, **Omed Aziz Ismail**, büntetőjogi felelősségem tudatában kijelentem, hogy a Debreceni Egyetem Marton Géza Állam - és Jogtudományi Doktori Iskolában a doktori fokozat megszerzése céljából benyújtott, **Unfair Termination of Employment Contract in Light of International and EU Standards: An Approach to Review Iraqi Labour Law** című értekezésem saját önálló munkám, a benne található, másoktól származó gondolatok és adatok eredeti leőhelyét a hivatkozásokban (lábjegyzetekben), az irodalomjegyzékben, illetve a felhasznált források között hiánytalanul feltüntettem.

Kijelentem, hogy a benyújtott értekezéssel azonos tartalmú értekezést más egyetemen nem nyújtottam be tudományos fokozat megszerzése céljából.

Tudomásul veszem, hogy amennyiben részben vagy egészben sajátomként mutatom be más szellemi alkotását, vagy az értekezésben hamis, esetleg hamisított adatokat használlok, és ezzel a doktori ügyben eljáró testületet vagy személyt megtévesztem vagy tévedésben tartom, a megítélt doktori fokozat visszavonható, a jogerős visszavonó határozatot az egyetem nyilvánosságra hozza.

Debrecen, February 23, 2022

A handwritten signature in blue ink, consisting of a horizontal line with a vertical stroke intersecting it, and a small loop on the right side.

Aláírás

SUPERVISOR'S OPINION

Omed Aziz Ismail:

"Unfair Termination of Employment Contract in Light of International and EU Standards: An Approach to Review Iraqi Labor Law."

Omed Aziz Ismail began his doctoral studies in the 2018/19 academic year at the Géza Marton Doctoral School of Legal Studies at the University of Debrecen. From the beginning of his studies, he is consciously and planned to prepare his doctoral dissertation. In the first year, his studies were published in fields other than his chosen doctoral topic, as a result of his previous scientific work, but his new research was already carried out in the framework of his doctoral dissertation.

The topic of his research is "Unfair Termination of Employment Contract; and Methods of Redressing it." Regarding the range of content issues related to the topic to be examined, the candidate has deepened the literature, processed a number of relevant literature during the preparation of the dissertation, and his studies underpinning his research have been published in qualified domestic and foreign journals. The final content of the dissertation, including its title, was designed with this in mind. The reviewers suggested changing the title, with which the candidate and I, as the supervisor, agreed, but this was not possible under the doctoral regulations. Regardless of this, the request will be taken into account in the case of later publication and further processing of the dissertation.

In the introductory chapter of the dissertation, the candidate basically outlined the directions of his research and research methods, in which he managed to highlight the special point of view, which resulted in differences in approach during the processing of the topic.

During the elaboration of the international standards, the basic institutions determining the rules of termination were examined, already focusing on the fact that the ultimate goal of the research was the compliance of the Iraqi Labor Law with these conventions. Differences in the level of international legal regulation and EU regulation appear in the dissertation, the results of which are also used in the processing of Iraqi Labor Law. The candidate's own position and legal conclusions appear in the dissertation in addition to the chapter that concludes.

The candidate has structured his dissertation logically, it is structurally well articulated, proportionately structured, transparent and the ideas formulated by him have been clearly formulated, the reference system of the dissertation meets the requirements of doctoral dissertations. I was convinced of the professional skills of the candidate during the preparation of the dissertation and during the reading of the finished dissertation.

Since the workplace defense, the candidate has supplemented his dissertation with elements suggested by the reviewers, maintained his position on some points and gave detailed reasons for this, but accepted the proposals in most places.

Finally, I would like to point out that it was good to work with the candidate, a dedicated researcher who was very humble about his work and listened to my opinion and in connection with his dissertation, he also tried to get the most out of the reviewers' opinions and the opportunity provided to him.

Debrecen, February 22, 2022.



Dr. Nádásné dr. Rab Henriett
the candidate's supervisor

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INTRODUCTION

1. General Background

Termination of employment contract is a complicated issue of a modern labour law that has different dimensions to focus on. Perhaps, the different interests that may involve into the case of employment termination and the conflict of such interests are what makes the issue to be more complicated. Superficially, the interests of employers and employees seem to be exclusive relevant interests in that case. However, in the new era, the interests of state, being accountable to protect income security and economic growth through flexible measures of employment, have also engaged. Nowadays, triple interests in case of employment termination are at stake. The notion of termination of employment and what constitutes unfair termination, therefore, are in constant change pursuant to different interests belong to employers, employees, and state.

An employment contract may come to an end on a mutual agreement of the employer and the worker or based on the expiration of the date set for the contract. These are normal circumstances to terminate an employment contract without the need for any interfere from the third party. The situation also seems to be normal when a contract is unilaterally terminated by the will of the worker whose legal status in the employment contract often does not render him/her a chance to terminate this contract in a harmful and abusive way. Thereby, the prospect of unfair termination primarily remains in case of termination at the initiative of the employer. This fear inherently resulted from the nature of the employment contract in which the employer is always a dominant party, and his/her prerogatives most likely lead to arbitrary termination. The actuality of this fear and the degree of its negative consequences has reached a level that mandates state intervention in employment contracts in form of articulating mandatory provisions governing this contract.

The articulation of provisions prevailing termination of employment contract have become a central issue in labour laws. This is not only because the significance to organize employment relationships concluded between unequal bargaining powers, but also because a direct impact of such provisions on the labour market fluctuations and economic growth, plus to the state's responsibility to save a budget for social security. It is commonplace that labour laws always contain protective provisions insofar as necessary to protect workers, entailing state intervention to limit freedom of contract due to objective reasons. However, beginning of a new era has

redefined the notion and scope of objective reasons since different factors engaged to formulate state intervention in freedom of contract, especially contract of employment. The need to protect workers has not remained the only objective reason justifying state intervention to articulate termination provisions. Along with that, the need to liberalize and modernize labour market have also become a part of objective reasons to formulate the type and the degree of such intervention. The mission of a modern state, therefore, is quite complicated to retain a balance between various aspects each tends to a reasonable interest.

The debate over unfair termination of employment contract, nowadays, does not merely keep an eye on contractual arrangements. Rather, it rests on multiple arguments. At the first glance, each argumentation can be seen as a counterargument to the other, but ultimately, they can be integrated with each other, serving multiple aims. While job security argumentation tends to enact stringent termination rules and expand the scope of unfair termination to protect workers, labour market flexibility argumentation tends to ease hiring and firing rules and shrink the boundary of unfair termination to activate labour market. The two different arguments can be integrated into a balanced model under which the worker can retain his/her employment status through an easy transfer from a job to another in an active and flexible labour market. What constitutes unfair termination, thus, shall be analyzed from different perspectives; first is a humanitarian perspective to protect the worker as being a weak party in a contractual relationship, second is a managerial perspective to enable the employer to govern his/her enterprise, and third is an economic perspective to keep an active labour market for sustainable development.

The importance of employment termination rules and its different dimensions have also become a matter of international concern. It brought the attention of International Labour Organization (ILO), seeking to bind member states with standards that promote workers protection as a crucial element of decent work on one hand, on the other hand, provide a leeway for member states to exclude some types of workers and contracts from afforded protection as a mean to retain a degree of flexibility in labour market. In this regard, Termination of Employment Convention No. 158, and Termination of Employment Recommendation No. 166, both are concluded in 1982 by ILO are the most known international instruments referred to in this study. The two instruments draw international standards to regulate termination of employment at the initiative of the

employer in reaction “to the serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries”.¹

To test the successfulness of international standards derived from ILO instruments and the way to apply them in labour market, we investigate the applicability of such standards within developed countries. For that purpose, we take EU standards in this field and the degree of integrating EU standards with international standards into consideration. The EU flexicurity model based on the open method of coordination and its ability to combine security and flexibility makes it one of the best practices of international standards. The model deserves to be a source for the other jurisdictions and from this angle, we analyze Iraqi Labour Law aiming to determine the defective points regarding termination of employment contract and the way to redress it. This study, thus, will be achieved through three steps; the first step to focus on the international standards concluded from the relevant international instruments regulating termination of employment contract, the second step to reveal the impact and the applicability of international standards within the EU as developed countries, the third step to test Iraqi Labour Law in light of international and EU standards aiming to improve provisions set for preventing unfair termination in Iraq.

2. Problem Statement

There are now ample studies in Iraq on the deficiency of the Iraqi labour market to supply job vacancies insofar as necessary to fulfil the demand of workers. In addition, sufficient research made on the vulnerability of workers in employment contracts, and how they easily can be fired in their position. The Iraqi labour market problem is twofold; first, it is not an active market that has shortages in displaying job opportunities to cover demands of labour forces, second, it is not a protective market for workers who have already been engaged in employment relationships. However, to address the presented problem that has different dimensions, much research focused on the traditional methods to protect workers and strengthen their position in the current employment relationships. However, to address the presented problem that has different dimensions, much research focused on the traditional methods to protect workers and strengthen their position in the current employment relationships. Many studies have consistently devoted

¹ International Labour Organization ILO. (1982). Termination of Employment Convention, No. 158, *Preamble*. Retrieved April 16, 2020, from: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158

toward the need to increase workers protection and expand the scope of unfair termination.² No research has been proceeded on how to formulate or apply identified standards in this field with different factors from developed countries so as to bring a change in Iraq.

The failure to transfer successful models in dealing with employment termination rules renders the current Iraqi Labour Code No. 37 of 2015 a deficient law which is not able to encounter contemporary issues raised in Iraqi labour market. Since 2014 in which Iraq faced economic crisis and the governmental agencies could not employ individuals anymore, the need to boost private sectors has gradually increased to create new jobs.³ This requires easing the restrictions on companies to hire and fire workers as a mean to establish a flexible environment where they are motivated to provide more opportunities. The need of labour market has not rightly studied in Iraq, this resulted an issue of the new Iraqi Labour Code in a problematic way that only strengthen contractual arrangements in favor of the workers.

3. Research Questions

This research tends to answer multiple questions. But the primary question that underpins the research is:

“How the international standards to prevent unfair termination of employment contract have turned to the EU flexicurity model, and what makes the Iraqi Labour Law reach to this developed model”.

² Mohammed, A. (2020). *Termination of Employment Contract in Iraqi Labour Law*. Retrieved July 30, 2021, from <https://www.egypt-lawyer.com/>; Abid, A., Elyas, Y. (2019). *Labour Law. Legal library*, Baghdad, p. 316; Elyas, Y. (1989). A brief interpretation of Labour Code No. 71 of 1987. *Administrative institute – Rasafa*, p. 110.

³ Since 2014, Iraq faced a severe economic downturn due to the Islamic State of Iraq and Syria (ISIS) invasion of the country and the drop of oil prices. The crises in Kurdistan Region of Iraq started with more serious features due to the bankruptcy of the Kurdish Government plus to the other factors hit the central government. The bad economic circumstances reached to a level that Kurdistan Regional Government issued the Decree No. (64) on February 3, 2016, imposing saving salary system. The system cut a relatively amount of the employees' salary according to different criteria for each employee till the government being able again to pay the full salaries. The application of the decree prolonged till July 25, 2021, when the government repealed the saving salary system on the condition to have enough revenue each month to finance full salaries. Along with that, the Kurdistan Regional Government announced its incapacity to employ individuals in governmental institutions anymore with motivating workers to acquire jobs in companies and private sectors in general. This forcefully rendered the workers to arrange their employment status in companies and private institutions, as they disappointed from public sector. The instability and rigidity of Iraqi labour market did not let the private sectors to perform its function and to be a good factor for an economic recovery. The result for that situation was an increase of unemployment rate in Iraq day by day. According to a statistic published by the World Bank, Iraq is one of the top countries where the rate of unemployment has notably increased from 2014. The rate scored 10.59% in 2014 and has reached to 13.74% in 2020.

The research question presented above is indeed relevant to the research problem since the answer to that question can help to find out a way to improve Iraqi labour Law and address the presented problems. Two aspects can be seen in the research question; first is to explore the applicability of international standards within developed countries represented in the EU countries in this study to prove the success of those standards being formulated in a new model, and second is to review the Iraqi Labour Law to detect the weakness sides in view of international and EU integrated model. The first aspect is crucial for the second one because the international provisions sometimes remain as theoretical standards unless if their adaptability is proven in a practical-based model.⁴ This could be an exact challenge in our study since the international instruments governing termination of employment contract have not been ratified by most states in the world.⁵ This fact may pose the prospect of dissatisfaction in most states especially developed countries with international standards derived from the ILO instruments. Through proof of the effectiveness of international standards in the EU countries, therefore, we may rebut such a prospect. The other challenge is most of the EU countries also have not ratified the ILO instruments regarding termination of employment contract.⁶ This also arises some minor questions ask whether the EU has its own system to deal with termination of employment contract away from international standards. If so, how the EU countries who have ratified the ILO instruments can keep their international commitments imposed by the ILO and EU simultaneously. However, this would not be a case, if the EU standards to transact with this matter are consistent with the ILO standards.

4. Hypothesis

Since a balanced model has taken into consideration in this study, we target fulfilling multiple concerns, namely workers' rights, employers' interests, and economic variables. From this perspective, our hypothesis identifies a direct relationship between employment termination rules and government policies that constantly change to reconcile such discordant sides. The hypothesis, then, expects that:

⁴ Billett, S., Harteis, C., & Gruber, H. (Eds.). (2014). International handbook of research in professional and practice-based learning (Vol. 1383). *Dordrecht*: Springer Netherlands.

⁵ According to the Formal website of ILO, only 36 countries so far have ratified on Termination of Employment Convention. No. 158 of 1982, Retrieved June 24, 2021, from https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303

⁶ Ibid.

“An ongoing assertion on the protectivity side of termination rules and expand the scope of unfair termination decreases the accessibility of labour market for workers”.

Therefore, our hypothesis considers different variables, such as the impact of flexible and stringent termination rules on the rate of employment and employability pursuant to different ages, especially, the rate of youth employment. It aims to manifest inverse relationship between stringent termination rules and high rate of employment. This apparently means that whenever termination rules tend to be strict, the rate of youth employment tends to be low. Such type of rules, ultimately, harm the entire workers in terms of easy access to labour market.

To prove our hypothesis, we start searching for international standards to address termination of employment issue, and then collect relevant data from the EU as a union for developed countries where a successful model based on international standards can be seen to balance security of workers and flexibility of labour market. For that purpose, we also analyze a significant number of empirical evidence, displaying various categories of EU countries in terms of rigidity and flexibility of termination rules. In addition, we support our hypothesis through EU flexicurity model to treat with different variables. What the evidence reveals, in this area, is the necessity of liberalizing labour market and actuality of the hypothesis.

Perhaps several concerns arise in the scope of our hypothesis. A non-correlation between international standards regarding employment termination rules and EU flexicurity model could be one of those concerns. Indeed, such a correlation can be drawn in a true sense. It is said that the international standards often remain as theoretical standards within international documents, unless if their actuality is proven in a practical model. Therefore, we intend to prove the actuality and applicability of international standards, namely ILO standards governing termination rules through a practical model, namely EU flexicurity model as a successful model of developed countries. The international standards of termination of employment have drawn general principles and guidelines. Under those standards, two aspects can be seen: security and flexibility. On the one hand, security provided for standard contracts, on the other hand, flexibility signaled out for temporary or non-standard contracts. The way to deal with both sides and combine each with other is deliberately left to a practical model. In this sense, EU flexicurity is a best practical model under which security and flexibility well combined and balanced. It is true that flexicurity model is an EU phenomenon, but in fact the model is quite affected by international standards drawn for

termination rules. Especially, the model took the advantages of those standards that extent flexibility for specific types of contracts and workers and exclude them from protection against unfair termination. Thus, the international standards were an inspiration for EU flexicurity model inventing atypical employment contracts. From this end, both international standards governing termination of employment and EU flexicurity can be referred to improve Iraqi labour law in the establishment of a balanced model combining security and flexibility.

Another concern may arise about the concept of unfair termination which seems not to fit with European flexicurity model since unfair termination includes illegal termination cases, while under flexicurity basically nothing illegal. In general, flexicurity model does not go beyond the concept of unfair termination and not absolutely deprive employees from the right to claim for unfair termination. It, rather, redefine the concept of security for various types of temporary and atypical contracts. For such contracts, it provides employment security instead of job security. The idea that requires easy rules for companies to fire and recruit workers without being liable for unfair termination. However, permanent contracts remain in force under EU flexicurity model. Workers in such contracts are protected against unfair termination and this what has been confirmed by EU directives and several number of EU case law discussed in this study along with flexible labour rules. In addition, flexicurity approach brought some changes on governing termination rules of permanent contracts. Such changes can be seen in facilitating restrictions that unduly imposed for terminating permanent contracts. This obviously can be seen in Dutch flexicurity model in which all undue requirements for terminating permanent contracts have been repelled. Such as, the requirement of an advance permission from the public employment service or taking a judicial decision to dissolve the contract of employment in every single case of dismissal in Netherland.⁷ A breach of such undue requirements often rendered termination of employment to be considered as unfair termination. However, after the onset of flexicurity approach in Netherland, such strict requirements for terminating an employment have been repelled, and consequently the scope of unfair termination of permanent contracts relatively minimized.

⁷ Bruurmijn, W. (2017). Flexicurity Measures in the Netherlands and Germany. Retrieved February 12, 2022, from https://www.researchgate.net/publication/315825577_Flexicurity_Measures_in_the_Netherlands_and_Germany

5. Aims and Objectives

The aim of this study is to improve the Iraqi Labour Law and bring a change to the realm of termination of employment as to redefine the notion of unfair termination in a way that may neither waive the right of workers in protection nor impede the economic interests. Iraq has not elaborated a successful model to enhance a modern labour market in which several interests can be achieved. Being a part of Socialist Regime for a long time made Iraq evading from the involvement in many significant international treaties and not to proceed an integration between international standards and its national laws. This situation prolonged until after the collapse of Ba'ath party in 2003 and the end of Socialist Regime in Iraq.⁸ Even after the fallout of Ba'ath party, the process of progress has not been fostered soon due to the political instability. Now, it is time to launch a comprehensive review for the Iraqi laws to integrate with identified success factors, the labour law at the forefront of them.

Many indicators prove that the Iraqi labour law is a defective law in terms of the ability to manage labour market from different perspectives. An onward increase of unemployment rate day by day as mentioned before is one of those indicators. This more likely mean that the traditional concept of job security still is the dominant concept in Iraqi labour law, while this trend is abandoned, and it has been substituted by the concept of employment security in modern labour laws. Iraqi labour market, thus, is in need to more flexibility and an establishment of non-regular employment as well as a modern law to support that. To this end, EU flexicurity model, under which flexible labour rules and atypical forms of employment normalized, is a good model to refer to. The aim to engage EU flexicurity model in this study is to inspire Iraqi lawmaker to proceed necessary modifications in labour law, so it can liberalize labour market from undue restrictions.

6. Methodology

This is a multidisciplinary, deductive, and qualitative study. It is a multidisciplinary study since we try to solve the problem from different perspectives, using the tools of different science especially law and economics together, so we can find a satisfied solution. According to Gestel and Micklitz, doctrinal legal research is dead in the United States, and in Europe, the debate over

⁸ The Socialist Regime has been repealed after the allied forces invasion of Iraq in 2003 and promulgate the new Iraqi Constitution in which the Socialist Regime replaced by a republican, representative, parliamentary, and democratic regime in 2005.

the abandonment of such type of research to be substituted by a multidisciplinary approach arose over the last decades.⁹ Multidisciplinary approach nowadays brought the attention of many academic institutions and renowned researcher as a proper approach to study a problem from all aspects.¹⁰ It allows sharing disciplines of different fields to reach a convenient conclusion.¹¹ As long as the law themes are involved with different aspects of life like political, social, economic, and institutional, a multidisciplinary approach is of utmost importance in law field. This is what exactly confirms the significance of this method in our case because what constitutes unfair termination of employment contract is not only confined to a legal perspective, but rather involved with economic concepts as well. While legal scholars often tend to protect workers in case of termination of employment and portray unfair termination on that basis, economists, in contrast, demand to ease protection and liberalize labour market from hiring and firing rules. Giving consideration merely to one side of the disciplines engaged in this matter will lead to relatively unsatisfied results.

It is also a deductive study to test our hypothesis, starting from general observation to more specific facts.¹² Our hypothesis is that an ongoing assertion on the protectivity side of termination rules decreases the accessibility of labour market for workers. To prove our hypothesis, we start from general observation by looking at the international standards to address termination of employment issue, and then collect relevant data from the EU as a union for developed countries where a successful model based on international standards can be seen to balance security of workers and flexibility of labour market.

Qualitative method is also picked up to serve the outcome of this study. Though using some numbers and statistics, it is still can be described as a qualitative study because we mainly focus on legal documents, case studies, literature reviews, and data analysis. The study is generally expressed in texts and words to understand notions, thoughts, or experiences. Even statistics and graphs are used to support concepts and to test our hypothesis. Hence, this method will

⁹ Van Gestel, R., & Micklitz, H. W. (2014). Why Methods Matter in European Legal Scholarship. *European Law Journal*, 20(3), 292-316.

¹⁰ Schnotz, W., Kauertz, A., Ludwig, H., Müller, A., & Pretsch, J. (Eds.). (2015). Multidisciplinary research on teaching and learning. *Springer*, p. 189.

¹¹ Mátyás, B. (2021). Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline. *Edward Elgar Publishing*, p. 173.

¹² Rahi, S. (2017). Research design and methods: A systematic review of research paradigms, sampling issues and instruments development. *International Journal of Economics & Management Sciences*, 6(2), 1-5.

systematically support the results of our research since it does not merely clarify what the relevant law is. Rather, the method is well known for analyzing core legal concepts, types of evidence, and basis of arguments to convince readers with the outcomes that the study reached.¹³ Different arguments and evidence involved to our study inspire the selection of qualitative approach to rationalize the outcomes.

The last methodological note which is worthy to mention is that the data used in this study are secondary data as being dependent on primary data collected before. Our main sources for the secondary data are international legal instruments, legislations, books, treatises, journal articles, and statistics and graphs done by the formal and informal institutions for specific purposes that vary from our purpose in this study. Therefore, the originality and novelty of our study are not coming from the data collection, but rather come from the way to use and analyze the data.

In sum, the deductive method is used for the first chapter -policies and doctrines- and second chapter -international standards on termination rules-, starting from general observations and common policies to deduce specific results and facts. For the second chapter, namely EU standards, a multidisciplinary method is used since EU flexicurity model as an increasing trend in EU employment strategy depends on different arguments of law and economics that needs a multidisciplinary approach to explain. As for the chapter to review and evaluate Iraqi labour law, a qualitative method is taken since we have done this chapter by referring to the Iraqi primary Iraqi legal documents including Iraqi legislation and case law.

7. Research Structure

This study comprised five chapters in addition to the introduction and conclusions. Each chapter connects to the other chapter and so on. The first chapter discusses policies and doctrines that underpin basic dogmatic concepts surrounded the topic. Job security policy and at-will employment doctrine have been introduced as the two primary paths that formulate termination rules and what consider unfair termination within different jurisdictions. The basic argumentation to rationalize each one of them have been discussed referring to the historical context to emerge these policies and doctrines. At-will employment is an American labour law base-model. Even though the doctrine of at-will employment is not a base for the relevant international conventions

¹³ Linos, K., & Carlson, M. (2017). *Qualitative methods for law review writing*. U. Chi. L. Rev., 84, 213.

discussed in this study and not a base for labour law in any European countries and Iraq, it is relatively important to explain in this context. The significance of this segment is to detect how different tenets or ideologies can impact termination rules, as such tenets and ideologies arguing the issue from different law perspectives and economic interests. The American model reveals to what extent can employment termination rules be liberalized. Further, it may give a supportive analysis for EU flexicurity model where economic reasons justify flexible labour rules. Therefore, the contribution of the U.S. model in this study, namely at-will employment, job property rights doctrine including the concept of due process, aims to support EU model that has been taken as a base model for our study. Though the two models are quite different in theory and practice, they may serve each other in some specific paths and results. The chapter is finalized by reaching to the most common results between the policy of job security and at-will employment doctrine with indicating to the different results regarding termination of employment contract.

The second chapter allocated to deduce international standards to prevent unfair termination of employment contract. For that purpose, we rely on ILO instruments as the most relevant international agency working on such issues. More precisely, we confine our research to study international standards deduced from Termination of Employment Convention No. (158) of 1982, and Termination of Employment Recommendation No. (166) of 1982.

The third chapter is to illustrate the EU standards as being developed standards that integrated with international standards to formulate the notion of unfair termination of employment contract. This chapter includes an examination of termination rules in EU hard law as presented in EU Charters, Directives, and Case law on one hand. It includes, on the other hand, an examination of the impact of the EU soft law under the Open Method of Cooperation (OMC) to improve the articulation of termination rules.

In the fourth chapter, we proceed reviewing the provisions governing termination of employment contract in the Iraqi Labour Law. We try to analyze and evaluate termination rules in Iraq in view of international and EU standards, aiming to determine the most defect aspects in Iraqi Labour Law and the way to rectify them. From the beginning of the chapter, we provide a quick historical development on that matter and how we got here in Iraq. The chapter provides a detail on termination of indefinite contracts, fixed-term contracts, and probationary contracts. It also

explains what constitutes unfair termination in the mentioned contract, and what remedies can be provided for such cases.

The last chapter designed for results and discussion to summarize findings that we reach in this study. This chapter followed by the conclusion including our recommendations to finalize this study.

CHAPTER I

TERMINATION OF EMPLOYMENT CONTRACT: POLICIES AND DOCTRINES

This chapter is a concept review of job security and employment-at-will as the most common policies and doctrines under which termination of employment contract has been articulated and the claim for unfair termination has been addressed. In addition, it tests how the notion of such policies affects termination rules in the view of rigidity and flexibility. The discussion over such policies can help to explain the variety of termination rules in different legal systems. It would not be surprising to see various articulation of termination rules as long as the policy of a state to deal with this matter is different from another state. Therefore, an analysis of employment termination policies is crucial to reach the basic root of termination rules and to evaluate to what extent workers are protected from unfair termination.

Each policy has its own history, impetus, and argumentation. These substantial factors surrounded to each policy should not be derelict to reach its rationality and suitability for implementation. In reaching to the policy of job security, several incentives and argumentations get involved to support the perception of this policy, as it is for employment-at-will doctrine. Such incentives and argumentations for each one of them are twofold: on one hand, they are supportive; on the other hand, they are used to be counter argumentations to rebut the counter side. To rationalize the notion of job security, various argumentations based on the humanitarian perspective, employee's property right over the job, and the unique nature of employment from the perspective of inequality of bargaining power can be found. For employment-at-will, basic argumentations for fostering free labour market can be found. The idea that depends on a trade-off between workers protection and free labour market.

Hence, job security and employment-at-will seem to be contradicted policies since the first one concentrates on workers protection as a focal point of termination rules, while the second one preserves the labour market from being restricted by stringent rules. The contradiction of these policies subsequently leads to different types of employment law regarding to employment termination. The one that enacted based on the policy of job security would be, of course, more protective for workers than the one relies on employment-at-will doctrine. Notwithstanding, these

two counter policies are getting closer to each other in some common points where protection shall inevitably be provided for workers from being unfairly dismissed. Those common points are embodied in the exceptions brought on the general concept of at-will employment where the employer is prohibited to dismiss a worker if one of the exceptions apply, otherwise the claim for unfair dismissal arises by the worker and the court shall provide protection. Explaining the main exceptions and how relatively establish an approach between at-will employment and job security in terms of providing protection against unfair dismissal come to discuss later in this chapter.

1. “Job Security” and Termination of Employment Contract

In the frame of the relation between workers¹⁴ and employers, job security is one of the most common policies that would impact the articulation of termination rules. Job security is frequently defined as stability of entrusted job to an employee or the likelihood that an employee will keep his/her current job.¹⁵ In the formal documents of International Labour Organization, job security refers to the sense of attachment to a particular job or range of tasks.¹⁶ The traditional idea of this policy is to incorporate contractual arrangements with social and legal protections for workers.¹⁷ It is essentially intended to provide protection for worker, since loss of his/her job will cause loss of his/her and family’s livelihood.¹⁸ First and foremost, job security requires the government to

¹⁴ The term of "worker extends to any individual who, for the purpose of receiving remuneration, performs an activity which has an economic value for another person who is entitled to direct his/her job. It does not matter what the motivation of the job is. As it is not necessary whether the level of economic activity meet minimum necessary for maintenance. This extended definition of the worker upheld by several case law. In *Levin* case, the European Court of Justice (ECJ) has found that the concept of worker is a community concept and that the concept shall not be so narrowly interpreted. In reasoning its judgement against Dutch court that rejected Ms. Levin’s application for residence permit on the grounds that she is not considered as a worker since her economic activity does not earn an amount of income match the Dutch minimum wage for subsistence, the European Court of Justice held that a person will still a worker even he/she reaped an income that did not reach the minimum necessary for maintenance. Further, ECJ ruled that the purpose of the worker is not substantial if the person seeks to pursue genuine and effective economic activity rather than marginal and ancillary one. *Levin v. Staatssecretaris van Justitie (Netherlands)* C-53/81 D.M. [23.03.1982].

¹⁵ Klehe, U. C., & van Hooft, E. A. (Eds.). (2018). *The Oxford handbook of job loss and job search*. Oxford University Press, p. 32.

¹⁶ ILO. (2006). *Job Security Index*. Retrieved February 2, 2022, from <http://www.ilo.org/sesame/SESHHELP.NoteJSI>

¹⁷ Gyulavari, T., Kartyas, D. G. (2015). The Hungarian Flexicurity Pathway? New Labour Code after Twenty Years in the Market Economy. *Pazmany Press* – Budapest, p. 47.

¹⁸ Termination of employment instruments, Background paper for the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), prepared by; *International Labour Organization, International Labour Standards Department*, Geneva, 18–21 April 2011. Pp3.

impose reasonable regulations to limit the ability of employers in hiring and firing workers.¹⁹ Considering what has been said above, Molz has defined employee job security as “the degree to which an employee can be certain of retaining his/her job in the future.”²⁰

Accordingly, this policy is utilized “to protect workers against labour market risks”²¹ where protective legislations are objectively needed to protect workers against unfair termination. The term of employment protection legislation (EPL), then, refers to all measures set within legislation, regulations, and court rulings that place several restrictions on the employer’s will to hire and fire workers based on the employment contract. Such regulations and restrictions have a dual impact. On one hand, a positive impact can obviously be seen for workers in providing protection against the arbitrariness of the employer. On the other hand, a negative impact can also be noticed in reducing the ability of employers to hire and fire workers, and then reducing the flexibility of labour market.

1.1. Job Security Argumentations

The base of job security and the leading factors of its adoption can be analyzed by referring to the humanitarian factors and the special nature of employment contract. Many scholars have argued that the linkage between job security and human rights as natural and moral tenets to impose general obligations is inseparable.²² In this context, job security has an utmost relationship to the second generation of human rights generated based on the principle of social justice.²³ These rights are well-known as economic and social rights which include “right to work” as one of the most fundamental rights connected to job security.²⁴ Everyone has the right to work for earning his/her

¹⁹ Kugler, A. D. (2004). The Effect of Job Security Regulations on Labour Market Flexibility. Evidence from the Colombian Labour Market Reform. *University of Chicago Press*, Volume ISBN: 0-226-32282-3, Pp. 183. Retrieved February 28, 2019, from <https://www.nber.org/chapters/c10070.pdf>.

²⁰ Molz, R. (1987). Employee Job Rights: Foundation Considerations. *Journal of Business Ethics*, 6(6), 449-458. Retrieved March 27, 2019, from <http://www.jstor.org/stable/25071683>

²¹ Clark, A., & Postel-Vinay, F. (2009). Job Security and Job Protection. *Oxford Economic Papers*, 61(2), new series, 207-239. Retrieved March 27, 2019, from <http://www.jstor.org/stable/20529416>.

²² Mansour, M. S., & Hassan, K. H. (2019). Job Security and Temporary Employment Contracts: A Theoretical Analysis. In *Job Security and Temporary Employment Contracts* (pp. 1-26). Springer, Cham. Retrieved March 21, 2019, from https://doi.org/10.1007/978-3-319-92114-3_1

²³ Fomerand, J. (2021). *Historical dictionary of human rights*. Rowman & Littlefield Publishers, p. 15.

²⁴ Article 6 (1) of the International Covenant on Economic, Social, and Cultural Rights of 1966, provides that “the States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”.

livelihood and living with dignity. In the same context, job security has an intense relationship with the right to social security since the worker's loss of his/her job deprives him/her from the contribution of social life where almost access to everything, such as goods, services, education, etc., based on income, and income depends on a decent work to achieve.

The segmentation of termination rules from humanitarian perspectives may cause immoral rules in this regard. The historical narrative on how the policy of job security has been arisen to protect workers over the past decades may support this outlook and justify the correlation between job security and human right issues. It is also evident that the various types of violations committed by employers against workers' rights was the main factor to elaborate much protective legislation as necessary measures to protect employees' rights at work.²⁵ It is not exaggeration to believe that this connection is the strongest argument that has been taken into consideration in enacting international rules²⁶ and regional or national regulations concerning termination of employment contract.

Another argumentation that contributes to this area is concerned with sole property rights in the job, an early argumentation that examines the laws of termination of employment by exploring property rights whether it belongs to employee or employer.²⁷ The impact of property rights assumptions can frequently help to underpin the different perspectives of employment termination laws that otherwise such those laws seem to be conflicted and remain unanswered.

Thus, the argumentations used to support and legalize job security, as well as to analyze rules and regulations codified based on the policy of job security, can be reached in the following points:

1.1.1. An Argumentation Related to the “Humanitarian Aspects”

Discourse on job security in this regard is always involved with the basic concept of human rights. Analyzing job security from humanitarian perspective is an essential starting point to reach out the

²⁵ Elys, W. (2007). A Brief Explanation of Labour Code No. 71 of 1987. *Ministry of higher education and scientific research*. Rasafa Institution, p. 9-10.

²⁶ Such as international standards of employment termination set by ILO through the Termination of Employment Convention, 1982 (No. 158) ratified by 36 states, and the Termination of Employment Recommendation, 1982 (No. 166).

²⁷ Barnard, C., Deakin, S., & Morris, G. (Eds.). (2004). *The Future of Labour Law Liber Amicorum Sir Bob Hepple QC*. Oxford and Portland Oregon, p. 101.

fundamental roots of this policy. This argument is based on the notion that economic interests and managerial prerogatives of employers do not justify violation of fundamental rights of workers in job. In this sense, the basic target of job security is to promote the employee's rights to be treated with dignity and not to be offended at work.²⁸ It requires both parties; the employer and the worker, to adhere to the concept of 'good faith' and 'mutual trust and confidence' in their contractual relationship.²⁹ Another perspective that would be raised in this respect is so-called 'Industrial democracy', focusing on the workers' right to get informed and consulted prior to getting fired at work.³⁰ This means that mutual trust and good faith imply the obligation of informing and consulting worker, otherwise the termination of his/her contract will be void.

In the past, termination rules of employment have been frequently analyzed by concentrating on workers' right to have dignity in life and a decent work promoted by social justice and equality in the life of workers. Going back to the historical point of view, the cruel situation of workers and how they were treated by employers indicates the need of labour laws to be integrated with job security provisions to protect workers and ensure their basic rights to life and decent work. In the middle ages, for instance, the employment relationship has quite renounced from the humanitarian trends when the worker had been treated by the employer as commodities³¹ needed for work.³² This situation was continued till the outset renaissance era where values of humanism have been integrated with the employment relationship and reformulate the concept of this relationship in the light of modernity "including ideas of work as a source of dignity ... and to facilitate participation in society and the dignity of family life."³³

An early contribution to connect job security of employees with basic human rights is made by significant numbers of philosophers and scholars in reaction to changes that occurred in the

²⁸ Njoya, W. (2016). *Property in Work: The Employment Relationship in the Anglo-American Firm*. Routledge, p. 6.

²⁹ Johnson v Unisys [2003] 1 A.C. 518; Eastwood v Magnox Electric plc [2004] 1.R.L.R 733.

³⁰ Njoya, op. cit., p. 7.

³¹ What confirms that workers had been treated as commodities in the past is the Declaration of Philadelphia held by ILO in 1944, confirming the traditional aims and purposes as well as the principles of ILO which they should be incorporated into the policy of its members. The declaration states in I. (a) "labour is not a commodity". Retrieved February 3, 2022, from <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf>

³² Abid, & Elyas, op. cit., p. 8-10.

³³ Blyton, P., & Turnbull, P. (2004). *The dynamics of employee relations*. 3rd Edition. Management, Work and Organisations, Basingstoke: Palgrave Macmillan, p. 5.

ideology of employment relationships. Perhaps, the contribution of Mayo,³⁴ Abraham Maslow,³⁵ and Frederick Herzberg³⁶ are quite enough to share in this respect. To rebut Tylor's theory,³⁷ Mayo argued that workers are encouraged by having their social needs, rather than only by payment in a job, and he claimed that the best motivation of workers is by creating a circumstances where managers and employees have engaged in better communications with mutual trust and feeling safe in job.³⁸ Mayo's theory, finally, recommended that recognition, a sense of belonging, and job security are main factors to encourage workers at work.³⁹ Maslow also has emphasized on decent work and human motivations of employees at work.⁴⁰ He started his famous theory⁴¹ with the view that individuals have multiple needs, particularly; five needs of individuals must be accomplished.⁴² Physiological needs as fundamental requirements for human survival come in the first level, such as food, water, oxygen, and sleep.⁴³ Once physiological needs have been satisfied, the safety and security needs come in the second level and become a second motivational factor.⁴⁴ To stimulate employees at work, therefore, they must feel that their jobs are secure because if they notice a lot of lay off in job, they will have a fear of losing their job, this means employees no longer being able to satisfy employers just for being nervous at work.⁴⁵ Job security, thus, is one of the most important security need for employees in this level. The third level will take place after satisfying physiological and safety needs, and this is what call "Belonging and Love" according to

³⁴ Elton Mayo was an Australian born (26 December 1880 – 7 September 1949). He was psychologist, organizational theorist, and industrial researcher.

³⁵ Abraham Maslow was an American by birth (April 1, 1908 – June 8, 1970). He is a famous psychologist who was best known for providing Maslow's hierarchy of needs.

³⁶ Frederick Herzberg was an American psychologist (April 18, 1923 – January 19, 2000). His most famous theory is Motivator-Hygiene theory, and his most famous book is "One More Time, How Do You Motivate Employees?"

³⁷ Frederick Winslow Taylor was an American by birth (March 20, 1856 – March 21, 1915). He was a mechanical engineer who sought to improve industrial efficiency. His theory is based on the idea that workers are motivated mainly by payment neglecting the other factors, such as job security.

³⁸ Greenwell, T. C., Danzey-Bussell, L. A., & Shonk, D. J. (2014). *Managing Sport Events*. Human Kinetics, p. 55.
³⁹ Ibid.

⁴⁰ Edelstein, S. (2011). Nutrition in Public Health. *Jones and Bartlett Learning*, 3rd Edition, p. 362.

⁴¹ The theory is known as "Maslow's hierarchy of needs." Even though the theory focused on motivations in workplace, it incorporated with psychological needs of employees as basic human needs at work.

⁴² Gulati, R., Mayo, A. J., Nohria, N. (2014). Management. *South-Western Cengage Learning*, 1st Edition, p. 465.

⁴³ Rodriguez, D. M. (2014). *The Balance Concept in Health and Nursing: A Universal Approach to Care and Survival*. iUniverse, p. 15.

⁴⁴ Grobler, P. A. (2006). Human Resource Management in South Africa. Thomson, *Human Resources in South Africa*, 3rd Edition, p. 217.

⁴⁵ Taormina, R., & Gao, J. (2013). Maslow and the Motivation Hierarchy: Measuring Satisfaction of the Needs. *The American Journal of Psychology*, 126(2), 155-177. doi:10.5406/amerjpsyc.126.2.0155.

Maslow.⁴⁶ Employees in this level seek to feel comfortable with others at work, especially, managers and supervisors. “Self-Esteem” and “Self-Actualization” are coming in the highest levels of needs, in which employees will be motivated to be productive and to do what exactly expected by employers.⁴⁷ In short, Maslow’s theory tells us that workers cannot be duly operated unless their foundational needs are met and treated as human beings. A worker, therefore, will not step forward or move to higher levels of welfare without fulfillment of these fundamental needs including a secure job. Frederick Herzberg developed the argument, and he presented job security as a hygiene factor surrounded the work, rather than the work itself which he called motivational factors.⁴⁸ According to Herzberg the hygiene factors, such as job security, good pay, and working conditions are satisfiers and essential for the existence of motivations in the workplace where dissatisfaction is observed if such factors do not exist.⁴⁹ Despite the fact that Maslow’s theory and the other mentioned theories are not without flaws, but still they are valuable for assessing human basic needs and employees as well.⁵⁰

Accordingly, the recognition of job security by modern states is an inevitable outcome of certain social and legal rights at work, which states are bound to respect. An action towards this realization requires states three levels of obligation: (1) respect the right of job security is an obligation from the first level; (2) protect the right of job security comes from the second level; (3) fulfill this right is in the third level.⁵¹ The first level can be achieved through acknowledgement and legal clarification by state to promote job security in the related legislation. However, the state must not interfere with any action which may impose limitations or restrict a right without a compelling justification.⁵² Whereas, the second and third level require states to do more action, especially, by preventing violations from third parties (e.g., employers) either by imposing commitments on employers or providing remedies in case of violation.⁵³

⁴⁶ Primeaux, P., & Vega, G. (2002). Operationalizing Maslow: Religion and Flow as Business Partners. *Journal of Business Ethics*, 38(1/2), 97-108. Retrieved March 29, 2019, from <http://www.jstor.org/stable/25074781>.

⁴⁷ Adler, S. (1977). Maslow's Need Hierarchy and the Adjustment of Immigrants. *The International Migration Review*, 11(4), 444-451. doi:10.2307/2545398. Retrieved March 29, 2019, from www.jstor.org/stable/2545398.

⁴⁸ Koontz, H. (2010). *Essentials of Management* Tata McGraw-Hill Education, 8th Edition, p. 291.

⁴⁹ Sennewald, C. A. (2003). *Effective Security Management*. Butterworth-Heinemann, 4th Edition, p. 120.

⁵⁰ Unrau, Y. A., Gabor, P. A., & Grinnell, R. M. (2007). *Evaluation in Social Work: The Art and Science of Practice*. Oxford University Press, p. 125.

⁵¹ Hepple B. (n.d). Rights at Work. *International Institute for Labour Studies-Geneva*, p. 21. Retrieved March 30, 2019, from <file:///H:/rights%20at%20work.pdf>

⁵² Ibid.

⁵³ Ibid.

1.1.2. An Argumentation Related to the “Property Right in Jobs”

At this level, the argument for drafting termination of employment rules in accordance with the policy of job security depends on defining job as a property right for workers, this means the argument will be switched from the basic human needs in a decent work to the property right itself like the other assets that humans may own. Likewise, the other properties, the job cannot be retaken from the possession of the workers unless by a spectrum of legal procedures established by law.⁵⁴ Therefore, the same level of legal safeguards as devoted to protecting real property should also be provided to protect jobs as intangible personal property of workers. This argumentation has been often used to prevent unfair termination of employment because it requires due process under which an employee could not be fired without being notified for the reasons; otherwise, unfair termination seems to be claimed.⁵⁵

As regards to the ownership of job in favor of workers, the best contribution was made by Collins, when he gave grounds for job security by referring to ‘the property rights in the job for employees,’ and justified the idea that workers should enjoy greater job security, compared to what has been accorded to them based on the doctrine of ‘termination at will’ in the common law system.⁵⁶ Moreover, he found three levels surrounded to the job security elements by indicating to what can be arisen from property rights; firstly, inappropriate taking of the job by the employer could be challenged and counted as void where a natural right of reinstatement must be considered, secondly; the forceful taking of the right causes a compensation and a demand for the loss of economic value derived from the right, thirdly; such the right also impliedly requires fair procedure in case of taking the property.⁵⁷

Some theorists denounce the notion of property rights in the job for employees, and they argue from the side of the owner’s right over the capital and physical assets in an enterprise, which entitles the owner the right to apply or withdraw those assets from the production process.⁵⁸ An economic view has also contributed in that respect, considering workers as a small part of the

⁵⁴ Deakin, S. F., Barnard, C., & Morris, G. S. (Eds.). (2004). *The Future of Labour Law: Liber Amicorum Bob Hepple QC*. Hart, p. 104.

⁵⁵ Molz, op. cit.

⁵⁶ Collins, H. (1992). *Justice in Dismissal: The Law of Termination of Employment*. Oxford, Clarendon Press, p. 88.

⁵⁷ Ibid.

⁵⁸ Coleman, J. L. (1984). *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*. *Ethics*, 649-679.

production process.⁵⁹ Despite the immorality of this view that does not differentiate between the worker and the raw materials of the production process, it has impacted judicial assumptions in many cases regarding employment law. A counter argument, therefore, exist at that point, and an assumption of the property rights in job for employers is underpinned by some judicial statements. To understand many UK judges' attitude, for instances, the assumptions of the property rights of employers in different cases can help to explain an implementation of easier standards to determine fairness of the dismissal, rather than what required by ILO standards.⁶⁰ In *Malik v BCCI*, the court held that "the implied obligation as formulated is apt to cover the great diversity of situations in which a balance is struck between an employer's interest in managing his/her business as he sees fit and the employee's interest in not being unfairly and improperly exploited."⁶¹ On the one hand, the holding, in that case, seems to be just and quite fair due to considering a balance between opposite interests. But on the other hand, the factors of balancing interests indicate that the court's primary consideration for this balance is the presumption of the property rights of the employer in an enterprise and recognize it as a dominant factor. In practice, the management of business as the employer sees fit will provide a wide scope for managerial prerogative because the ownership of business according to this judicial thinking is vested solely to the employer. The ownership in this context, then, gives the employer the right to manage not only over the physical property, but rather on the entire body of the firm including employees. Furthermore, the right of managing businesses cannot be restricted only by a reasonable practice, the idea is that the managerial prerogatives of the employer shall not contain unfair treatment or abuse of the worker. This may not require a strict standard to review by the court due to the right of the employer in managing his/her business.

From another side of view, a property right as described by legal systems empowers its holder to practice all the core benefits; including exclusive use and prevent others from interference as well as the right to dispose or exclude others from one's property.⁶² These prerogatives of the right holder derived from the nature of the property right, which consists of a spectrum of privileges that can be used against other people and correlative obligations of those others not to

⁵⁹ Jensen, M. G., Meckling, W. H. (1979). *Rights and Production Functions: An Application to Labour-Managed Firms and Codetermination*. Journal of Business, 469-506.

⁶⁰ Deakin, Barnard, & Morris, op. cit., p. 103.

⁶¹ [1997] IRLR 462, HL.

⁶² Deakin, Barnard, Morris, op. cit., p. 104.

do harm with one's property.⁶³ This may extend the control of property right holder over employees, particularly, from the sense of an economic outlook that states "the work is done in return for a wage."⁶⁴

In the context of the employment relationship, the presumption of the property right for employers could be used as a basic analysis that underpins at-will employment, where employers are free to enter into employment contracts and are also free to terminate such contracts.⁶⁵ The concept of at-will employment was entirely endorsed and governed the rights of employees in the U.S. until recent decades when certain courts brought basic limitations on the scope of its application that play a role to minimize termination cases and the onset of unfair termination claims.⁶⁶ According to several court rulings, therefore, the right of the employer to discharge workers has been restricted in at-will employment doctrine through some legal exceptions as discussed in this chapter later. What is notably important in the exceptions is that the traditional meaning of at-will employment doctrine has been explicitly changed in a way that requires the employer to be bound by at least not to discharge workers for reasons prohibited by law.⁶⁷ Such exceptions have gradually tied between at-will employment doctrine and the minimum standards of due process in favor of workers. This is simply because the employer will adhere to respect statutory rights of workers in the workplace, and the workers will have a guarantee against arbitrary treatment.⁶⁸

By taking both sides into consideration, the assumption of property rights in the job for the worker or for the employer, one can notice that the argument from both sides will not go far away from the need of workers to job security. Since the due process is an essential factor of job security to protect workers from being unfairly fired in the job, the discussion from both sides indicates the necessity of articulating due process in case of termination of employment. From the assumption of the property rights in the job for the worker, it is self-evident that workers must not be separated

⁶³ Harris, J. W. (1996). *Property and Justice*. Oxford: Clarendon Press, p. 130.

⁶⁴ Deakin, Barnard, Morris, op. cit.

⁶⁵ Arnold, D. G., Beauchamp, T. L., & Bowie, N. E. (2019). *Ethical theory and business*. Cambridge University Press, p. 59.

⁶⁶ Miles, T. (2000). Common Law Exceptions to Employment at Will and U.S. Labour Markets. *Journal of Law, Economics, & Organization*, 16(1), 74-101. Retrieved April 10, 2019, from <http://www.jstor.org/stable/3555009>

⁶⁷ Roehling, M. (2003). The Employment At-Will Doctrine: Second Level Ethical Issues and Analysis. *Journal of Business Ethics*, 47(2), 115-124. Retrieved April 11, 2019, from <http://www.jstor.org/stable/25075131>

⁶⁸ Robinson, R. k., Franklin, G. M. (2015). *Employment Regulation in the Workplace: Basic Compliance for Managers*. Routledge, 2nd Edition, p. 350.

from their personal assets unless by fair procedures recognized by the law. Any violating of fair procedures by the employer in taking worker's property, particularly, in taking away the job from his/her possession in this case; will lead to a worker's inherent right to reinstatement.

As we have found, the need for due process still can be raised from the assumption of the property rights for the employer which is one of the basic justifications of 'at-will employment' where employees may get dismissed from the job even for no reason. This is due to several exceptions made on the absolute right of the employer to terminate the contract. The exceptions are not merely restrictions but provide a level of guarantee and the right of workers to challenge the decision of termination within fair procedures. It is also found that the right of due process here is not based on the worker's property rights but rather depends on his/her right to be treated fairly in the workplace.

However, the workers' due process rights may be violated either by taking the job as their own property right without legal procedures or by terminating them arbitrarily from the job as a sole property right for the employer. In such cases, the worker may have a valid claim for unfair termination. These standards ultimately will guarantee a high level of job security in articulating the rules of termination of employment contract.

1.1.3. An Argumentation Related to the "Nature of Employment Contract"

A further debate to support job security for workers is giving the consideration to the nature of the employment contract in which the parties have unbalanced power, beginning from the formation of this contract, the way of its implementation, and the way of terminate it.⁶⁹ The employment relationship under this contract is characterized by "inequality of bargaining power" between the contractual parties.⁷⁰ Inequality of bargaining power, at first glance, can be perceived at the step of searching for a contract, whereas the employer has more and better choices to engage the contract or agreement than the worker.⁷¹ A good example of that situation is a common case in

⁶⁹ Protecting at Will Employees against Wrongful Discharge: The Duty to Terminate Only in Good Faith. (1980). *Harvard Law Review*, 93(8), 1816-1844. doi:10.2307/1340625, p. 1828.

⁷⁰ The phrase of "inequality of bargaining power" has been used for the first time by the British philosopher, John Beattie Crozier in his famous book "The Wheel of Wealth: Being a Reconstruction of the Science and Art of Political Economy on the Lines of Modern Evolution" (1906) Part III, chapter 2, 'On the tendency to inequality', p. 377.

⁷¹ Shell, G. Richard. (1993). Contracts in the Modern Supreme Court. *California Law Review*, vol. 81, no. 2, pp. 431-529. Retrieved April 24, 2019, from www.jstor.org/stable/3480756.

which a worker applies for an exclusive job in his/her specialty in a firm, but the firm has a great number of applicants who have the same specialty. This implicitly confers greater power to the firm in negotiating on the contract and the chance to reject the deal as well as to find the best choice, bearing the vast number of applicants in mind. Moreover, the firm in that bargaining will obtain a position that is apparently superior for dictating favorable terms and conditions. Consequently, the worker has not adequate chance to bargain on the contract as much as the employer has, meaning the worker may reluctantly agree to sign the contract with all designed terms and conditions by the employer, otherwise he/she will lose the chance to obtain the job.

The concept of inequality of bargaining power was soon described as a distinguishable attribute of employment contracts and recognized by a significant number of legal scholars and court's rulings. In illustrating the notion, Kahn-Freund⁷² wrote,

“The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has been, and ... will always be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.”⁷³

Kahn-Freund has rightly pointed out the inequality of bargaining power as an inherent characteristic of the employment contract, that renders the power of the employer dominates the power of the worker. The condition of subordination in this contract is another application of this characteristic that restricts the freedom of workers and requires them the duty to comply with regulations made by employers. Thus, inequality of power also exists between the employer and the worker in terms of the rights and obligations originated from this contract. The managerial prerogatives always authorize employers to command, and the condition of subordination compels workers to obey the rules that have been set by employers to govern their entities.⁷⁴ From this end, Kahn-Freund has also truly reached out to serve the concept of inequality of bargaining power as

⁷² Sir Otto Kahn-Freund was a professor in labour law and competitive law at the London School of Economics and the University of Oxford.

⁷³ Richardso, S. (1999). *Reshaping the Labour Market: Regulation, Efficiency and Equality in Australia*. Cambridge University Press, p. 79.

⁷⁴ Rajah, M. (2019). From Third World to First: A Case Study of Labour Laws in a Changing Singapore. *Labour Law Journal*, 70(1), 42–63. Retrieved April 23, 2019, from <http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=lgs&AN=135012247&site=eds-live>

a justification for enacting labour law to bring mandatory rules that guarantee non-abuse of this inherent characteristic.

Unjust terms and results may append to the employment contract whereas bargaining power is constantly unequal if the law does not limit its range. Such unjust terms, in the first place, can be seen within arbitrary conditions stipulated by the employer, as for example, arbitrary conditions for terminating the contract that may compel the worker to keep the contract even under unusual circumstances. Or the contract may contain some terms that permit the employer to terminate the contract in an easy way without being responsible for any monetary cost. A further fear in this contract that will likely turn to the reality comes from the subordination element, the condition that obliges the worker to compliance the rules and regulations of the employer in an enterprise, otherwise non-obedience may justify discharge the worker from his/her job.⁷⁵ To prevent abusive practice, hence, the scope of orders designed by the employer and the idea of worker's non-obedience that justify termination also shall be drawn by law.

Since the employment contract is portrayed by inequality of bargaining power at the time of forming the contract, and then by subordination element at the time of its implementation, there is an objective reason for law interference into this contract. This nature of the employment contract has been considered for a long time as a justification for the implication of mandatory terms into the employment relationship.⁷⁶ It has also become a justification for a variety of court's rulings in non-enforcement of the contract, particularly, when the contract includes arbitrary terms against the worker.⁷⁷ These interferences in the employment relationship are logically and morally accepted because the nature of the contract undermines the freedom of contract, resulting from the principle of the agreement must be kept "Pacta Sunt Servanda".⁷⁸ The principle essentially requires having a proportionate amount of freedom between contractual parties, so they can dictate terms and conditions of their contract without interference from the third party. This is what does not exist in the employment contract, where unequal bargaining of power persistently poses a

⁷⁵ Lockton, D., Brown, T. (2020). *Employment Law*. Red Globe Press, p. 325.

⁷⁶ Ibid.

⁷⁷ Frankel, R. (2014). The Arbitration Clause as Super Contract. *Washington University Law Review*, 91(3), 531–587. Retrieved April 23, 2019, from

<http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip.uid&db=lgs&AN=95833539&site=eds-live>

⁷⁸ Davison-Vecchione, D. (2015). Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty. *German Law Journal*, 16(5), pp. 1163–1190. Retrieved April 24, 2019, from

<http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip.uid&db=lgs&AN=110647350&site=eds-live>

disproportionate level of freedom. To this end, the worker shall be necessarily protected by law and enjoy a great level of job security articulated by law, rather than by the contract. Contrarily, the prospect for termination at any time, including unfair termination at the initiative of the employer is extremely high.

1.2. Job Security Forms

Based on what have been discussed before, the job security poses a high level of protection with strict standards and requirements for termination of employment contract. Accordingly, the job security encompasses all the forms of legislation and regulations that would not let employers to retake job from employees easily. The odds to terminate employment contract will get decreased because the possibility of termination under this policy is narrowly adopted, and the claim for unfair termination in potential cases is often possible. Here are the main forms of job security that might be reached in five points.

1.2.1. Valid Reason for Termination ‘Just Cause’

The standard of ‘Just Cause’ or having a valid reason to justify an employee’s departure is the most common form of job security against unfair termination or any other arbitrary discipline at work.⁷⁹ It simply requires the employer to sustain the employment relationship, unless the employer displays a legitimate reason for termination.⁸⁰ If there is no valid reason, then the termination is null and void.⁸¹ Since the validity of employment termination is conditional and should be measured by providing a valid reason, the employment relationship is not subject to the employer’s absolute power. The central notion is that the employment relationship shall remain in effect, and in case of termination the employer bears the burden of proof of the termination legitimacy. Therefore, the lack of a valid reason in termination cases is a legal presumption for unfair termination.

⁷⁹ Pittard, M. (2006). *Back to the future: Unjust termination of employment under the Work Choices legislation*. Australian Journal of Labour Law, 19(2), 225-241.

⁸⁰ Glynn, T. P., Arnow-Richman, R. S., & Sullivan, C. A. (2019). *Employment law: Private ordering and its limitations*. Wolters Kluwer Law & Business, p. 179.

⁸¹ Ibid.

Just cause and its substantial and procedural aspects is a very broad concept.⁸² However, the concept of just cause in termination of employment relationship has been portrayed according to certain jurisprudential trends along with legislation, courts' ruling, and arbitration. In 1964, the famous arbitrator, Carroll Daugherty, expanded the notion of just cause to a degree that requires seven tests to uphold a worker's discharge as legal action.⁸³ Here are Daugherty's seven tests of just cause:

- i) Was the worker warned of the outcomes of his/her action or behavior?
- ii) Were the employer's rules and orders reasonably adopted and objectively related to business efficiency?
- iii) Was there any investigation from the side of the employer to verify the charge directed to the worker?
- iv) Was the investigation made in a fair and objective manner?
- v) Did the investigation find substantial evidence of the worker's wrongdoing?
- vi) Did the employer equally apply the rules and order for all workers without discrimination?
- vii) Was there a reasonable proportionality between the degree of discipline and the worker's guilt with considering his/her past record?⁸⁴

Although Daugherty's checklist of just cause has been criticized as been too mechanical,⁸⁵ it provided good guidelines that apparently affected the articulation of international standards regarding termination of employment relationship through international treaties as can be observed later.

1.2.2. Notice Period

Another cornerstone of job security is the necessity of providing an adequate notice period prior to termination of employment contract. The term notice period, thus, commonly refers to that period in which a contractual party shall notify the other party about the intention of terminating

⁸² American Arbitration Association. (2010). *AAA Handbook on Employment Arbitration and ADR*. Juris Publishing, Inc., p. 44.

⁸³ Grenig, J. E., Scanza, R. M. (2011). *Fundamentals of Labour Arbitration*. Juris Publishing, Inc., p. 58.

⁸⁴ *Ibid.*, p. 58-60.

⁸⁵ *Ibid.*, p. 62.

the employment contract.⁸⁶ The debate over the notice period concentrates on the interest of both; employer and employee together in employment relationship. Such a notice period protects the interest of the employer to not be damaged from the sudden evacuation of the employee's place in an undertaken.⁸⁷ While the employee is responsible for performing a regular function in an enterprise, the sudden leave without notice period, of course, will impede the normal operation of the enterprise and detriment the interest of the employer who owned that enterprise. Considering the interest of employee, an automatic termination of employment relationship also will be harmful, since a sudden termination followed by the loss of family livelihood of the employee whose being unemployed without giving a chance to search for a new job.⁸⁸ Thus, the common reason for giving notice is to protect both contractual parties from the shock of an automatic termination and to avoid them from its negative consequences. Considering this reason, the law in many countries requires a notice to be given within a limit period before termination of the contract with rare exceptions related to some sorts of employment contracts where termination of employment does not cause any shock for parties.⁸⁹ The termination of employment contract, therefore, turns to be unfair and needs to be redressed whenever it lacks giving notice.

In general, two types of notice period exist: statutory and contractual. The contractual notice also may have two different shapes embodied in employment contracts and collective agreements. Statutory notice is the minimum period of notice stipulated in the law for both parties; employer and employee to give each other prior to terminating their employment relationship.⁹⁰ This type of notice period also can be named mandatory notice period because the amount of period is determined by law apart from the will of contractual parties. Regarding the minimum notice period, the law has different rules in various countries. In the UK, for instance, notice period is stipulated based on the seniority of employment; one week's notice is required if the

⁸⁶ Blackham, A. (2013). UNCERTAIN JUNCTURES BETWEEN EMPLOYMENT AND CONTRACT LAW. *The Cambridge Law Journal*, 72(2), 269-273. Retrieved March 5, 2020, from www.jstor.org/stable/24694004

⁸⁷ Collins, H., Ewing, K., & McColgan, A. (2019). *Labour law*. Cambridge University Press, p. 165.

⁸⁸ Eger, T. (2003). *Opportunistic termination of employment contracts and legal protection against dismissal in Germany and the USA*. *International Review of Law and Economics*, 23(4), 381-403.

⁸⁹ In some jurisdiction, giving notice is not required to terminate a contract during a probationary period and Fixed-term contract when it normally reaches to agreed end date., such as Italy, Netherlands, and Jordan. See; European Commission (2006). *Termination of employment relationships: Legal situation in the Member States of the European Union*. Directorate General Employment, Social Affairs and Equal Opportunities Unit D2, p. 120, and Jordanian Labour Code No. 8 of 1996, Art. 35.

⁹⁰ Corthésy, N. G., & Harris-Roper, C. A. (2014). *Commonwealth Caribbean Employment and Labour Law*. Routledge, p 137.

employment continues from one month up to two years; one week's notice is obliged again to offer for each additional year of lasting employment between two and twelve years; and for twelve years employment or more, twelve weeks' notice is required.⁹¹ Likewise the UK, some other European countries took the seniority into consideration in determining legal notice period with the different length of periods, such as Finland,⁹² and French.⁹³ Since most of the U.S. employees are covered by at-will employment policy, no notice period is required in case of termination of employment, unless if it is agreed upon in the contract.⁹⁴ In Iraq, a minimum notice period is also required that must be given to the employee at least 30 days prior to the termination date.⁹⁵

Besides the statutory notice, the contractual parties may arrange another definite time for the notice period; this is what so-called contractual notice. The contractual notice can affect statutory notice and amend the period.⁹⁶ However, it must not shorten the period of statutory notice, it rather can extend the period.⁹⁷ If the contract includes a notice period which is shorter than what stipulates as a statutory minimum notice, the latter will prevail. Though contractual notice period is subject to the will of parties, some restrictions apply to determine the period. As for instance, in Germany, a notice period for an employee to terminate a contract shall not be longer than the notice period for an employer to terminate the same contract.⁹⁸ This would be void by German courts due to discriminatory reasons.⁹⁹ In addition to individual employment contracts, collective agreements also may fix a notice period for termination of employment contract and amend the statutory minimum notice period. In a few states, namely Germany, Netherlands and some parts of Canada, collective agreements can even shorten the minimum statutory notice besides being able to extend it.¹⁰⁰

⁹¹ Employment Rights Act 1996, S. 86.

⁹² Employment Contracts Act (55/2001), Ch. 6, S. 2&3.

⁹³ Hardy, S., & Butler, M. (2016). *European employment laws: a comparative guide*. Spiramus Press Ltd, p. 125.

⁹⁴ Summers, C. W. (2000). *Employment at will in the United States: The divine right of employers*. U. Pa. J. Lab. & Emp. L., 3, 65.

⁹⁵ Iraqi Labour Code, No. (37) of 2015, Art. 44.

⁹⁶ Blackham, op. cit.

⁹⁷ Ibid.

⁹⁸ Tilkorn, J. (2014). *Ins and Outs re. Notice Periods and Fixed-Term Employment*. Retrieved February 3, 2022, from <https://blogs.dlapiper.com/employmentgermany/2014/10/23/ins-and-outs-re-notice-periods-and-fixed-term-employment/>

⁹⁹ Ibid.

¹⁰⁰ Venn, D. (2009). *Legislation, collective bargaining, and enforcement: Updating the OECD employment protection indicators*, p. 15.

1.2.3. Due Process

Due process, in general, is a principle of law that protects individuals from being deprived of their legal rights unless by proper application of legal proceedings.¹⁰¹ Among the primary legal proceedings to deprive someone's right is the process of fair hearing and giving a chance to respond the subject of the allegation.¹⁰² Since the worker has a property right over the job, s/he cannot be deprived from this right without the application of due process. Under due process principle, workers who have done something completely reprehensible, still have the right to a fair hearing enabling them to present their justifications surrounded what they have done before taking dismissal action. The due process in that respect, thereby, does not merely require the employer to show a reason for termination and the right of the worker to be notified about such a reason. But the worker also can struggle the bad consequences including termination of employment by defending themselves and convince the contesting party to their justifications.

In fact, the right of the worker to have an opportunity for defending himself against the allegation is not the destination of due process. Because the voice of the worker at that level can only be heard by the employer who is the dominant party in the dispute, and the possibility to violate justice in this hearing is highly expected. This risk motivates many jurisdictions to extend the scope of due process rights to the level that includes the right of the worker to appeal the decision of termination before an impartial body.¹⁰³ At that level, the due process permits an impartial body, such as a court, to engage the dispute arose between the worker and the employer upon the termination decision and to test the validity of such a decision.¹⁰⁴ The obligation of the impartial body, then, is to reach the truth and the legality of the termination through the procedures established by national law and practice.

1.2.4. Severance Allowance

The policy of job security, in a significant number of states, extends to a level that requires severance allowance or severance pay upon the end of employee's job. Severance pay is a bundle of money and advantages given to an employee whose contract has been terminated from a

¹⁰¹ Chapman, N. S., & McConnell, M. W. (2011). *Due process as separation of powers*. Yale LJ, 121, 1672.

¹⁰² Ibid.

¹⁰³ Bruun, N., Lörcher, K., Schömann, I., & Clauwaert, S. (Eds.). (2017). *The European Social Charter and Employment Relation*. Bloomsbury Publishing.

¹⁰⁴ Bellace, J. R. (1982). *A right of fair dismissal: Enforcing a statutory guarantee*. U. Mich. JL Reform, 16, 207.

company, especially, for being laid off in a job.¹⁰⁵ The amount of money shall be paid based inter alia on the length of employment before termination and may also include payment for remained vacation and unused sick days.¹⁰⁶ Severance allowance, hence, is a sort of monetary appreciation for an employee as being a loyal character during performance of his/her job, and is a guarantee for unemployed workers, enabling them to surpass unemployment period and reinstate in a new employment. From another perspective, severance pay secures the job of the employee from not being fired easily, particularly, it secures those who have been spent a long time of employment service that they entitled to reap much money in case of terminating their employment contract from the side of the employer. Companies, thereby, may not touch their employees and keep them safe considering the amount of money should be paid to terminated employees and spending the same amount of money again for newly hired employees in the future. Consequently, severance allowance has a dual impact in terms of hiring and firing employees. On one hand, it protects elderly employees in states where severance pay offered based on length of service. On the other hand, it harms and negatively impacts the young employees whom the possibility to terminate their contracts is extremely high, especially, during a recession. The employer during a recession is likely to decide terminating young employees whereas such decision costs less than the decision to terminate the employment of elderly employees.¹⁰⁷

However, the rule of severance pays targets the interest of workers and tends to prevent unfair termination. For that purpose, many European countries minimize an employer's ability to terminate workers through stringent severance pay requirements. Nevertheless, the laws about severance pay and the way to calculate the amount of severance pay vary between European countries. For instance, France, Spain, and Italy have required the most stringent severance pay amount.¹⁰⁸ Although severance pay is not formally imposed by American labour law, it can be stipulated in the employment contract as a bargaining point, such a stipulation then does not let the employer to get rid from firing costs.¹⁰⁹

¹⁰⁵ Holzman, R., & Vodopivec, M. (2012). *Reforming severance pay: An international perspective*. (Washington, DC, World Bank).

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Lazear, E. (1990). Job Security Provisions and Employment. *The Quarterly Journal of Economics*, 105(3), 699-726. Retrieved March 8, 2020, from www.jstor.org/stable/2937895

¹⁰⁹ Ibid.

Despite all benefits outlined before, a debate on disadvantages of severance pay as a passive measure is one of the central concerns of employment strategy in some EU countries. Since in the two last decades EU employment strategy stepped forward toward flexibility, there is no EU uniform law regulating severance pay.¹¹⁰ This paves a way for many EU member states to ease severance payments rules considering its negative impact on employability and job turnover.

1.2.5. Compensation for Dismissal

The provisions of job security mandate that workers have the right to not be unfairly dismissed, if so, they should be compensated in an appropriate way. In giving content to valid reason ‘Just Cause’ contained in job security provisions, every single case of dismissal should be based on a reason justifying such a dismissal. Therefore, when an employee has been dismissed for no reason or for a reason that does not fulfill the requirements of valid reason, the dismissal is deemed to be unfair termination.¹¹¹ In such a case, the violation of the employee’s due process right arises, compelling the employer to redress the situation soon. Because the retake of the job from the employee is unfair, the primary remedy must focus on the enforcement of re-employ the employee unless certain exceptions apply.¹¹² Such exceptions refer to all circumstances in which the re-instate of the dismissed employee are infeasible. It may be infeasible to re-instate the employee when all surrounded circumstances inspire that the persistence of their employment relationship would be unbearable.¹¹³ If the primary remedy, namely, a re-employment order is not a good choice anymore for unfair dismissal, the court or the tribunal body on the case shall make an award for compensation.

In general, the amount of indemnification awarded to an employee who is been unfairly dismissed must be ‘just and equitable’.¹¹⁴ To determine a just and equitable indemnification, all circumstances surrounded the unfair dismissal that harms the commercial benefits and social reputation of the employee should be considered by the court. Without doubt, the contract of

¹¹⁰ Barceló, C., & Villanueva, E. (2018). *The risk of job loss, household formation and housing demand: Evidence from differences in severance payments*. Documentos de Trabajo del Banco de España, (1849).

¹¹¹ Emmenegger, P. (2014). *The power to dismiss: Trade unions and the regulation of job security in Western Europe*. Oxford University Press, USA, p. 188.

¹¹² Vettori, S. (2012). THE ROLE OF HUMAN DIGNITY IN THE ASSESSMENT OF FAIR COMPENSATION FOR UNFAIR DISMISSALS. *P.E.R Journal*, 2012 Volume 15 No. 4, Pp. 102-231. Retrieved March 10, 2020, from <http://dx.doi.org/10.4314/pej.v15i4.3>

¹¹³ Ibid., p. 104.

¹¹⁴ Ibid., p. 105.

employment is not purely a commercial contract, it rather being a contract related to humanitarian aspects. An aspect of this contract is tied with the employee's individual identity and dignity since this contract poses a continuous relationship between the contracting parties based on dignity and humanitarian sense.¹¹⁵ With that in mind, the court should purposefully consider any violation on an employee's right to dignity and the right of commercial benefits when determining a just and equitable compensation for unfair dismissal. However, the law in many countries placed some cap on the amount of compensation as a remedy for unfair dismissal, for instance, in France the maximum amount for compensation must not exceed "20 months' salary for 30 years of service and beyond".¹¹⁶ Even in such countries where the amount for compensation is fixed, the court and tribunal bodies still have discretion to grant what constitutes a just and equitable amount for compensation within the limited amount.

2. "Employment At-Will" and Termination of Employment Contract

Besides the policy of job security, a counter argumentation arises in the employment-at-will policy. The latter policy has also become a legal doctrine and impacted employment termination rules in a way that minimizes the ability of workers to challenge unfair termination. Contrast to the policy of job security, the employment-at-will policy permits the employer to dismiss a worker without being compelled to have reason at all or to dismiss a worker for whatever reason as long as the reason is not listed within illegal reasons.¹¹⁷ The permission to terminate a contract in that way means the employer, in general, is not liable for unfair termination and courts accordingly deny the worker's claim for loss resulted from the termination.¹¹⁸ The policy, simultaneously, allows a worker to quit his/her job and leave his/her position at any time, without reason, and without being responsible for legal consequences.¹¹⁹ Since both parties can terminate the contract whenever they will, the policy is named employment-at-will to indicate not having restrictions on the will of parties to terminate their relationship.

¹¹⁵ Ibid., p. 103.

¹¹⁶ Macron Ordinance of 22 September 2017, Art. 2.

¹¹⁷ Harcourt, M., Hannay, M., & Lam, H. (2013). Distributive Justice, Employment-at-Will, and Just-Cause Dismissal. *Journal of Business Ethics*, 115(2), 311-325. Retrieved November 28, 2020, from: <http://www.jstor.org/stable/42001985>

¹¹⁸ Notestine, K. E. (2000). *Fundamentals of employment law*. American Bar Association, p. 184.

¹¹⁹ Carlson, R., Moss, S. (2018). *Employment Law*. Wolters Kluwer Law & Business, p. 662.

The freedom to terminate employment contract in this policy is somehow measured by the freedom to enter such a contract; as long as the parties have freedom to enter an employment contract, they must have freedom to end it as well.¹²⁰ But indeed, this is not a convincing justification to rationalize this policy since the freedom to enter a contract is quite different from the freedom to terminate it, as being the latter does not need to a mutual agreement while it needs for entering the contract. This fact makes the employer be able to practice on-sided cancelation of the contract without the need to make a new agreement with the worker. Considering that end, literature indicates that the consequence of at-will employment policy will serve the employer more than it does the employee due to the fact that this policy subjects the fate of employment relationship to the absolute power of the employer.¹²¹ Moreover, firms often support this policy under which they have more leeway to change their policies and to protect their interests since it does not matter for the law to retain the worker's job or to restrict firms for such purposes.¹²² However, the employment-at-will policy has never remained in its absolute context since courts have made exceptions in which the ability of the employer to terminate the contract gradually minimized. The policy, therefore, starts to provide protection against unfair termination but in a degree lower than what has been provided in the policy of job security of course.

2.1. Historical Background

It is not arguable that the employment-at-will is an American Labour Law policy,¹²³ this necessarily means an attempt to explore the history, or the root of this policy shall start from the US and the role of the Common law system to improve this policy. Many legal scholars referred to Horace C. Wood as the first-person states on the doctrine of employment-at-will in 1877 through his famous treatise "*Master and Servant*".¹²⁴ To support his statement about employment-at-will, Wood cited four American cases.¹²⁵ Though misinterpretation the cases in a way that does not support his statement, Wood apparently invented the concept of employment-at-will.¹²⁶ After the

¹²⁰ Cochran, T. G. (1972). *Business in American Life: A History* (Mcgraw-Hill, New York).

¹²¹ Arnow-Richman, R. (2010). *Just notice: Re-reforming employment at will*. *UCLA L. Rev.*, 58, 1.

¹²² Roehling, M. V., & Wright, P. (2004). *Organizationally sensible vs. legal-centric responses to the eroding employment at-will doctrine*. *Employee Responsibilities and Rights Journal*, 16(2), 89-103.

¹²³ Njoya, W. (2016). *Property in work: The employment relationship in the Anglo-American firm*. Routledge, p. 25.

¹²⁴ Standler, R. B. (2000). *History of at-will employment law in the USA*. Retrieved November 29, 2020, from <http://www.rbs2.com/atwill.htm>

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

appearance of Wood's treatise, various American courts start citing Wood's statement on employment-at-will and then has become an acceptable legal doctrine in the US.¹²⁷

The US courts have a long history to develop employment-at-will doctrine through various cases. Considering the date of the cases after Wood's treatise, *Payne v. Western & Atlantic Railway*¹²⁸ in Tennessee can be the first case referred to in this area.¹²⁹ Following the Western & Atlantic Railroad company's ban placed for prohibiting workers to buy whiskey from L. Payne, and Payne's lawsuit against the company to stop its decision for discharging any worker who trades with Payne, the Tennessee Supreme Court held in support of the company where the decision allowed the company to discharge any worker, or any number of them at will, "for good cause, for no cause, or even for cause morally wrong, without thereby being guilty of a legal wrong."¹³⁰ The court, to rationalize its decision, stated that the same right is accessible for workers, extended to the same degree as provided to the employer.¹³¹ An absolute language of the court to adopt employment-at-will can be simply noted without exceptions and this became the standard in the US for a while.¹³² There were fears of the bad consequences of this decision as presented by the dissenting judges in the case expressing that the adoption of this doctrine resulted in an unfair amount of dominance over workers.¹³³ This dissent has extremely impacted the modernization of the doctrine in modern era as discussed later.

Three years later in *McCullough Iron Co. v. Carpenter*¹³⁴ Maryland Appellate Court confirmed the employment-at-will doctrine but not in an absolute manner, it has been narrowly adopted instead. The court ruled in 1887 that "there can be no doubt that, in this country, the rule is, an indefinite hiring is prima facie a hiring at will."¹³⁵ On one hand, the decision has confirmed the employment-at-will doctrine and became a part of common law in Maryland.¹³⁶ On the other

¹²⁷ Ibid.

¹²⁸ 81 Tenn. 507, 518 (1884).

¹²⁹ Gamonal, S., & Marzán, C. F. R. (2019). *Principled Labour Law: US Labour Law Through a Latin American Method*. Oxford University Press, p. 130.

¹³⁰ Hogler, R. (1989). *The employment relationship: Law and policy*. New York: Ardsley House Publishers, Inc, p. 3.

¹³¹ Hackstock, C., & HEYTOTH, A. (2002). *Employment at will: the legal perspective*. Values-Based Leadership, Section, 2/Houston, p. 1.

¹³² Ibid.

¹³³ Hogler, op. cit.

¹³⁴ 67 Md. 554 (1887).

¹³⁵ Ibid, 67 Md. 554, 557.

¹³⁶ Perritt, H. H. (2006). *Employee dismissal law and practice*. Aspen Publishers Online, p. 1-95.

hand, the court never upheld this doctrine in an absolute language, it rather provided a presumption to consider indefinite hiring as hiring at will which either party can terminate it at any time.¹³⁷ By contrast, the contracting parties are still able to show a mutual understanding for just cause requirement to terminate the contract or for a specific duration of the contract to rebut such presumption.¹³⁸ Nothing in the court's decision prohibits the contracting parties from doing so. However, the contract is ruled by the employment-at-will doctrine if it is proven that the contract is provided for an indefinite duration, and parties are able to terminate it at any time even for no reason.

In New York, the doctrine was officially acknowledged in 1895 in the case *Martin v New York Life Insurance Co.*,¹³⁹ the majority of workers then are subject to employment-at-will in this state.¹⁴⁰ In this case, after the company's decision to discharge the plaintiff Martin, the latter filed a suit against the company alleging that his/her contract was a yearly one as he was entitled to "salary for the balance of the year."¹⁴¹ The Court of Appeals dismissed Martin's argumentation to presume general hiring as a one-year term hiring merely on the basis of salary description in terms of an annual rate.¹⁴² The court, finally, concluded its decision by quoting Wood's treatise and ruled that general hiring for an indefinite continuation can be terminated by either party of the contract, at any time, and for whatever reason.¹⁴³

The doctrine of employment-at-will and its lack of worker's protection soon rose to the level of federal government of the United States. The US federal government started to bring some reforms to the US labour law after the Pullman strike in 1894.¹⁴⁴ Following the strike that disrupted national rail traffic, Congress passed the Erdman Act in 1898.¹⁴⁵ That act recognized the right of

¹³⁷ Ibid.

¹³⁸ Ibid., p. 1-96.

¹³⁹ 42 NE 416 (1895).

¹⁴⁰ Kassai, N. J. (2011). The State of The New York Rule to At-Will Employment Law. Retrieved December 02, 2020, from: http://nysbar.com/blogs/lawstudentconnection/2011/11/the_state_of_the_new_york_rule.html

¹⁴¹ 42 NE 416 (1895), at 119.

¹⁴² Ibid., at 121.

¹⁴³ Ibid.

¹⁴⁴ Hogler, R. (2017). How Noncompete Clauses Clash with US Labour Laws. Retrieved December 02, 2020, from <https://theconversation.com/how-noncompete-clauses-clash-with-us-labor-laws-81808>

¹⁴⁵ Lovell, G. I. (2003). *Legislative deferrals: Statutory ambiguity, judicial power, and American democracy*. Cambridge University Press, p. 86.

rail workers to have unions and join their activities, the right to engage collective bargaining as well.¹⁴⁶

Ten years later, the US Supreme Court struck down the Erdman Act in 1908 through its judgment passed by the majority opinion in *Adair v. United States*.¹⁴⁷ The case rose to the Supreme Court after Adair, an employer who fired a worker just because of joining a union, has been prosecuted for violating the Erdman Act as a federal statute.¹⁴⁸ The question arose whether the Erdman Act violated the right of employers and workers to ban a contract that prohibits workers from joining a union.¹⁴⁹ The Court held in favor of Adair and invalidated the law by referring to the Constitution that does not enable Congress to regulate employment.¹⁵⁰ The judgment enabled states to keep the right of interpretation of employment-at-will in a wide range.¹⁵¹ Justice Harlan wrote:

*“The right of a person to sell his/her labour upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labour to prescribe the conditions upon which he will accept such labour from the person offering to sell it.”*¹⁵²

The Adair ruling, thus, buried the Erdman Act and its guarantees for workers to form and join unions, as it led then to widespread “yellow dog” contracts enabling the employer to fire workers if they form or join a union.¹⁵³ This situation continued to three decades later in which the employment-at-will frustrated any endeavor to pass legislation that would have protected workers from unfair termination of employment relationship.¹⁵⁴ Courts had not granted any protection even in a case that a long-term employee was threatened to be fired if he refused the supervisor’s demand to do sex with his wife.¹⁵⁵

¹⁴⁶ United States. Erdman Act of 1898, Section 10.

¹⁴⁷ 208 U.S. 161 (1908).

¹⁴⁸ Hogler, op. cit., p. 4.

¹⁴⁹ “Adair v. United States.” Oyez, www.oyez.org/cases/1900-1940/208us161. Accessed 3 Dec. 2020.

¹⁵⁰ Ibid.

¹⁵¹ Hackstock, & HEYTOTH, op. cit.

¹⁵² Hogler, op. cit.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

2.2. Inception of Protection Against Unfair Termination (Employment-At-Will Exceptions)

In the late 19th century, the concept of employment-at-will has been redefined and not remained in the form of its onset.¹⁵⁶ In most US states, the employment law under the rule of common law initiated to recognize the default of this doctrine and to mitigate its severity on workers.¹⁵⁷ During the 20th century, courts in many states modified the application of the doctrine accompanied by some exceptions that inevitably led to mitigating the harsh consequences of the previous application.¹⁵⁸ The established multiple exceptions by courts were the beginning of arising unfair termination concept under this doctrine and providing legal protection against thereof.¹⁵⁹

However, the employment-at-will is still very challenging for workers because to get protection against unfair termination, a worker must prove that his/her case falls under one of the exceptions below.

2.2.1. Public Policy Exceptions

According to the public policy exception, an employment termination shall be considered void and null if it is done contrary to an explicit public policy established by the state.¹⁶⁰ Most US States, for instance, prohibit employers to terminate a worker for rejecting the employer's demand to violate the law, or for filing a compensation claim in the court after being injured because of the job.¹⁶¹ Workers, therefore, are protected from being fired for a reason clashes with the State's public policy, otherwise workers can claim for wrongful termination.¹⁶² literature and courts' ruling indicate to public policy as the most widely established exception in 43 of the 50 States where a State Constitution, legislation, or administrative rules and regulations are sources to find the public policy.¹⁶³

¹⁵⁶ Muhl, C. J. (2001). *The employment-at-will doctrine: three major exceptions*. Monthly Labour Review, 124, 3.

¹⁵⁷ Ibid.

¹⁵⁸ Miles, T. (2000). Common Law Exceptions to Employment at Will and U.S. Labour Markets. *Journal of Law, Economics & Organization*, 16(1), 74-101. Retrieved December 02, 2020, from <http://www.jstor.org/stable/3555009>

¹⁵⁹ Gamonal, & Marzán, op. cit., p. 130.

¹⁶⁰ Glynn, T. P., Arnow-Richman, R. S., & Sullivan, C. A. (2019). *Employment Law: Private Ordering and Its Limitations*. Wolters Kluwer Law & Business, p. 453.

¹⁶¹ Muhl, op. cit., p. 4.

¹⁶² Hackstock, & HEYTOTH, op. cit., p. 2.

¹⁶³ Ibid.

*Petermann v. International Brotherhood of Teamsters*¹⁶⁴ was the first case law to acknowledge public policy as an exception to curb the general application of the doctrine.¹⁶⁵ According to the fact of the case, Petermann got fired after refusing his employer's demand to provide false testimony in an investigation made on corruption inside the Teamsters Union.¹⁶⁶ Contrary to this demand, Petermann rightly answered all the questions directed to him, and for this reason, he has been dismissed.¹⁶⁷ The California Appellate court, based on the consideration of public policy, held in favor of the discharged worker, and the court further found that public policy covers acts that had a "tendency to be injurious to the public or against the public good" to limit the employer's right to terminate a worker.¹⁶⁸

Since then, courts in the other US States gradually followed the California case to limit the employment-at-will doctrine.¹⁶⁹ Although courts adopted the notion of public policy, their findings to define the phrase "public policy" were different to some extent, and this also led to the various definitions of public policy within the US from State to State.¹⁷⁰ Some States narrowly define the phrase based on the clear statements in their constitution or statutes, while some other States go further to a broader definition under which courts can conclude to "public policy beyond the State's constitution or statutes."¹⁷¹ In most states, however, this exception forbids employers to terminate workers for: disclosing crimes, rejecting to do an illegal act, exercising rights guaranteed by law, or performing legal duties.¹⁷²

2.2.2. Implied Contract Exceptions

The employment-at-will also does not absolutely enable the employer to terminate a worker whenever an implied contract for just cause firing exists between them regardless of being the contract is a written instrument or not.¹⁷³ This is what has been recognized in 39 of the 50 US

¹⁶⁴ 174 Cal.App.2d 184 (1959).

¹⁶⁵ Muhl, op. cit.

¹⁶⁶ 174 Cal.App.2d at 187.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid., p. 188.

¹⁶⁹ Ballam, D. A. (2000). *Employment-at-will: The impending death of a doctrine*. American Business Law Journal, 37(4), 653-653.

¹⁷⁰ Muhl, op. cit., p. 5.

¹⁷¹ Ibid., p. 7.

¹⁷² Ruud, J. K., & Becker, W. S. (2012). *Employment-at-Will*. The Encyclopedia of Human Resource Management, 180-185.

¹⁷³ Coley, T. J. (2010). *Contract, custom, and the common law: Towards a renewed prominence for contract law in American wrongful discharge jurisprudence*. Brigham Young University Journal of Public Law, 24, 2, 193-224.

states including District of Columbia.¹⁷⁴ Having an implied contract, thus, is the second major exception to this doctrine, but this exception seems to be more controversial than previous since it depends on the court's finding to determine that an employer violated an implied contract when s/he discharges a worker.¹⁷⁵ The burden to prove an implied contract, which is often difficult, is placed on the discharged worker.¹⁷⁶ However, the discharged worker who demonstrates an implied contract can prove it through an employer's personal documents, such as personnel policies, handbooks, company manuals, or any other instruments indicating to the just cause policy of firing workers or prohibiting firing unless after the due process.¹⁷⁷

The leading case confirming implied contract exception is *Toussaint v. Blue Cross & Blue Shield of Michigan*, traced back to 1980.¹⁷⁸ In this case, Toussaint brought a civil action for wrongful termination against his employer, and to convince the court with his claim, Toussaint gave evidence that on the day of recruitment he was provided a "Supervisory Manual" and a booklet of "Guidelines", which indicated to the employer's personnel policies regarding the discipline procedures and termination policy of employment.¹⁷⁹ Accordingly, the plaintiff argued for wrongful discharge since according to these documents, which constituted a written part of his oral contract, he could not be fired unless for a just cause, and after notice and hearing process.¹⁸⁰ The highest court of Michigan ruled in favor of the plaintiff and found that a dictated provision in the presented documents to prohibit firing a worker unless for just cause was enforceable and created an implied contract to restrict the ability of the employer to terminate the contract even if it is for an indefinite term.¹⁸¹ The court then rightly noted that the discharge was arbitrarily practiced and the claim is actionable because the defendant established just cause policy instead of following a policy gives the right to terminate the employment for no cause at all.¹⁸²

Courts in the other US states, where implied contract exception is confirmed, concluded with almost the same holding cited in the Michigan case. For example, *Pine River State Bank v.*

¹⁷⁴ Craig, C. E. (2008). *Basic Labour and Employment Law for Paralegals*. Aspen Publishers Online, p. 36.

¹⁷⁵ Hackstock, & HEYTOTH, op. cit., p. 3.

¹⁷⁶ Smith, V. (Ed.). (2013). *Sociology of work: An encyclopedia*. Sage Publications, p. 8.

¹⁷⁷ Ibid.

¹⁷⁸ 408 Mich. 579, 292 N.W.2d 880 (1980).

¹⁷⁹ Ibid, at 596.

¹⁸⁰ Ibid, at 598.

¹⁸¹ Ibid, at 644.

¹⁸² Ibid.

*Mettilee*¹⁸³ in Minnesota, *Continental v. Keenan*¹⁸⁴ in Colorado, *Goff-Hamel v. Obstetricians & Gynecologists, P. C*¹⁸⁵ in Nebraska, *Collins v. Colorado Mountain College*¹⁸⁶ in Colorado again.

2.2.3. Statutory Exceptions

This is the clearest exception to the common application of the employment-at-will. The idea is that the employers must comply with the US Statutes and do not terminate workers in contrast to thereof.¹⁸⁷ As long as the employer violates a statute in terminating a worker, employment-at-will is not an applicable defense in courts.¹⁸⁸ In other words, the employment-at-will argumentation is rebuttable if the employer is found guilty of violating a federal statute or a state statute.¹⁸⁹ Workers, in that case, are protected by statutes from wrongful termination.

Even though all US states have established protection for workers each in a various degree from others based on a number of statutory protections, the role of Federal Statutes also shall not be forgotten to protect workers, especially, the National Labour Relations Act of 1935 and the Civil Rights Act of 1964.¹⁹⁰ Among the significant provisions added to the latter Act in 1991 was the discrimination ban that prohibits the employer to discharge a worker based on sex, color, religion, race, age, national origin, disability, or veteran status.¹⁹¹ Regarding discrimination, the federal government goes further to protect a certain type of workers who at least turned 40 years of age by an act promulgated in 1967 named Age Discrimination in Employment Act.¹⁹² Family and Medical Leave Act of 1993 is also worthy to mention since it permits workers to take a “leave of absence” for medical reasons and family problems outlined in the act, and prohibits employers to discharge a worker for such reasons.¹⁹³

In providing exceptions to employment-at-will through statutes, US states carried out different approaches between the lenient and stringent one. In several states, Montana as for

¹⁸³ 333 N.W.2d 622 (1983).

¹⁸⁴ 731 P.2d 708 (1987).

¹⁸⁵ 588 N.W.2d 798 (1999).

¹⁸⁶ 56 P.3d 1132 (2002).

¹⁸⁷ DeCenzo, D. A., Robbins, S. P., & Verhulst, S. L. (2016). *Fundamentals of human resource management*. John Wiley & Sons, p. 92.

¹⁸⁸ Hackstock, & HEYTOTH, op. cit., p. 3.

¹⁸⁹ DeCenzo, Robbins, & Verhulst, op. cit.

¹⁹⁰ Ruud, & Becker, op. cit.

¹⁹¹ L. 88–352, 78 Stat. 241

¹⁹² 81 Stat. 602 (1967).

¹⁹³ 107 Stat. 6 (1993).

example, the statute does not merely make exceptions, it completely dismantled employment-at-will instead.¹⁹⁴ According to the Montana Wrongful Discharge Act, no employers can fire workers without good cause.¹⁹⁵ By enacting this act, Montana suspended courts' advocacy for employment-at-will doctrine contrary to most states.¹⁹⁶

2.3. Employment-At-Will Argumentations

Employment-at-will, as has been noted before, remains controversial issue from its outbreak as an absolute doctrine to terminate workers without any protection till its modernization through some exceptions in the new era. Though the exceptions limit the application scope of the doctrine, the majority of US states adhere to the notion of the doctrine considering it as a general principle referred to in case of termination of employment relationships. Since it is the rule in most US states so far, the argumentations to rationalize this doctrine deserved to be discussed.

The historical background indicates different argumentations to support this doctrine and how such argumentations started with some outlook which extremely clashes with the basic human rights and then improved in a way that involved a degree of rationality from the perspective of legal analysis. An argumentation which is completely soulless and immoral can be observed in the leading case to support this doctrine, *Payne case*, where the court enabled the employers to fire any worker or a number of them for “good cause, for no cause, or even for cause morally wrong, without thereby being guilty of a legal wrong”.¹⁹⁷ The court's recognition of the legality of termination decision even for an immoral cause is rooted in the argumentation that looks to the worker like any other commodities used by the employer at work and can be thrown at any time. In this argumentation, no differentiation between a worker as a human being and the other commodities at companies can be seen, as being both can be used and taken away at any time and for any reason. An early change in the courts' ruling within a short period, as can be noted through

¹⁹⁴ Hogler, op. cit., p. 9.

¹⁹⁵ Mont. Code Ann. § 39-2-901 to -914 (1989).

¹⁹⁶ Schramm, L. H. (1990). *Montana employment law and the 1987 Wrongful Discharge from Employment Act: A new order begins*. Mont. L. Rev., 51, 94.

¹⁹⁷ 81 Tenn. 507, 518 (1884).

the date of the cases,¹⁹⁸ indicates that this argumentation had not remained in force for a long time and had not needed any logic to rebut because of its contradiction with the core of human rights.

The second argumentation to rationalize and retention of this doctrine is the respect of “freedom of contract”.¹⁹⁹ In this regard, proponents of employment-at-will justify the fairness of this doctrine as inherent extension of freedom of contract according to which a worker is similarly entitled to leave his/her job for no reason and without warning.²⁰⁰ Since the worker has such freedom in the contract, the employer from the other side must have this freedom to the same degree. Thereafter, the interest of both parties in at-will contracts overrides job security.²⁰¹ Furthermore, proponents arguing that freedom of contract along with the other aspects of individual liberty, such as freedom of speech and freedom to exercise religious belief, shall be respected.²⁰² How abridging of individual’s freedom to free speech or to adopt a religious belief is unjust, the abridging of individual’s economic liberties is unjust too.²⁰³ The desire of individuals to make their own choice for entering and withdrawing from employment perhaps much stronger as it is regarding religious and political activities.²⁰⁴

Freedom of contract seems to be the most powerful argumentation from the legal perspective. It has been reflected from the courts’ ruling where such freedom cited to rationalize their verdict for a period that ended when an absolute application of the doctrine became a default rule, and the three exceptions gradually recognized to curb its scope. The US Supreme Court’s holding to defeat the Erdman Act in *Adair case*²⁰⁵ is quite enough to strengthen this argumentation since the court through the majority opinion found that the right of the worker to dictate terms upon selling his/her labour is equal to the right of the employer as the purchaser of this labour with his/her own conditions.²⁰⁶

¹⁹⁸ After the decision of the Tennessee Supreme Court in 1884 that allows the employer to discharge workers even for cause morally wrong in Payne case, there were only two and a half decades until the US Supreme in 1908 Court upheld the employment-at-will-doctrine but in a quite different language and different argumentation as discussed later in Adair case.

¹⁹⁹ Vickers, L. (2002). *Freedom of speech and employment*. Oxford University Press on Demand, p. 32.

²⁰⁰ Epstein, R. A. (1984). *In defense of the contract at will*. The University of Chicago Law Review, 51(4), 947-982.

²⁰¹ NCSL. (2008). At-Will Employment – Overview. Retrieved November 11, 2020, from: <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx>

²⁰² Epstein, op. cit.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ 208 U.S. 161 (1908).

²⁰⁶ Hogler, op. cit.

Freedom of contract argumentation to rationalize employment-at-will, however, is rejected as being unjust argumentation in practice by those who characterize the employment contract through “inequality of bargaining power”.²⁰⁷ The situation that makes one party has more choices and better alternatives to bargain a contract than the other party. Since such a situation inherently found in employment contract which made the employer has more chances than the worker to engage the contracts and more alternatives to terminate such contracts, it poses the high possibility of agreements that are not the product of freedom from the side of the worker.²⁰⁸ The perception of imbalanced power renders a comparison between the employer’s freedom to fire and the worker’s freedom to leave the contract to become an unreasonable comparison.²⁰⁹ Explaining that is very easy to be understood by looking at the social, financial, and emotional consequences of the worker’s freedom to quit employment which is much risky than what is consequent from the employer’s freedom to fire.²¹⁰ Thus, freedom of contract to support at-will employment contracts might be a rebuttable argumentation considering the counter-argument justifying a reasonable restriction on freedom of contract to inhibit the abuse of imbalanced power by the employer.

During the judgment of the cases, there were several numbers of judicial opinions arguing for inequality bargaining of power to rebut freedom of contract argumentation as a base for employment-at-will. Since such judicial opinions did not rose to the majority’s advocacy, remained as dissent opinions in the cases till the outset of the exceptions to the doctrine. For example, in the case of *Coppage v. Kansas*²¹¹, where the US Supreme Court struck down laws that restrained freedom of contracts and validated yellow-dog contracts under which the employer could prohibit workers from joining unions. In view of inequality of bargaining power, Justice Holmes wrote a dissent opinion in the case arguing that the liberty of contract only begins when parties of a contract have equal positions, and such positions in employment contract should be enforced by law.²¹² Such judicial opinions then gradually became strong to restrain freedom of

²⁰⁷ Vickers, op. cit., p. 31.

²⁰⁸ Choi, A., & Triantis, G. (2012). THE EFFECT OF BARGAINING POWER ON CONTRACT DESIGN. *Virginia Law Review*, 98(8), 1665-1743. Retrieved December 12, 2020, from <http://www.jstor.org/stable/23333519>

²⁰⁹ Vickers, op. cit., p. 32.

²¹⁰ Ibid.

²¹¹ 236 U.S. 1 (1915).

²¹² Ibid.

contract, especially for employment contracts during the 20th century when most US states rapidly adopted the exceptions.²¹³

After the inception of exceptions based on the consideration of inequality of bargaining power, freedom of contract was not enough rationale anymore for employment-at-will, but the doctrine is still survival. In the new era, employment-at-will became a crucial topic of the study of economics as well. The freedom of contract argumentation substituted by “macroeconomic efficiency”, a modern argumentation that examines the positive role of at-will contracts on fostering labour market and employment fluctuations.²¹⁴ This argumentation is more improved by economists rather than legal scholars. Many economists, based on their hypotheses, have proven the positivity of US labour law model on the productivity and competitiveness of labour market.²¹⁵ Moreover, they “believe that a layoff and a weak job security are the price that must be paid for a healthy economy”.²¹⁶ If the worker already knows that he can be fired for any reason and at any time, he will be motivated to be productive.²¹⁷ And the employer to keep productive workers will be responsive to their interests since he knows that they can quit at any time.²¹⁸ This argumentation, thus, depends on a tradeoff between job security on one side, productivity, and competitiveness from the other side, preferring the latter side as an inevitable requirement for a sustainable economy.

3. Final Remarks

After a brief display of job security policy and employment-at-will doctrine, we may conclude the main impacts of such policies and doctrines to protect workers from unfair termination of employment contract:

- 1) The concept of unfair termination of employment contract is broadly adopted under the policy of job security, meaning that the protection provided to workers renders every single

²¹³ Autor, D. H., Kerr, W. R., & Kugler, A. D. (2007). *Does employment protection reduce productivity? Evidence from US states*. The Economic Journal, 117(521), F189-F217.

²¹⁴ Ibid.

²¹⁵ MacLeod, W. B. (2010). *Great expectations: Law, employment contracts, and labour market performance (No. w16048)*. National Bureau of Economic Research, p. 14-15.

²¹⁶ Houseman, S. N. (1994). *Job Security v. Labour Market Flexibility: Is There a Tradeoff?* Employment Research Newsletter, 1(1), 1.

²¹⁷ Hackstock, & HEYTOTH, op. cit., p. 5.

²¹⁸ Ibid.

case to discharge a worker unfair termination if the discharge made without considering guaranteed protection for workers. In contrast, the employment-at-will doctrine narrowly adopted the concept of unfair termination since the general application of this doctrine lacks protection for workers and accordingly does not enable the worker to claim for unfair termination unless in narrow cases.

- 2) According to the policy of job security, termination of employment is a prohibited and unfair act unless if there is a reason validated by law, while according to the employment-at-will, termination of employment is allowed and considered fair if it is not for a reason prohibited by law.
- 3) Since the general rule under job security is the prohibition of employment termination, the burden of proof having a valid reason to discharge a worker is placed on the employer, this facilitates the win of unfair termination cases in favor of workers. The opposite is true for employment-at-will where the general rule is the permission of employment termination, this requires placing a burden of proof on the worker when he/she alleges that his/her termination made for a prohibited reason and shall be invalidated.
- 4) Though the policy of job security and at-will employment are completely different from each other in logic and argumentation, they both are getting closer in some points relating to protection against wrongful termination. This approach has begun with the exceptions made to employment-at-will and courts started to provide protection against wrongful termination in cases found that termination took place in contrary to an established public policy, an implied contract, or a statutory law.
- 5) Though the limitations brought by recognized exceptions to employment-at-will, the protection for employees at-will does not reach that level of protection provided for employees pursuant to the policy of job security. A worker may still face challenges to prove that his/her case is fallen under the scope of one of the exceptions.
- 6) Contracts shall not modify the rule of job security to provide less protection than what guaranteed for workers, while contracts may modify the rule of employment-at-will and stipulating that the contract shall not be terminated unless for a just cause.

CAPTER II

INTERNATIONAL STANDARDS ON TERMINATION OF EMPLOYMENT CONTRACT

As presented in the first chapter, different policies, regimes, and doctrines have tailored the termination of employment provisions in each country. The regulation of this matter can be different pursuant to the policy or the doctrine that a country adopted to deal with it. However, the argumentation over those policies, as concluded before, takes different aspects into consideration to review the standards of employment termination. The establishment of common standards considering different aspects became an international concern since unfair termination of employment contract and the expected damages from such termination have become a global issue. On the other hand, globalization, and the growth of a free movement of labour force across international borders made labour laws generally and termination of employment rules particularly to get an international character. The significance of international standards refers to the efforts that will take for reforming domestic legal systems, as such efforts will take place after the evaluation of different aspects related to the matter along with the collective role in efforts to resolve the issue. Therefore, International treaties have begun to shed a light on this matter. In this regard, the conventions, and recommendations of the International Labour Organization (ILO) are presumed the most dominant international instruments in the last decades.²¹⁹

The International Labour Organization as an agency belongs to the United Nations has mainly established to promote decent work and to assist employers and employees worldwide through imposing international labour standards.²²⁰ By February 2016, the membership of ILO reached 187 countries worldwide.²²¹ Iraq has become a member since 1932 and has endorsed 67 ILO Conventions.²²²

In dealing with termination of employment, the first international instrument was specifically embraced by ILO in the form of Recommendation (No. 119) in 1963. Following that,

²¹⁹ Biffi, G., & Isaac, J. (2005). *Globalisation and core labour standards: Compliance problems with ILO conventions 87 and 98. Comparing Australia and other English-speaking countries with EU Member States.* International Journal of Comparative Labour Law and Industrial Relations, 21(3), 405-444.

²²⁰ ILO official website at: <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> Accessed: 13 March 2020.

²²¹ Ibid.

²²² Ibid.

the Termination of Employment Convention (No. 158) was formally endorsed in 1982 subsequent by Termination of Employment Recommendation, 1982 (No. 166) as a supplement to the convention.²²³ These two instruments are assumed the most prominent ILO instruments to lay down minimum levels of job security in the legislations of ILO member states concerning termination of employment. Therefore, to obtain an international perspective on termination of employment, we seek to examine what standards have been set in the two mentioned ILO instruments above.

1. Historical Background

As cited before, the ILO is the most specialist agency that began inspecting the question of international standards on employment contract termination more than 70 years ago.²²⁴ On different occasions, the ILO has taken the employment contract and the way to terminate such a contract into consideration. In 1963, the ILO has outlined the conditions and requirements of employment termination at the initiative of employers in Recommendation No. 119. The Recommendation drawn up the core principle that the employer should not practice termination of an employment relationship without a valid and sufficient cause. From this tenet, the claim of unfair termination of employment relationship has come out to discuss and challenge an employer's decision to terminate such a relationship without sufficient reasons. Many other principles have been adopted by the Recommendation, such as the right of workers for not being dismissed for some reasons listed in the recommendation as invalid reasons for termination, and the right of the worker to appeal the termination decision before an impartial body. As the recommendation provides the right of the employer to dismiss the worker without giving notice and compensation in case of committing an act described as serious misconduct.²²⁵

Although the Recommendation achieved significant protection for workers, the global fluctuation accompanied by the technology developments throughout the world after the adoption of the recommendation raised the demand of rearranging the recommendation in a way that would

²²³ Chapman, A. (2003). *The declining influence of ILO standards in shaping Australian statutory provisions on unfair dismissal*. Monash UL Rev., 29, 104.

²²⁴ ILO: International Labour Standards Department. (2011). *Termination of employment instruments*. International Labour Office, Geneva, p. 3.

²²⁵ Kenner, J. (2014). *Article 30–Protection in the Event of Unjustified Dismissal*. In the EU Charter of Fundamental Rights (pp. 848-875). Nomos Verlagsgesellschaft mbH & Co. KG.

be more compatible with the global changes. In 1974, the Recommendation 119 was reviewed by an expert committee aiming to evaluate the impact of recommendation to prevent unfair termination and, in that year, the committee recommended that the subject of employment termination should discuss before the ILO conference again to revise the standards of such termination.²²⁶ The representatives of the workers and government in the committee expressed further interest to adopt a fresh instrument in form of a convention that would impose obligations rather than just recommendations, as the latter is a non-obligatory tool and may not effective to achieve the targets.²²⁷ But the representative of the employers has had some objections considering that a convention as such would not be a realistic answer, however, they also agreed upon re-examination the Recommendation No. 119 and revised again.²²⁸ On the basis of the committee's recommendation to put the issue before the conference in order to design a new satisfactory instrument considering recent developments since the adoption of the Recommendation 119, the ILO commanded competent bodies and entrusted them doing this purpose.²²⁹ The competent bodies entrusted by the ILO concluded that mission, and the Termination of Employment Convention No. 158 with the Termination of Employment Recommendation No. 166, were endorsed by the conference in 1982 as replacement of the Recommendation 119.²³⁰

The two mentioned instruments above are, nowadays, the most effective international instruments that brought a significant number of ILO member states to the table, examining the question of international standards on termination of employment contract. After sufficient numbers of meetings, the International Labour Conference took place in Geneva, Switzerland, and has adopted Convention No. 158 on 2 June 1982.²³¹ The convention came into force on 23 Nov 1985, and by now 36 of ILO member states have ratified this convention including Brazil that subsequently denounced its ratification on 20 Nov 1996.²³² From this number, 10 EU member

²²⁶ Napier, B. (1983). Dismissals-The New ILO Standards. *Industrial Law Journal*, Volume 12, Issue 1, 1983, p. 17–27. Retrieved October 06, 2020, from <https://doi.org/10.1093/ilj/12.1.17>

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ ILO. (2011). *Termination of employment instruments*. Geneva, p. 4.

²³⁰ Ibid.

²³¹ Convention No. 158 on the ILO official website at:

https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303 Accessed: 14 March 2020.

²³² Ibid.

states have ratified convention No. 158.²³³ Similar to the majority of Arab countries, Iraq, due to the complexity of political situation, has not ratified this convention so far.²³⁴

Although the convention is predominantly intended to provide employee's rights at work, the endeavor of contributed states was embodied to balance the several interests concerned: that of the employees in job security, since deprivation of his/her job may cause loss of his/her welfare and his/her family's livelihood; that of the employer in possessing managerial prerogative over to control matters may negatively impact the progress of the undertaking; that of the economy in preserving flexible labour market in which the rate of employment can be grown.²³⁵ Building a balanced approach between such different interests seems too difficult without taking into account a degree of flexibility in a number of provisions. The convention, for that purpose, provides a degree of flexibility by excluding specific types of the workers from the termination of employment requirements based on the nature of their contract and the nature of the job entrusted to them. However, the subject matter of the convention as it was agreed upon was Termination of Employment at the Initiative of the Employer. From the subject name, it is apparent that the convention has not taken termination of employment into consideration that would be done due either to the will of the worker or based on the bilateral agreement of the worker and the employer.²³⁶ The reason -in our opinion- why the convention considers solely termination of employment at the initiative of the employer is that the risk of unfair termination from the side of the employer is much higher than what can be expected from the side of the worker or upon the agreement. Since the employer has many alternatives to substitute a worker who leaves a job, the risk of unfair termination to damage the employer is to a very little degree. The risk would be in a zero degree for the employer in case if the employment comes to an end upon the agreement as long as the worker cannot force the employer to sign such an agreement. In contrast, the risk of signing such an agreement by the worker under the pressure of the employer is rather expected, and then the possibility of unfair termination is also expected pursuant to that. However, the degree

²³³ Dorsement, F., Lörcher, K., Clauwaert, S., & Schmitt, M. (Eds.). (2019). *The Charter of Fundamental Rights of the European Union and the Employment Relation*. Bloomsbury Publishing, p. 516.

²³⁴ The history of Iraq with ILO and its conventions will be more detailed in the next chapter.

²³⁵ ILO. (2011). *Termination of employment instruments*. Geneva, p. 3.

²³⁶ Article 3 of Convention No. 158, obviously expresses that "the terms termination and termination of employment mean termination of employment at the initiative of the employer."

of this risk is not necessarily gross as can be rebuttable through the rules of domestic laws and has not reached international concern.

Recommendation No. 166 has also provided supplementary provisions solely on termination of employment at the initiative of the employer.²³⁷ But, it is important to highlight that the legal nature of the recommendation is different from the convention, because the latter lays down binding principles and compulsory provisions for the ratifying states, whereas, the former serve as noncommittal guidelines.²³⁸ In our case, therefore, the Convention No. 158 draws up the basic standards to be incorporated with the domestic laws of the ratifying states, while a related recommendation, in particular, Recommendation No. 166 supplements the convention by offering more detailed instructions on the way to apply the convention. Since Recommendation No. 166 is a non-binding tool, we mainly concentrate on Convention No. 158 to conclude basic standards of termination of employment, and secondarily we indicate the detailed guidelines in the recommendation as well.

2. Termination of Employment Requirements

A review on the main articles indicates that the convention is not essentially intended to inhibit the employer from termination of employment contract in an absolute manner. Rather, it tends to restrict the power of the employer to terminate the contract at will, aiming to prevent unfair termination. For that purpose, the process of termination should fulfill a spectrum of requirements set out in the convention. Therefore, the sound and the validity of the employment termination depend on such requirements in the assessment process.

2.1. Valid Reason

At the very beginning of the process, there should be a valid reason justifying terminating a worker from his/her job.²³⁹ The text of article 4 in the convention when provides that “the employment of a worker shall not be terminated unless there is a valid reason” inspires that the termination otherwise is absolutely null and void.²⁴⁰ The stipulation of having a valid reason to justify an

²³⁷ R166, op. cit., I (4).

²³⁸ Orakhelashvili, A., & Williams, S. (Eds.). (2010). *40 Years of the Vienna Convention on the Law of Treaties*. BIICL, p. 12.

²³⁹ C158, op. cit., Art. 4.

²⁴⁰ Keall, S. (Ed.). (2012). *Employment & Labour Law: Jurisdictional Comparisons*. Sweet & Maxwell, p. 150.

employee's termination is the first cornerstone of the convention's provisions to curb unfair termination. In this regard, the Committee of Experts has declared that the endorsement of this principle, as summarized in Article 4, "removes the possibility for the employer to unilaterally end an employment relationship of indeterminate duration by means of a period of notice or compensation in lieu thereof".²⁴¹ The principle that stipulates a valid reason to justify termination of employment cannot be replaced by the right of the employer for a period of notice.²⁴² National laws and practices that substitute a valid reason for termination by giving a period of notice, where the law requires the former just in case of not providing the latter or where a period of notice excuses the employer from stating his/her reason for termination, are not compliant with the convention.²⁴³

Provisions on what constitutes a valid reason has been left for national laws and practices since the convention does not contain any specific articles naming an apparent act as a valid reason for termination. Instead of that, the convention determines some categories that valid reasons should be enacted in accordance with thereof. This tendency provides a degree of flexibility in which the definition of valid reasons is fallen under the discretion of countries. Some countries used a broad and general concept of valid reasons to justify termination, while some others revise such concept and precisely defined valid reason.²⁴⁴ In other words, the law in some countries prolong detailed provisions on what shall be deemed valid reasons for employment termination, whereas the legislation in others used undetailed phrases, for example, "real and serious ground" or valid reason in general without specification.²⁴⁵ In countries where the latter direction enacted, the responsibility to draw the line of valid reasons under general provisions vested to bodies of case-law.²⁴⁶ A number of countries use the theory of abusive exercise of a legal right under which a valid reason shall be tested by standards of abusive practice. The theory limits the right of

²⁴¹ ILO. (2015). *Employment protection legislation: Summary indicators in the area of terminating regular contracts* (individual dismissals), p. 8.

²⁴² Olmen, C. (2018). *Labour and employment compliance in Belgium*. Kluwer Law International BV.

²⁴³ ILO. (1995). *Protection against unjustified dismissal*, para. 76; Heerma van Voss (n 11) at 290; Simms (1995) 34(6) International Labour Review 698-700.

²⁴⁴ *Ibid.*, para. 78.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*, para. 81.

dismissal exercised by the employer and invalidates the reason whenever proved that the employer abused his/her right to dismiss a worker.²⁴⁷

However, the convention identifies three categories of valid reasons since article 4 stipulates that a valid reason should result from one of the following categories: (i) the ability of the worker to perform the job; (ii) the behavior of the worker; or (iii) ‘the operational requirements of the undertaking, establishment or service’.

2.1.1. Valid Reasons Resulted from the Worker’s Capacity

As pointed out earlier, the convention has not contained specific provisions on what constitutes a valid reason for termination, rather it draws up three categories under which valid reasons shall be identified. Accordingly, the first category are valid reasons resulted from the worker’s capacity. It is expected from the worker to perform the job entrusted to him with an acceptable degree of efficiency. Such capacity is necessarily required to accomplish tasks of an undertaking. Hence, a lack of capacity constitutes a valid reason for termination of employment if the degree of incapacity can cause the failure of tasks and goals of an undertaking. In practice, the incapacity of the worker can be seen in two different forms. While a certain job requires specific skills, the capacity of the worker in this form measured by such skills.²⁴⁸ The incapable worker thus is who lacks the required skills causing to dissatisfying performance. The other form of incapacity can result from poor work performance due to the various reasons from the side of the worker, such as negligence, illness, or injury.²⁴⁹ These are the two different forms of worker’s incapacity that may take different shapes within national laws.

To prevent unfair termination of employment based on reasons connected with capacity, some safeguards can be conferred to the worker, including accurate assessment of his/her performance, continued guidance to improve his/her performance, warning him about mistakes and possible consequences, as well as providing a second chance to improve his/her performance and reassessment.²⁵⁰ Recommendation No. 166 confirms on the necessity of such previous

²⁴⁷ Sultanate of Oman is one of those countries. See: Oman Labour Law No. (35) of 2003, Article 106; Mahmood, S. J. (2007). Unjustified termination of employment contract according to the Oman Labour Law. Shtat for publication and software, Cairo, p. 112-113

²⁴⁸ ILO, Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment, NORMES-2009-02-0268-1-En.doc/v2, p. 2.

²⁴⁹ Ibid.

²⁵⁰ Antoine, R. M. B. (2000). *Termination of Employment Digest*. International Labour Organization, p. 302.

safeguards when states in Part II (8) that “The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his/her duties unsatisfactorily after a reasonable period of time for improvement has elapsed”. This guideline provision will curb the power of the employer to terminate a worker from his/her job for incompetent reasons. Though safeguards considered in Recommendation No. 166 can minimize the risk of unfair termination, a degree of uncertainty regards to what exactly constitutes incompetence remain. Nonetheless, the determination of unsuitability is, of course, located to the scope of the employer’s discretion to evaluate the worker’s performance, subjecting to the supervision of impartial bodies that should be referred to in case of confliction.²⁵¹

The process to evaluate whether a worker has satisfactory performance and whether s/he suitable to remain in the position is different for workers during probationary period from others after the expiration of that period. More lenient standards are applied to evaluate probationary employees, while the evaluation of workers after the expiration of this period is subject to more restrictive standards.²⁵² Perhaps, providing the second chance and warning the worker to improve his/her performance is not recommended, as it is recommended for other workers before terminating their employment. Case law, in certain countries, also improves the evaluation process of probationary workers to prevent unfair termination of their employment status but still has provided lenient standards that would be discussed later in this chapter.

2.1.2. Valid reasons Resulted from the Behavior of the Worker

Article 4 in the convention used the word ‘conduct’ instead of the word behavior; this means that valid reason in this context results from a worker’s ‘misconduct’ justifying termination of employment.²⁵³ The convention is intentionally silent to provide provisions on what constitutes the act of misconduct. This is because the determination of misconduct acts is highly affected by some factors related to cultural values and varies in different societies. While such factors and

²⁵¹ National Labour Relations Board (Ed.). (2016). *Decisions and Orders of the National Labour Relations Board* (Vol. 358). Government Printing Office, p. 1158.

²⁵² Ismail, O. A. (2019). Unfair Termination Review During Probationary Period. *Pro Futuro*, 9(4). Retrieved December 11, 2020, from: [file:///C:/Users/Khoshi/Downloads/6716-Cikk%20sz%C3%B6veg-14845-1-10-20200802%20\(5\).pdf](file:///C:/Users/Khoshi/Downloads/6716-Cikk%20sz%C3%B6veg-14845-1-10-20200802%20(5).pdf)

²⁵³ Peers, S., Hervey, T., Kenner, J., & Ward, A. (Eds.). (2014). *The EU Charter of fundamental rights: a commentary*. Bloomsbury Publishing, p. 826.

values are, of course, vary between countries, it is better to vest this function for national laws. However, an act of misconduct can be specified by one of the two measurements, either (a) the conduct violates a duty that the worker bears to carry out according to the contract, e.g., breach of work disciplines, non-compliance of reasonable orders, or (b) the conduct constitutes inappropriate behavior, e.g., committing crimes, abusive conducts, assault others, aggressive language, violating the peace and safety of the workplace.²⁵⁴

Therefore, the first category of misconduct can be reached out by referring to the contract and the enterprises' internal system which is often annexed to the contract of employment. The right of an enterprise to identify worker's duties in its internal system or in the employment contract, which the violation of such duties by the worker arises the case of misconduct, is an inherent right derived from the employer's managerial prerogative. But in general, the practice of this right by the employer should be lawful and reasonable, otherwise, it can be struggled by the abusive practice of legal right, the theory that obliged rightsholders to practice their rights in a reasonable and good manner.²⁵⁵ The lawfulness in the first level requires the employer to not impose a duty on the worker in which the performance of such duty violates the law, for example, a duty to not report crimes to the public authority. Then, in the second level, the practice of this right should be reasonable, and the reasonability can be tested by some reasonable measurements in an enterprise, such as the necessity to protect health, and safety.²⁵⁶ For instance, the duty of the worker to wear a mask inside the premises of the enterprise during the outbreak of the Covid 19 pandemic is a reasonable duty since a breach of this duty by the worker may cause health issues and damage the enterprise. The duty of the worker to not smoke unless in an area assigned for that purpose outside the enterprise is also reasonable for safety issues, in particular, for protecting the premises and assets belong to the enterprise from unattended fire. Such duties and certain others that reasonably imposed constitute the work rules, where the violation of each one of them can

²⁵⁴ NORMES-2009-02-0268-1-En.doc/v2, at 2.

²⁵⁵ The theory or the principle of "Abuse of rights" has widely adopted in both civil law and common law systems, though the scope and shape of this principle can be varied from country to another. However, the core idea of that principle is to inhibit the right holder from an abusive practice of his/her right. Paulsson, J. (2020). *The Unruly Notion of Abuse of Rights*. Cambridge University Press.

²⁵⁶ ILO, 1995, *op. cit.*, para. 90.

justify dismiss the worker under the term of “misconduct” or “breach of duty” or “breach of discipline”.²⁵⁷

Accordingly, the case of unfair termination of employment may only be possible to arise when a worker gets fired for violating a duty or an order which is not lawful or not reasonable to impose and seems to be an abused practice of the employer’s legal right to manage the enterprise, as for example, a duty to not hold membership in Labour Union, which is definitely not lawful,²⁵⁸ or an order to force the worker doing the employer’s personal tasks within or outside time work, which is not reasonable.²⁵⁹ When the worker challenges the employer’s decision in cases like that, the mission of the bodies of case law is to test whether the worker’s duty is lawful and reasonable. Further, to decide whether the termination upon the violation of such duties is unfair or not.

The second category of misconduct as mentioned earlier, can be found in legislation, where each country describes some specific acts and behaviors that constitute misconduct which must not be committed at workplace. Often such acts include either inappropriate behavior or committing crimes in detailed examples. The legislative body in each country considers the nature of the conduct and its gravity on the enterprises while codifying misconduct provisions. On that basis, legislation in several countries distinguishes a type of misconduct named as “serious misconduct” or “gross misconduct” from the other types of misconduct which are in a lower degree.²⁶⁰ Gross misconduct mainly encompasses: breaches of safety provisions, such as committing crimes; or inappropriate behavior, for example, drunkenness while on duty, attacking others, and assaulting the employer.²⁶¹ The differentiation between these two types of misconduct gives an effect on the procedure of dismissal; a summary dismissal is often a proper response for gross misconduct, while for misconduct of a less serious nature a normal procedure of dismissal including a notice period is applied.²⁶² Summary dismissal, thus, is the dismissal of the worker for

²⁵⁷ Bugdol, M. (2018). *A Different Approach to Work Discipline. Human Resource Management*. Palgrave Macmillan: Springer International Publishing, p. 61.

²⁵⁸ Convention No. 158 in Article 5 (a) prohibits the termination of employment based on Union membership and considered an invalid reason for the purpose of termination. In compliance with that, a vast majority of countries incorporated this provision in their national laws including countries that have not ratified the Convention yet. Iraqi Labour Law No. (37) of 2015 in Article 48 (a) provides the same provision where deemed the termination based on Union membership void and null.

²⁵⁹ Lewis, D., & Sargeant, M. (2004). *Essentials of employment law*. CIPD Publishing, p. 25-26.

²⁶⁰ Van der Wagen, L., & Goonetilleke, A. (2015). *Hospitality management, strategy and operations*. Pearson Higher Education AU, p. 533

²⁶¹ Ibid.

²⁶² NORMES-2009-02-0268-1-En.doc/v2, at 2.

gross misconduct that does not require giving notice, but the steps associated with due process is still needed.²⁶³

An aspect of misconduct that is not dealt with by the convention is whether misconduct constitutes a valid reason for termination even if it has occurred outside the workplace and work hours. Ruling over this issue needs detailed provisions explaining to what extent external misconducts negatively impact on the continuation of the employment relationship in an undertaking. Since the mission of enacting detailed provisions is vested to national laws rather than international treaties, the convention 158 abandoned this issue to be answered by the laws of member states. In many countries, the effect of misconduct on the continuation of the employment contract extends to include misconduct that is occurred even outside the workplace and work hours, especially, misconduct that results in the imprisonment of the worker, the case that makes the worker unable to retain his/her employment status.²⁶⁴

Taking the serious consequences of employment termination into account, Recommendation No. 166 in Part II (7) provides that “the employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning”. This is a sort of safeguard that can be given based on the assumption that the worker might not be knowledgeable about the consequences of some acts and behavior for the first time. Hence, the worker might be excused for doing misconduct the first time and giving him the second chance to rectify his/her behavior. The reason for providing such safeguards shall not exist anymore if the employer has already notified the worker about the consequences of misconduct in a written warning. It is also worthy to note that providing such safeguards can be varied based on the type of misconduct. More clearly, serious misconduct or gross misconduct may not be eligible for this safeguard, whereas some specific types of misconduct of a less serious nature can be covered thereof, and the separation process in that area, of course, shall be vested to national laws.

²⁶³ Harcourt, M., Hannay, M., & Lam, H. (2013). Distributive Justice, Employment-at-Will and Just-Cause Dismissal. *Journal of Business Ethics*, 115(2), 311-325. Retrieved October 24, 2020, from: <http://www.jstor.org/stable/42001985>

²⁶⁴ ILO, 1995, op. cit., para. 92

2.1.3. Valid Reasons Resulted from the Operational Requirements of the Undertaking, Establishment or Service

Nothing provides to explain the concept of ‘operational requirements’ of the undertaking in the convention. Hence, the concept of this term remains unclear within the context of the convention. Nevertheless, the Office to the first discussion at the conference offered a definition on that term stating that these requirements refer to all situations in which the employer may reluctantly reduce the workforce or close the undertaking due to reasons involved with “an economic, technological, structural or similar nature”.²⁶⁵ This means that such kind of reasons to terminate contract of employment are absolutely not related to the worker’s capacity or behavior, rather they related to the other issues surrounded an undertaking.²⁶⁶

A common example for operational requirements can be given in a recession when the economic activities get decreased because of economic crises and the operational requirements of an undertaking need fewer workforces than usual.²⁶⁷ The recession basically gives a valid reason for the employer to terminate a worker or a group of workers who are superfluous at work.²⁶⁸ During a recession, the consequences start with less consumption subsequent by less business and jobs, and then firing workers to cut costs.²⁶⁹ The number of the affected workers depends on how far businesses will be diminished during a recession. Therefore, termination of employment based on the employer’s operational requirements may take individual and collective forms as it is apparent in the presented example. The situation will justify whether the termination takes the form of either individual or collective, as the latter justifies termination of a group of workers from their job. The further regulation on the individual and collective termination of employment and the way to prevent unfair termination remain as a task of national laws and practice.

Recession is not an exclusive example for reasons related to the operational requirements of the undertaking. Examples may extend to encompass all cases could role a play in the size of an enterprise by downsizing or closing it entirely. The most recent example can be the outbreak of

²⁶⁵ NORMES-2009-02-0268-1-En.doc/v2, at 2.

²⁶⁶ Smit, P., & Van Eck, B. (2010). International perspectives on South Africa's unfair dismissal law. *The Comparative and International Law Journal of Southern Africa*, 43(1), 46-67. Retrieved October 25, 2020, from: <http://www.jstor.org/stable/23253142>

²⁶⁷ Parboteeah, K. P., & Cullen, J. B. (2013). *Business ethics*. Routledge, p. 165.

²⁶⁸ Ibid.

²⁶⁹ Desai, P. (2011). *From financial crisis to global recovery*. Columbia University Press, p. 50.

Corona Virus in the late of 2019 in China where the Virus of “Covid 19” grew for the first time and then has fulminated throughout the world.²⁷⁰ Since a vast majority of countries have imposed lockdown and many other restrictions with the beginning of Corona Virus pandemic (Covid 19), the situation in many enterprises give rise to redundancy cases.²⁷¹ This is, therefore, a situation under which workplace closure or minimizing workers doing a particular sort of work are allowed. Notwithstanding, the employer must act carefully in the current situation brought by this pandemic, and s/he must not start terminating staff just because a redundancy situation has arisen. The employer will need to show that he faced a serious situation under which the workers’ dismissal was the last option to respond a genuine redundancy situation, otherwise, s/he might be liable for unfair termination.

In many countries, the law requires specific conditions and strict procedures to terminate employment contract for reasons related to the operational requirements of the undertaking.²⁷² The law in some countries does not permit employers to downsize or to close their enterprises for economic reasons unless after the approval of competent authorities.²⁷³ Although such a condition is arguable from the flexibility point of view, it is really reasonable to protect workers from being unduly redundant. The reasonability of this condition refers to the obligation of employers to prove the actual situation faced as a step for getting approval from competent authority to downsize or close their enterprises. In the absence of a condition like that, employers can misuse cases and start terminating staff unfairly. France is one of those countries where the law requires the employer to justify layoffs by providing evidence on financial loss for several quarters, not just demonstrating a generalized situation for turning down the economy.²⁷⁴ Japan has also restricted the right of employers to layoffs by demonstrating evidence on financial losses for several quarters to a degree that close to a bankruptcy.²⁷⁵ Some other countries go to further restrictions, including court

²⁷⁰ Van Teijlingen, K., & Hogenboom, B. (2020). COVID-19 Impact on the Value Chain in Latin America. *Clingendael Institute*. doi:10.2307/resrep25676. Retrieved October 25, 2020, from: www.jstor.org/stable/resrep25676.

²⁷¹ According to the latest formal of Yelp, an American public company, business closures across the U.S. have reached 31, 163,735 businesses as of August 31, 2020. The data released by Yelp also indicates that permanent closures have reached 97,966, constituting 60% of closed businesses that will not be reopening.

²⁷² ILO, 1995, op. cit., para. 98.

²⁷³ For example: Iraqi Labour Code No. (37) of 2015, Art. 43 (3) provides that the employer is not entitled to close or minimize the size of his/her enterprise unless after the approval of the labour minister.

²⁷⁴ Cascio, W. F. (2010). *Employment downsizing and its alternatives*. SHRM Foundation’s Effective Practical Guide Series, p. 7.

²⁷⁵ Ibid.

approval or negotiation with government agencies for a significant layoff, as the requirements of layoffs in the Netherlands, China, and Colombia confirm that.²⁷⁶

Several numbers of countries considering alternatives for termination of employment during economic crises, particularly, during a recession that resulted in a reduction of the workforce of the undertaking. This is a new and modern tendency to take flexicurity policy into account; the policy that considers employment security and labour market flexibility both in a suitable degree. Redeployment, and work sharing are the two examples of such new and modern tendencies to provide alternatives for the termination of employment contract and considers the latter as the last option. In Australia, a worker's dismissal shall not be deemed a legal procedure of genuine redundancy if reasonable circumstances still exist to redeploy the worker in the employer's enterprise or in the other enterprises where the employer has associated with.²⁷⁷ In determining whether reasonable circumstances still exist for redeployment, a number of matters may be considered, including: whether there is any other available position where the worker can be redeployed; the nature and suitability of the available position; the required skills to perform the job and the worker's qualification for this job.²⁷⁸ To avoid the potential liability for unfair termination, the employer, therefore, must estimate reasonable circumstances for the worker's redeployment in his/her enterprises. Failure to do so may cause the recourse to unfair termination claim by the worker. It is really a notable model of flexicurity since the interests of both sides; the employer and the worker, are considered. On one hand, the employer has entitled to reorganize his/her enterprise for operational requirements in unusual circumstances, such as a recession, on the other hand, the worker has a certain degree of job security for not being fired in such circumstances unless after the examination of redeployment availability.

Work sharing or job sharing has also become a center alternative of flexicurity to react to economic crises instead of termination of employment in layoffs form.²⁷⁹ The core notion of work-sharing is that upon a temporary decline in business for reasons that bring changes in the operational requirements of the undertaking, such as economic crisis, the employer may share

²⁷⁶ Ibid.

²⁷⁷ Fair Work Act 2009 s.389(2)

²⁷⁸ Technical and Further Education Commission T/A TAFE NSW v Pykett [2014] FWCFB 714 (Ross J, Booth DP, Bissett C, 29 January 2014) at para. 36, [(2014) 240 IR 130].

²⁷⁹ Zenker, I., Popescu, C., & Nenu, C. (2014). *Guide for Romanian and German Labour Law: Basics of the Employment Relationship*. BoD–Books on Demand, p. 119.

works by reducing the hours and wages of all workers or a particular group of them to share it with others instead of laying off a certain group of workers.²⁸⁰ For instance, a company suffering from a 20 percent reduction in production might usually lay off one-fifth of its workforce. To get rid of this situation, the company can apply work sharing plan instead of laying off. According to the plan, the company will retain its total workers by reducing work hours on a four-day-a-week basis. The plan, thus, depends on reducing hours from 40 to 32 hours, and all affected workers would receive their payment based on four days of work.²⁸¹

The application of work sharing could role a play to mitigate the risks of termination in layoffs form and to satisfy employers and workers since it has dual benefits.²⁸² For employers, it helps to cut costs without the need for the recourse of layoffs that may arise potential liability of unfair termination resulting from the worker’s civil action before the court. Moreover, it helps employers to retain skilled workers, and to avoid the costs that should spend in the future for recruiting staff and training new workers when the economic upturn starts again.²⁸³ The benefits of work sharing for workers are also notable. Since the plan helps the workers to keep their job and to retain at least partial income, it gives a certain degree of job security for workers and makes them sure for not being necessarily laid off during an economic downturn.²⁸⁴

Despite the U.S. is running through at-will employment system where the workers might get fired even for no reason, an action at the Federal level had taken to promote work sharing plan during the Great Recession in 2012, and to mitigate the risks of layoffs during that period.²⁸⁵ The action was concluded by passing the Layoff Prevention Act of 2012, promulgated on February 22, 2012.²⁸⁶ According to the Act, an employer is obliged to provide the state workforce agency with a written work sharing plan on the condition that the plan must cover workers’ health and retirement benefits without reduction due to involvement in the work sharing program.²⁸⁷

²⁸⁰ Whittaker, J. M. (2016). *Compensated Work Sharing Arrangements (Short-Time Compensation) as an Alternative to Layoffs*. Congressional Research Service, p. 1.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid., p. 8.

²⁸⁴ Ibid., p. 9-10.

²⁸⁵ Wentworth, G., McKenna, C., & Minick, L. (2014). *Lessons Learned: Maximizing the Potential of Work-Sharing in the United States*. National Employment Law Project.

²⁸⁶ Ibid., p. 4.

²⁸⁷ NELP. (2016). *Work Sharing: An Alternative to Layoffs*. Center for Law and Social Policy. Retrieved October 27, 2020, from: <https://www.nelp.org/publication/work-sharing-an-alternative-to-layoffs/>

Nowadays, twenty-eight (28) states in the U.S. have amended their laws to incorporate work sharing programs and a mechanism by which a state may implement such programs.²⁸⁸

With the application of new tendencies, namely redeployment and work sharing, as alternatives of employment termination in form of layoffs, the latter becomes the last option to resort. Meaning that the employer is authorized to select a group of workers for laying off when the situation of an enterprise even not suitable for the application of redeployment and work sharing programs, rather the enterprise should be downsized in compulsory layoffs. Once the decision has been made to resort to layoffs as a final strategy, the most important legal issue that will arise in this stage is the selection process of the workers for downsizing the enterprise, the way to determine who stays and who leaves.²⁸⁹ Although the employers are entitled to make a decision on the selection process based on the needs of the business, their decisions are not immune to the potential liability of unfair termination through the workers' complaints alleging discrimination.²⁹⁰

Discrimination, accordingly, can be the most common base for civil actions taken by the workers alleging unfair termination of employment to challenge the employers' decision. The allegation of unfair termination of employment based on discriminatory acts might be proven whenever the selection process of layoffs depends on the prohibited reasons, such as race, sex, color, religion, marital status, social origin, and political opinion.²⁹¹ To avoid the discrimination lawsuits, employers are abide by criteria in which making a decision to downsize an enterprise does not discriminate based on the affiliation to a protected class.²⁹² In addition, the decision shall be made based on legitimate business grounds.²⁹³ Even in countries where the employers are free to apply whatever criteria they wish in terminating workers, for example, the U.S., discrimination ban is always a prior restriction that constitutionally imposed on such freedom.²⁹⁴

²⁸⁸ Ibid.

²⁸⁹ Cascio, op. cit., p. 4.

²⁹⁰ Ibid.

²⁹¹ Lieber, L. D. (2009). *How to manage terminations and layoffs in a recession*. Employment Relations Today, 36(1), 95-102.

²⁹² Cascio, op. cit.

²⁹³ Ibid.

²⁹⁴ Smith, V. (Ed.). (2013). *Sociology of work: An encyclopedia*. Sage Publications, p. 8.

However, to prohibit discriminatory selection and provide more guarantee for workers in that area, relevant laws might be engaged to determine legal criteria of who goes and who stays. In the Netherlands, Sweden, Germany, Hungary, and other certain countries, the legal criterion is “last in, first out”.²⁹⁵ A “last in, first out” (LIFO) criterion stipulates that the most recent hire in the enterprise has to be dismissed first during a downturn.²⁹⁶ Taking the seniority into account, the LIFO obliges employers to fire workers with less seniority status and restricts firms’ ability even to lay off their least productive workers in a recession. The fact that LIFO selection criterion often affects the young workers may still contain a discriminatory termination of workforce, unless if the employer can prove that the application of the LIFO is the safest option and objectively justified.²⁹⁷ Since downsizing results in some or many workers to be laid off, the “last in, first out” criterion is often deemed as the most reasonable one, as it is justifiable in courts.²⁹⁸ The application of this criterion, thus, minimizes the odds of litigation based on unfair termination claims.

Some other criteria are also applicable to avoid or at least to mitigate the risk of discrimination, including “Contract Status-Based Selection” and “Worker’s Skill-Based Selection”. In Contract Status-Based Selection, an enterprise tends to provide more security to full time workers.²⁹⁹ Contingent and part-time workers are going to be laid off first. This criterion may simply depend on the argumentation that enterprises do not bear the same legal obligation for part-time and contingent workers as they bear for full time workers.³⁰⁰ In addition, an enterprise may provide more argumentation in reasoning this criterion by showing that the contingent and part-time workers are less productive than full time workers.³⁰¹

In Worker’s Skill-Based Selection, the priority has given to skill as the most impactful tool for business enterprises’ success.³⁰² Accordingly, the selection process retains the workers with

²⁹⁵ Butschek, S., & Sauermann, J. (2019). The Effect of Employment Protection on Firms’ Worker Selection, p. 6. Retrieved November 01, 2020, from: <file:///C:/Users/Khoshi/Downloads/dp12305.pdf>; Cascio, op. cit., p. 7; Numhauser-Henning, A. (Ed.). (2017). *Elder Law: Evolving European Perspectives*. Edward Elgar Publishing, p. 215; Numhauser-Henning, A., & Rönmar, M. (Eds.). (2013). *Normative patterns and legal developments in the social dimension of the EU*. Bloomsbury Publishing, p. 3.

²⁹⁶ Butschek, & Sauermann, op. cit., p. 6.

²⁹⁷ Dube, P. (2020). Last In First Out (Fair Redundancy?). Retrieved November 03, 2020, from: <https://www.davidsonmorris.com/last-in-first-out/>

²⁹⁸ Ibid.

²⁹⁹ Brown, A. (2020). How Do You Choose Which Employees to Layoff? Retrieved November 03, 2020, from: <https://blog.careerminds.com/how-do-you-choose-which-employees-to-layoff>

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

the most valued skills that a business cannot sufficiently be survived without such skilled workers. While this criterion seems great, it may also run the employer to be involved with discrimination suits based on age. This possibility refers to the fact that pursuant to this criterion, the older workers often are let go due to the lack of new skills that young workers have.³⁰³ Such possibility is extremely high especially in countries where the law protects the older workers from discrimination, as for example, the Age Discrimination in Employment Act in the U.S. bans employment discrimination against anybody at least 40 years of age.³⁰⁴ Notwithstanding, an argumentation for discrimination based on age can be rebuttable with having a clear documentations proving the reasonability and necessity of taking that method to protect the enterprise.

Back to the main point that valid reasons shall be legitimized by connecting with one of the three categories explained before, the convention simultaneously prevents some cases to be defined as valid reasons for terminating an employee from his/her position. Article 5 prevents the employer to allege a valid reason for terminating an employee in the following cases:

- (a) being a membership in a union and contribution in union activities even during working hours upon the consent of the employer
- (b) acting or representing workers in an office
- (c) performing legal procedures, such as having a complaint or being involved in legal procedures against an employer who prosecuted by the law.
- (d) discrimination on the different grounds, such as “race, color, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin”
- (e) being absent from work because of maternity leave.

Article 6 (1) in the convention adds another case that will not be regarded as a valid reason for termination, the case is namely about temporary absence from work due to illness or injury. The detailed rules on the temporary absence from work and the necessary documents to prove such

³⁰³ Ibid.

³⁰⁴ 29 U.S.C. § 631.

absence, according to article 6 (2), shall be enacted pursuant to the methods of implementation of this convention.

It is worth mentioning that the list provided in article 5 & 6 is not closed list. This conclusion can be reached from the wording of the two articles above, in particular, article 5 that used the phrase ‘inter alia’. Such a phrase clearly indicates that the list is not an exclusive list and that member states have a degree of freedom to add further cases and grounds that will not constitute a valid reason for termination.³⁰⁵

2.2. Notice Period

According to article 11 of the convention, the right of giving notice has been given to an employee whose employment contract is about to be terminated, otherwise, s/he is entitled to be compensated in lieu of notice. An exception provided in the same article for an employee involved with gross misconduct.³⁰⁶ The Committee of Experts has also asserted that the exception related to gross misconduct provided in article 11 is the only exception that releases the employer from giving notice or compensation in lieu of thereof.³⁰⁷

The provision of the above article impliedly provides that a valid reason as required in the convention does not entitle the employer to take immediate action for terminating a worker. Rather, the process of termination to be legal and fair, must be backed by giving a notification to the worker whose contract is going to be terminated. On the other side, the need for giving notice does not exempt the employer to terminate an employment status if it is not justified through a valid reason.³⁰⁸ Giving a notice, thus, is a prerequisite for terminating a worker based on a valid reason whenever the reason does not reach the level of gross misconduct.

The purpose for giving notice is to mitigate fatigue resulting from termination of employment. The fatigue will be extremely high when a worker surprisingly gets fired.³⁰⁹ A prior notice may help the worker to gradually be adapted to the situation and prepare himself to find a

³⁰⁵ Smit, P., & Van Eck, B. P. S. (2010). *International perspectives on South Africa's unfair dismissal law*. Comp. & Int'l LJS Afr., 43, 46.

³⁰⁶ C158, op. cit., Art. 11.

³⁰⁷ NORMES-2009-02-0268-1-En.doc/v2, at 3.

³⁰⁸ Davulis, T., & Petrylaitė, D. (Eds.). (2012). *Labour Regulation in the 21st Century: In Search of Flexibility and Security*. Cambridge Scholars Publishing, p. 279.

³⁰⁹ ILO, 1995, op. cit., para. 239.

new job.³¹⁰ While the purpose of this commitment is to prevent the worker from being shocked and to mitigate monetary losses by immediate termination of employment,³¹¹ the worker can be deprived of such right and its purposes due to a managerial punishment for being guilty of serious misconduct. An act of serious misconduct, therefore, ruins the reasonableness of continuation the employment during the notice period.³¹² Apart from gross misconduct cases, the vast majority of countries adhere to the right of the worker to have a period of notice when the employment status is terminated.³¹³ Even in countries running through an at-will employment system where no reason required for termination, a period of notice right is protected and widespread.³¹⁴ However, provisions on notice period, methods to do it, and contracts that might be covered by this procedural right vary from country to another. This variety can be seen since the requirement of notice period in many countries merely applies on contracts of indefinite term; fixed term contracts including contracts for a specified period or specified task are automatically ended once the duration expires or the task is accomplished.³¹⁵ Few countries require the notice period to be documented and submitted to the competent authorities before dismissal taking place for certain workers.³¹⁶

Neither article 11 nor the other articles of the convention have assigned the duration of the notice. The convention just provides that a notice must be given within a ‘reasonable’ period. The specific length of notice period, then, is intentionally left to be regulated by national laws. The legislation of countries may reasonably determine the minimum length of the notice period, such period can be variously determined between countries. In case of dispute, the decision to determine whether the duration is reasonable shall be vested to the supervisory bodies. The length of period required for giving notice is not varies only between countries, rather it varies even within the same country depending on the type of contracts and the length of service.³¹⁷ The latter is a criterion to determine the duration of notice in many countries; whenever the length of service

³¹⁰ Ibid.

³¹¹ Blackham, A. (2013). UNCERTAIN JUNCTURES BETWEEN EMPLOYMENT AND CONTRACT LAW. *The Cambridge Law Journal*, 72(2), 269-273. Retrieved November 23, 2020, from www.jstor.org/stable/24694004

³¹² C158, op. cit., Art. 11.

³¹³ ILO, 1995, op. cit., para. 241.

³¹⁴ Ibid.

³¹⁵ Ibid., para. 242.

³¹⁶ This is the case in Chile when the employment is termination based on the operational requirements of an enterprise according to s. 162 of the Labour Code of 1994.

³¹⁷ Russell, R. (2017). *Concentrate Questions and Answers Employment Law: Law Q&A Revision and Study Guide*. Oxford University Press, p. 102.

increases, the length of notice period increases as well.³¹⁸ However, it is worthy to mention that the period of notice can also be extended by collective agreements, the contract of employment, or by custom.³¹⁹

In the event of not providing a notice period when the employment status terminated for a valid reason, Article 11 in the convention stipulates to provide compensation in lieu of notice. The amount of compensation should correspond to the payoff that would be given to the worker during the period of notice if it had been fulfilled.³²⁰ In compliance with compensation in lieu of notice stipulated by the convention, legislation in most of the countries, where the period of notice is required, covers a provision for providing compensation in lieu of notice in the case that a period of notice has not given to the worker.³²¹

2.3. Pre-Termination Requirements

Pre termination requirements encompass procedures that must be taken before the decision of termination has been made. In that respect, article 7 of the convention states that a worker shall have the right to defend himself and to respond an allegation made, before terminating the employment contract for reasons relating to the conduct and performance, unless the employer can reasonably dispense from this opportunity. What clear from the requirements of this article, is that the letter of dismissal detailed the reasons for dismissal is not sufficient for a worker as long as his/her right to defend himself has been violated.³²² In such a case, the worker could appeal against dismissal, as the interpretation of article 7 by Spanish courts upheld that.³²³ The purpose of this article is to make sure that the process of termination depends on dialogue and an ambiguous point

³¹⁸ Ibid.

³¹⁹ NORMES-2009-02-0268-1-En.doc/v2, at p. 3.

³²⁰ Collins, H. (2010). *Employment Law*. OUP Oxford, p. 114.

³²¹ Legislation regarding the termination of employment in 55 countries has been examined and reviewed by the International Labour Standards Department (Sector I), the Employment Analysis and Research Unit (Sector II) and the Social Dialogue, Labour Law and Labour Administration Branch (Sector IV), with the collaboration of specialists from the ILO Training Centre in Turin. The selected countries for the purpose of the examination include (24) European countries, (12) African countries, (11) American countries, only (1) Arab state, and (7) Asian countries. Regarding the notice period and compensation in lieu of notice as required in the convention Article (11), the examination reveals that the legislation only in five countries, including Georgia, Mexico, Panama, Peru, and the United States does not match the provision of mentioned article. The legislation of (50) countries, thus, is consistent with the provision of the notice period or compensation in lieu of notice. NORMES-2009-02-0268-1-En.doc/v2, p. 15-16

³²² ILO. (2011). Final report. TMEE-FR-2011-07-0110-1-En.docx/v6, p. 17.

³²³ Ibid.

has not been left behind in taking the decision.³²⁴ Denial of the right of defense drawn by this article raises the possibility of unfair termination since the process unilaterally and without taking the worker's point of view will take place.

However, the convention provided a degree of flexibility in the last part of article 7 states "unless the employer cannot reasonably be expected to provide this opportunity". In practice, this may allow certain exemptions determined by legislation and courts' decisions. It is a leeway under which governments may broadly interpret the word of 'reasonably' to exempt the employer from providing such a right since the convention does not contain any specification of reasonable situations. To protect workers, therefore, it is the responsibility of the competent authorities to act with good faith during the application of this provision in national practice.³²⁵ Any exemption provided to deprive the worker of the right of defense shall be reasonable and applied in good faith. From our standpoint, it is reasonable to not expect the employer to provide an opportunity for the worker to defend himself if the latter commits a flagrant crime inside an enterprise.³²⁶ Cases in that nature can be laid down by national laws since such cases are reasonable and backed up by the principle of good faith for the purpose above.

According to some jurisprudential trends, the application of this article shall exclusively be provided for cases in which the worker's contract is terminated for reasons related to conduct and performance.³²⁷ This outlook argues that employment termination for reasons related to the operational requirements of the undertaking, establishment or service, are not covered by the rule of this article since the procedures of termination based on such reasons are set forth in Articles 13 and 14 of the Convention.³²⁸ Nevertheless, Article 7 which includes the right of defense can be applicable in that area as well, in particular, when the termination based on the operational requirements of an enterprise leads to discrimination or when the termination depends on the skill-

³²⁴ Saul, B., Kinley, D., & Mowbray, J. (2014). *The international covenant on economic, social, and cultural rights: commentary, cases, and materials*. OUP Oxford, p. 354.

³²⁵ Ibid.

³²⁶ A crime would be flagrant if the offender is caught while doing the crime or immediately after committing the crime in a situation where the offender is pursued by an injured party or by eyewitnesses or under any other circumstances likely to involve the person in the crime. The law often treats such crimes and its offenders more roughly than the other crimes. Assefa, S. K. (2010). *Criminal Procedure Law: Principles, Rules and Practices*. Xlibris Corporation, p. 161.

³²⁷ ILO, 1995, op. cit., para. 145.

³²⁸ Ibid.

based selection, but the process for laying off workers on that basis seems to be done improperly.³²⁹ This attitude can be justified on the basis that the termination of employment especially in the latter situation contains an implied accusation of bad performance and that the worker has been selected to be laid off because of not being qualified compare to others. Thus, it is reasonable to extend the application of Article 7 to cover such cases.

Neither the form of defense nor the way of accusation has been determined in Article 7. The core of this right is the ‘opportunity’ that must be provided for a worker to defend himself against the accusation made. What is important in this regard, therefore, is an explicit accusation that shall be communicated to the worker in circumstances under which the worker has an opportunity to defend himself.³³⁰ It is also important to document the procedure of accusation and the opportunity of defense against the accusation made. The documentation in this regard can be used then to rebut unfair termination lawsuits in courts. To this end, many countries formalized the procedure of accusation and an opportunity for defense by law which contains provisions to do such procedures through investigation hearing.³³¹ The investigation for that purpose can be vested to an investigation committee formed by the employer, or it might be done by any other employer’s representative. In sake of transparency and for making the worker be more confident in defending himself, the law in some countries stipulates on the employer to perform the investigation on condition of the presence of labour union’s representative.³³²

2.4. Post-Termination Hearing

The essential purpose of the convention to protect workers against unfair termination cannot be accomplished if there are not serious post-termination procedures to ensure whether the termination process meets the requirements established by this convention. While pre-termination requirements, including valid reason, notice period, and fair hearing, established to secure lawful termination, the post-termination procedures are aiming to ensure the application of pre-

³²⁹ This perception might be supported by France Labour code, s. L. 122-14, where states that “a worker is heard irrespective of whether employment is terminated for reasons in connection with the worker or for economic reasons. The provisions are not applicable when the employment of a specific number of workers is terminated for economic reasons where there is a works council or staff delegates in the enterprise”.

³³⁰ ILO, 1995, op. cit., para. 146

³³¹ Qatar Labour Code No. (14) of 2004, Art. 62 (3); Kuwait Labour Code No. (6) of 2010, Art. 37; Egyptian Labour Code No. (12) of 2003, Article 70 & 71.

³³² Bahrian Labour Code No. (36) of 2012, Art. 76 (a); Iraqi Labour Code No. (37) of 2015, Art. 140.

termination requirements. With regards to post-termination procedures, the most important action is the right of the worker to appeal against the termination of employment before an impartial body.³³³ The impartial body, for that purpose, embodies in the court or any other tribunal bodies whose decision expected to be impartial in the case. Therefore, the right of appeal can be considered as an essential component of a worker's immunity against unfair termination of employment.³³⁴

The convention in articles 8 and 9 deal with the concept of this right: the competent authority to scrutinize the appeal; its powers during the appeal review; and the burden of proof. Article 8, paragraph 1, empowers the worker to appeal the decision of the employer whenever he considers that his/her right to not be unfairly terminated has been violated. The appeal must be filed before "an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator".³³⁵ This necessarily means that an administrative appeal in which the process of examining termination of employment entrusts to an administrative committee does not fulfill the requirement of the convention. An appeal in that form cannot be satisfactory from the perspective of the convention's provisions even with the engagement of the third party to stand by the worker, such as the engagement of trade union.³³⁶ The reason for not considering such appeal refers to the fact that the administrative committees often belong to the enterprises owned by the employer, where the degree of impartiality as expected by the convention cannot be reaped at that level of appeal.

Article 8, paragraph 2, emphasizes the right of the worker to appeal the termination decision, and this right cannot be impaired even if the termination authorized by a competent authority. The application of this right, in this case, might be varied according to the national legislation and the way to practice it.

In article 8, paragraph 3, the convention permits member states to restrict the right of appeal by providing a time-limit in which the appeal should be filed. In this regard, the wording of the

³³³ Bellace, J. R. (1982). *A right of fair dismissal: Enforcing a statutory guarantee*. U. Mich. JL Reform, 16, 207.

³³⁴ ILO, 1995, op. cit., para. 175

³³⁵ C158, op. cit., Art. 8, para. 1.

³³⁶ ILO, 1995, op. cit., para. 178.

article has used “may” inspiring that each country has a leeway to impose such a time-limit or not.³³⁷

In the connection with the appeal procedures, article 9 of the convention is guiding the referred bodies in article 8 to the way that the procedure of appeal should be done thereof. The procedures shall begin examining the termination decision to determine whether a valid reason accompanying such a decision. Since this examination rendered to the competent bodies, the power to decide whether the termination is lawful or not shall also be given to those bodies.³³⁸ This provision founded the essential role of the right to appeal and made it an effective procedure against unfair termination.³³⁹ It does not let the decision of the employer on termination to be immune since the article enables the impartial bodies to issue the final statement on the validity of the reason.

To issuance its decision, the impartial body must rely on the evidence that would be submitted from the contesting parties; the employer and the worker, to prove the case. The burden of proof, in this regard, has been dealt with by article 9, paragraph 2, providing a rule a bit distance from the general rules enacted to prove a claim. While the application of the general rule in contract law places the burden of proof on the complainant,³⁴⁰ the above-cited article provides that the worker should not have to bear alone the burden of proving unjustified termination. To give a reason on that, the Committee of Experts has noted that an application of the general rule in contract law which puts the obligation of the burden of proof on the complainant makes the worker unable to prove that the termination was unjustified, especially because the real reason led to the termination has been given by the employer, and then the proof of that reason should be rest on the employer.³⁴¹ Consequently, the convention approaches two methods to mitigate applicable rule in contract law for the worker: (a) the employer shall bear the burden of proving the existence of a valid reason justifies the termination as described in article 4 of this convention; (b) reaching a conclusion on the termination reason shall be rendered to competent bodies mentioned in article 8

³³⁷ ILC, 68th Session, Geneva, 1982, Provisional Record, p. 30/9.

³³⁸ C158, op. cit., Art. 9, para 1.

³³⁹ ILO, 1995, op. cit., para. 197.

³⁴⁰ Ibid., para. 199.

³⁴¹ NORMES-2009-02-0268-1-En.doc/v2, at 10.

of this convention, as such bodies, for that purpose, should rely on the evidence presented by the parties according to the national law procedures.³⁴²

Member countries, thus, may adopt in their national laws one of the two methods presented above to excuse the worker from bearing alone the burden of proof. In the first method, member states have the possibility to impose the burden of proof on the employer, under which s/he must prove the existence of a valid reason for termination. This method seems to be more impressive and applicable; as it is adopted by the very large majority of countries in different wording that provide the same rule.³⁴³ Iraq as a non-member state of the convention has also adopted this method in its labour law.³⁴⁴ However, the second method is still possible for member countries that rest the burden of proof neither on the worker nor on the employer. Rather, it requires competent bodies to reach the truth about the reason for the termination in light of the evidence presented from both parties. The success of an appeal against unfair termination, particularly, in countries where the second method adopted, depends on the worker's strength to present the evidence and the ability to convince the impartial body on the legitimacy of his/her complaint. In countries³⁴⁵ where the burden of proof placed on the employer, the chance to win the appeal by the worker is more foreseeable since the failure of the employer to prove a real reason for the termination will necessarily cause the success of the worker's appeal.

Back to the main point where we started examination the international standards of employment termination so far, the four core principles of Convention No. 158, to prevent unfair termination of employment are the following:

1. There must be a valid reason; otherwise, the termination of employment is null and void.
2. A reasonable period of notice shall be given to the worker whose contract tended to be terminated by the employer if s/he is not guilty of gross misconduct.
3. A worker shall be entitled to defend himself against the accusation directed to him; such an opportunity must be conferred prior to the decision of termination.

³⁴² C158, op. cit., Art. 9, para. 2 (a & b).

³⁴³ ILO, op. cit., para. 197.

³⁴⁴ Iraqi Labour Law, No. (37) of 2015, Art. 46 (3).

³⁴⁵ For example: Australia, Germany, Italy, Peru, and Iraq.

4. The worker must have the right to appeal the decision of termination before an impartial body.

3. Flexibility

Flexibility in the context of the convention is referred to as the ability of member states to not compel with requirements imposed by the convention to terminate an employment relationship for some categories of workers. With such ability, the ratifying states enjoy more leeway to enhance the labour market in which security and flexibility can be provided for economic activities. Rules of the convention shall cover all segments of economic activities and apply to all persons engaged in the employment relationship.³⁴⁶ This means that the scope of its application is very broad, and the ratifying states may not exclude any economic activities or employed persons from the provisions of the convention unless the exclusions provided by the convention itself. However, the convention mitigates from the rule of general application by offering member states the option of excluding specific types of workers.³⁴⁷ According to Article 2 (2), member states are free to exclude some type of workers from all or some of the provisions provided in this convention. Such exclusions are given either based on the employment contract type or based on the category of workers apart from the contract itself. From the cited article, two points are notified. First, the exclusions provided by the convention do not bind the ratifying states to do so in their national law since the wording of the article uses “may” to express that the ability of members to practice such exclusion is an optional choice. Therefore, members are not bound by such exclusions, and they may extend protection to cover all types of workers as a reaction to the labour market instability. Second, members are also free to decide whether the exclusions are made from the whole or just some of the provisions in the convention. This retains the discretion of member states to select between the provisions of the convention to be applied or not for excluded workers.

3.1. Flexibility for Specific Types of Employment Contracts

The convention in Article 2 (2) permits the ratifying states to exclude workers from whole or some provisions of the convention based on the following type of contracts:

³⁴⁶ C158, op. cit., Art. 2 (1).

³⁴⁷ ILO, 1995, op. cit., para. 34.

- (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
- (c) workers engaged on a casual basis for a short period.

Though taking a flexible manner as regards to such contracts, the convention adheres member states to take necessary safeguards to prevent the abusive practice of such contracts aiming to deprive the worker of the protection given by the convention.³⁴⁸

3.1.1. Fixed-Term Contracts

Article 2, paragraph 2 (a), deals with fixed-term contract of employment in a flexible manner, and allows member states to exclude such type of contracts from all or some provisions of the convention. According to the article above, a contract can be categorized as a fixed-term contract either by a definite period or by a specific task to achieve. No major differences exist between the specific period and task and the two of them are fallen under the type of fixed-term contracts, however, the latter may a bit differ in the duration due to the fact that the task will determine the real date of ending the contract, but this does not change the general concept of the fixed-term contract since the worker already knows that the contract will be ended once the task achieved.³⁴⁹

The distinction between fixed-term contracts and contracts for an indefinite duration of time is an international acknowledgment to legitimize fixed-term contracts even in jobs which are permanent in nature. However, Recommendation No. 166 in part I (3-2) tends to limit the use of fixed-term contracts in labour market by determining specific cases under which solely such contracts can be formed. It proposes to permit specified period of time contracts only for “cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration”.³⁵⁰ Unless in such cases mentioned above, Recommendation No. 166 suggests deeming contracts for a specified period of time to be contracts of indefinite-term

³⁴⁸ C158, op. cit., Art. 2 (3).

³⁴⁹ Arranz, J. M., & García-Serrano, C. (2014). *The interplay of the unemployment compensation system, fixed-term contracts and rehiring*s. International Journal of Manpower.

³⁵⁰ R166, op. cit., I (3-2-a).

automatically.³⁵¹ In line with this guideline brought by Recommendation No. 166, some countries do not recognize fixed-term contracts in permanent jobs considering more job security for workers into account, for instance, Iraqi labour law No. 71 in 1987 does not permit any time-limit for the contract in economic activities and works which are permanent in nature.³⁵² Any time-limit in permanent jobs shall be deemed void and null, and the contract will be held on an indefinite time automatically.³⁵³ A number of Iraqi courts' ruling confirmed this attitude and upheld that the validity of the fixed-term contract depends on the nature of the job trusted to the worker.³⁵⁴ As long as the job has a permanent nature, the time-limit is not permissible.³⁵⁵ The new Iraqi Labour Law No. 37 in 2015 has repeated the same provision in formation a contract of employment in jobs which are permanent in nature.³⁵⁶ This trend, of course, has a dual impact: on one hand, it seems to provide a high level of job security by forcing the employer to sign indefinite time contract in permanent jobs, and the workers may enjoy the benefits of indefinite time contract; on the other hand, it negatively impacts the rate of employment due to the deactivate the labour market in offering new jobs, especially for the non-employed workers. However, this trend has gradually abandoned through international trends taking flexicurity point of view into account. Globalization as well as rapid changes in employment structure and work institutions led to change in the traditional perception of the employment contract that subsequently caused to normalize fixed-term contracts as a suitable form of a flexible employment relationship.³⁵⁷

In compliance with the convention, many countries have drawn a distinction between fixed-term contracts and indefinite-term contracts, aiming to determine unfair termination under the stringent rules applying only to the latter.³⁵⁸ Notwithstanding, unfair termination in a fixed-term contract still can be a case particularly if the contract is terminated at the initiative of the employer before the expiry date. The employer in that case is obliged to pay an amount of compensation to the worker whose contract has been terminated before its expiry.³⁵⁹ It is also

³⁵¹ Ibid, I (3-2-b).

³⁵² Iraqi Labour Law, No. (71) of 1987, Art. 32 (1).

³⁵³ Abid, & Elyas, op. cit., p. 44.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Iraqi Labour Law, No. (37) of 2015, Art. 38 (2).

³⁵⁷ Mačiulaitis, V. (2010). Fixed-Term Employment Contracts in the Context of Flexicurity. *Societal Studies*, 3(7), 293-310. Retrieved October 08, 2020, from: <https://www3.mruni.eu/ojs/societal-studies/article/view/1325>

³⁵⁸ For instance: Cyprus, and Gabon. ILO, 1995, op. cit., para. (37).

³⁵⁹ Ibid.

worthy to note that workers during the period of fixed-term contracts are in a greater position as regards job security than others in indefinite-term contracts, this simply because that, in many countries,³⁶⁰ a fixed-term contract cannot be terminated before its expiry date except in the case of “serious misconduct or force majeure”, while an indefinite-term contract may be terminated with giving notice and for a valid reason at any time.³⁶¹ Furthermore, termination of a fixed-term contract on the basis of serious misconduct or force majeure is not quite easy, since the first reason should be passed under the disciplinary measures and the second requires strict circumstances, as the judiciary precedents in many cases have confirmed that economic difficulties should not be considered as a case for constituting force majeure.³⁶² In contrast to the previous case, the law in some countries subjects the worker in fixed-term contracts to the same circumstances assigned for terminating indefinite-term contracts, meaning that workers during the duration of fixed-term contracts may be dismissed with notice period even before the expiry date for the same reasons justifying the termination of indefinite-term contracts.³⁶³ In this sort of situation, workers who are engaged in fixed-term contracts will not enjoy a better position as regards job security than those engaged in indefinite-term contracts even during the duration of their contracts.

Despite in many countries fixed-term contract can offer notable security to the worker during its duration, this type of contract, in general, does not reach to the level of job security granted to the worker in indefinite-term contract since the fixed-term contract will come to end at the expiry date without the need of having a valid reason. The risky of fixed-term contracts, thus, is hidden in the termination point that would be done automatically at the expiry date without being subject to the general application of unfair termination. To this end, the convention adds an obligation on the member states aiming to prevent an abusive practice of fixed-term contracts. Article 2 (3) binds the ratifying states to adhere to adequate safeguards “against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention”. The means of applying adequate safeguards have not been determined in the convention; it rather left to the discretion of member states. For that purpose,

³⁶⁰ For instance: France: s. L. 122-3-8 of the Labour Code.

³⁶¹ Kruppe, T., Rogowski, R., & Schömann, K. (1998). *Labour market efficiency in the European Union: Employment protection and fixed term contracts*. Routledge.

³⁶² France: s. L. 122-3-9 of the Labour Code and Cass. Soc, 28 Apr. 1986.

³⁶³ For instance: Czech Republic. Sil, R. (2017). The battle over flexibilization in post-communist transitions: Labour politics in Poland and the Czech Republic, 1989–2010. *Journal of Industrial Relations*, 59(4), 420-443. Retrieved October 12, 2020, from <https://doi.org/10.1177/0022185617705684>

countries have adopted various provisions to fulfill this obligation and to prevent the employer from recourse to fixed-term contracts for the purpose of depriving the worker of the protection provided by the convention. The provisions mostly formulated in form of restrictions that limit the use of fixed-term contracts to ensure the right way of practicing such contracts. In a significant number of countries, the duration and the renewal of fixed-term contracts are not exempt from time limit, otherwise under certain provisions the contract turns to an indefinite-term contract. With a bit of difference, many countries determined the maximum duration of the contract for a specified period.³⁶⁴ In Qatar,³⁶⁵ Kuwait,³⁶⁶ and Bahrain,³⁶⁷ for example, the maximum duration of the contract must not exceed five years, and the contract turns to an indefinite-term contract in case of determining a period more than five years. Less than this period can be found in many countries, the United Arab Emirates, for example, allows four years as the maximum duration of the contract.³⁶⁸ In Mali, only two years can be fixed for a specified period contract.³⁶⁹ EU law also provided measures to prevent the abuse of fixed-term contracts.³⁷⁰ Directive 1999/70/EC, requires member states to implement at least one of the following measures in their national laws to inhibit abuse of fixed-term contracts. The measures for that purpose are “(a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships”.³⁷¹

In Iraq, the new Labour Code states that the fixed-term contract merely can be used to carry out a specific task or to provide a specific service in an enterprise that would come to an end in a specific or on an expected date.³⁷² The duration of such a contract and under such a situation cannot exceed one year, bearing that the contract will turn to an indefinite-term contract if it has been renewed more than one time.³⁷³

³⁶⁴ Mahmood, S. J. (2007). *Unjustified termination of employment contract according to the Oman Labour Law*. Shtat for publication and software, Cairo, p. 300.

³⁶⁵ Qatar Labour Law, No. (14) of 2004, Art. 40.

³⁶⁶ Kuwait Labour Law, No. (6) of 2010, Art. 30.

³⁶⁷ Bahrain Labour Law, No. (36) of 2012, Art. 98 (2).

³⁶⁸ Mahmood, op. cit., p. 301.

³⁶⁹ ILO, 1995, op. cit., para. 50.

³⁷⁰ Ellis, E., & Watson, P. (2012). *EU anti-discrimination law*. OUP Oxford, p. 322.

³⁷¹ Council Directive 1999/70/EC of 28 June 1999, Clause 5, Sec. 1 (a, b, & c).

³⁷² Iraqi Labour Law, No. (37) of 2015, Art. 38 (1).

³⁷³ Ibid., Art. 38 (4).

Another safeguard provided to prevent an abusive practice of fixed-term contracts can be seen in the right of the renewal of such contracts. Such right is also not absolute, and subjects to different provisions enacted by countries. Although the countries have various rules on how often the parties can renew such contracts based on a new agreement, they frequently provide that the contract will turn to an indefinite-term contract if the parties continue their relationship after the expiry date of the contract without a new agreement.³⁷⁴ This safeguard has built on the assumption that the continuation of the employment relationship after the expiry date is an intentional will from both sides to switch the contract to an indefinite-term type contract.³⁷⁵ This necessarily means that after the expiry date and during the continuation of the employment relationship, the employer cannot deprive the worker from the protection allocated to an indefinite-term contract. A provision contrary to that, of course, leads to misuse of fixed-term contracts by the employer in a way that s/he can use the worker for a long time with the ability to exclude him from the benefits of the indefinite-term contracts. A further safeguard provided in certain countries where the law stipulates that fixed-term contracts shall be done in writing form, the failure to do so causes to consider it as an indefinite-term contract. Such a provision can be seen in France, where the labour law clearly requires the contract must be concluded in writing with indicating its purpose, otherwise it is deemed an indefinite term contract.³⁷⁶

3.1.2. Contracts Containing a Probationary Period

To find a suitable person for a particular position, the worker can be tested for a period so-called probationary period. The purpose of this period is to enable the parties to assess each other and to make the final decision whether they keep the contract.³⁷⁷ The contract, then, may begin with probation stipulated by the parties based on a mutual agreement. With having this contract, the worker must demonstrate his/her skills and try to satisfy the employer with his/her performance.³⁷⁸

The reason that justifies flexibility during probation probably refers to the employer's managerial prerogatives to hire qualified workers of his/her enterprise, and this goal cannot be achieved if the employer is bound by stringent rules to terminate the contract of the probationary

³⁷⁴ Mahmood, op. cit., p. 29.

³⁷⁵ Ibid.

³⁷⁶ France: s. L.122-3-1 of the Labour Code (as amended by Act No. 90-613 of 12 July 1990).

³⁷⁷ Forrester, K., & Griffiths, D. (2014). *Essentials of Law for Health Professionals-eBook*. Elsevier Health Sciences.

³⁷⁸ Ibid., p. 10.

workers. To that end, the permission is given by the convention to exclude workers, whose contracts contain probationary period, from its protection on condition that such period should be for a reasonable duration and determined in the contract in advance.³⁷⁹ The term ‘reasonable duration’ used by the convention does not specify any time period, this could logically mean countries are allowed to specify such period but it could not be unduly prolonged.³⁸⁰ Thus, the term inspires each country to specify a duration for probation considered as a reasonable duration and a bit different from other countries.³⁸¹ In Iraq, and in certain others, a probation cannot be extended for more than three months, the worker as well as cannot be put under probationary period for more than one time.³⁸² In some others, it can be extended for a maximum of six months.³⁸³ The duration, however, should be determined in advance as required by the convention, so that to make sure the worker is informed by what kind of contract is he engaged. This requires, in general, that the contract of probation should be done in writing, failing to do so results to conclude the contract without being subject to a probationary period.³⁸⁴

Since the relevant protection may not be applied, more flexible standards govern the review of unfair termination of employment contract during this period.³⁸⁵ This can be seen obviously in France and Portugal, as for example, where the law provided that the general rules governing employment contract termination for an indefinite term do not apply during probationary period.³⁸⁶ Notwithstanding, a degree of protection insofar as it safeguards employees from the risk of unfair termination shall be granted.³⁸⁷ Some countries provide safeguards to the probationary workers if their contract terminated during the probation for the discriminatory grounds, such as race, sex, color, religious belief, marital status, political opinion, or membership of a trade union, any case arises on such grounds enables the worker to make a complaint about unfair termination before impartial bodies.³⁸⁸

³⁷⁹ C158, op. cit., Art. 2 (2-b).

³⁸⁰ ILO, 1995, op. cit., para. 39.

³⁸¹ Ibid., para. 40.

³⁸² Iraqi Labour Code No. (37) of 2015, Art. 37 Sec. 2; Egyptian Labour Code No (12) of 2012, Art. 33; Bahrain Labour Law, No. (36) of 2012, Art. 21 (a).

³⁸³ Qatar Labour Law, No. (14) of 2004, Art. 39.

³⁸⁴ ILO, (1995), op. cit., para. 41.

³⁸⁵ Ismail, op. cit., p. 1.

³⁸⁶ France: ss. L. 122-4 and L. 122-25 of the Labour Code; Portugal: s. 55 of Legislative Decree No. 64-A/89.

³⁸⁷ Ismail, op. cit., p. 75.

³⁸⁸ Van Voss, G. H., & Ter Haar, B. (2012). *Common ground in European dismissal law*. *European Labour Law Journal*, 3(3), 215-229.

Case law or judiciary trends in general have gradually developed the way to treat workers during the probationary period.³⁸⁹ The most significant questions arose in cases of termination during the trial period and have been answered by the judiciary in better way than what can be found in the statutory laws. Cases dealing with the legality of employment termination during probationary period are numerous. In finding a sensible answer to the question asks whether the implied notion of the probationary period gives an absolute power to the employer in terminating the contract during probation, it is interesting to point out the judgment of the Spanish Constitutional Court of 16 October 1984 and 16 September 1988. The Constitutional Court recognized that:

[T]he reasons for terminating the contract of employment during the probationary period will be of little importance in so far as they are confined to the freedom recognized by the Legal Order, which obviously does not lead to unconstitutional results.³⁹⁰

According to its judgment above, the court asserts the limitation of an employer's power to terminate the probationary employee in a way that cannot be approved for reasons irrelevant to the work; it rather related to violating a basic right.³⁹¹ This case, indeed, confirms that the possibilities for unfair termination during probationary periods still exist, and thereby the worker shall be able to request immediate reinstatement in such a case. More specifically, the termination of a probationary employee shall be deemed null and unfair if it is proven that it has occurred based on discriminatory reasons banned in the constitution or prohibited by law such as race, religion, age, social status, sex, or political belief. The same rule shall apply for such a case in which the termination has been decided in a trial period on the grounds of violating the employee's basic rights and freedoms including the right of dignity, 'physical and moral well-being', freedom of speech, the right of privacy, being a member of a trade union, and the right to strike within the law.³⁹² Despite the acknowledgment of Spain's highest court on providing lenient standards of termination during the probationary period, the judgment in this case is really effective in curbing the employer's power and in establishing a protective approach for workers during the trial period. Hence, the limitation provided in the context of the court's decision entitles the worker to challenge

³⁸⁹ Antoine, R. M. B. (2000). *Termination of Employment Digest*. International Labour Organization, p. 191-192.

³⁹⁰ European Commission (2006). *Termination of employment relationships: Legal situation in the Member States of the European Union*. Directorate General Employment, Social Affairs and Equal Opportunities Unit D2, p. 120.

³⁹¹ Ibid.

³⁹² Ibid.

the employer whenever the latter abuse their right in terminating a contract during a probationary period.

As regards to suitability, a probationary employee can be fired if he is distinctly found not to be appropriate for the job. It is also agreed upon that standard of reviewing unfair termination during the probation period should be more lenient than severe after the expiration of the probationary period.³⁹³ Nevertheless, a serious question arises here, looking for standards that can be taken into consideration to decide the suitability of the worker during probationary period by employers. Are there standards to test employees? Or is the test subject to the employers' evaluation without prior standards? Since the statutory laws have not answered this question, a proper answer might be found in cases dealing with this matter.

The answer to the question presented above is often controversial due to the different outcomes of cases where the courts handed down verdict decisions in accordance with different paths. Primarily, the common law afforded little rights for employees whose contracts have been terminated and basically upheld that employer may do so without giving reasons during a probationary period.³⁹⁴ However, the case law in dealing with probationary employees has been modified and shifted in some manner.

In a unique decision, the Supreme Court of Canada³⁹⁵ redefined standards and the way to test the suitability of probationary employees in its judgment in *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*.³⁹⁶ While examining Nicholson's claim whose job has been terminated during the probationary period without any reason given, the Canadian Supreme Court established 'reasonable opportunity', the principle in which the suitability of probationary employees should be demonstrated.³⁹⁷ The 'reasonable opportunity' impliedly confers the right of

³⁹³ Reitz, A. E. (Ed.). (2007). *Labour and employment law in the new EU member and candidate states*. American Bar Association.

³⁹⁴ Leonard, A. S. (1987). *A new common law of employment termination*. NCL Rev., 66, 631.

³⁹⁵ The reason for selecting Canada and UK in that area refers to the fact that Canada and UK are the two countries where the common law system permits relevant courts to establish new trends, dealing with contemporary issues. As regards the unfair termination review during the probationary period, the UK and Canadian courts have derived notable results and conclusions that seem to be unique in that field compared to the other jurisdictions. Ismail, O. A. (2019). Unfair Termination Review During Probationary Period: The Case of Iraq in Light of New Judiciary Trends. *Pro Futuro*, 9(4), 75-89.

³⁹⁶ [1979] 1 S.C.R. 311.

³⁹⁷ *Ibid.*

employees to be treated fairly and be informed of the reasons for their termination.³⁹⁸ Consequently, the decision of the Board of Commissioners of Police was repealed by the court as being an unfair termination, and Nicholson was awarded costs.³⁹⁹ The summary of the case, therefore, established the notion that the standards of the employer must be reasonable, and the employer must inform the employee of the acceptable standards for testing suitability. Otherwise, the employer will not be immune from an employee taking civil procedures to reinstate the position during probation.

In *Ritchie v Intercontinental Packers Ltd*, The Court of Queen's Bench for Saskatchewan also asserted a fair and 'reasonable opportunity' as standards for satisfying the employer's obligation to test whether an employee is fit.⁴⁰⁰ Such a reasonable opportunity includes the employee's potential to work in cooperation with others and "such other factors as the employer deems essential to the viable performance of the position."⁴⁰¹

The most updated judgment approaches almost the same result with better expression in the case of *Ly v. Interior Health Authority [2017] BCSC 42*. This case was initiated by Mr. Ly's claim for wrongful dismissal from his position during probationary period. In the final judgment, The British Columbia Supreme Court concluded that:

[T]he employer had not sufficiently communicated to Mr. Ly the standards by which he would be assessed, had not given him a reasonable opportunity to demonstrate his suitability, and had not met the required standard of good faith in assessing him. Consequently, the Court found that the employer wrongfully dismissed Mr. Ly. The Court awarded Mr. Ly pay in lieu of three months' reasonable notice because his contract did not specify a specific notice period.⁴⁰²

The standards by which the suitability of probationary employees should be tested are genuinely clear in the provided judgment. According to the cited decision, the employer must set suitability requirements in advance, and prove that the employee was aware of such requirements.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ [1982] 14 Sask. R. 206, at p. 212.

⁴⁰¹ Ibid.

⁴⁰² [2017] BCSC 42, para. 58.

It also requires the employer to act pursuant to good faith with the responsibility to provide a reasonable opportunity for the employee to demonstrate their suitability.

3.1.3. Casual Contracts

Another type of temporary contracts, in which the worker can be excluded based on, is a casual contract.⁴⁰³ From the context of the used term ‘casual’ in the convention, it comes to mind that this permission to exclude workers from the relevant protection of indeterminate term contracts includes those who are hired only for a short period of time and in casual circumstances. The situation, thus, does not rely on the worker status, it rather relies on the type of the work which should be short-term work and casual. Such works, typically, carried out by the worker without a contract in writing. The nature of the work and the frame time to achieve it perhaps not deserve to arrange a contract in writing, and it is often concluded from a verbal contract. Casual contracts are similar to fixed-term contracts, being formed for specified tasks, simultaneously, they can be different in which the latter may take the form of seasonal work or extend to a period quite longer than the period of a casual contract used for temporary needs.

An approach to recruiting the staff on a casual or short-term basis has become popular among businesses that demand rapid fluctuations at different times and different occasions.⁴⁰⁴ Nowadays, casual employees can be an auxiliary source for filling out fluctuating and irregular needs of work where the prediction of the employer’s level of work is impossible, or where a temporary need for a work that should be accomplished in a very short time become apparent, for instance, the need of a restaurant to employ additional staff to serve guests at a private hospitality.⁴⁰⁵ As regards the previous example, a survey conducted by the Labour Force in 2001 indicates that about 37% of casual workers hired in tourism companies, restaurants, and hotel sectors.⁴⁰⁶

It is not rational to cover casual workers by the protection as provided to those who engaged in indefinite-term contracts since such workers perform only temporary activities and there is even no “regular pattern of days or hours” to be applied to their activities.⁴⁰⁷ A flexible approach regards

⁴⁰³ C158, op. cit., Art. 2 (2-c).

⁴⁰⁴ Macdonald, L. (2009). *Tolley's Managing Fixed-Term & Part-Time Workers*. Routledge, p. 215.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

this type of worker, therefore, is quite reasonable that adopted by the convention permitting member states to exclude such workers from the protection governing termination of employment contract. Nevertheless, the safeguard of Article 2, paragraph 3, in the convention to prevent using specified period contracts for the purpose of inhibiting workers from the provided protection shall also cover casual workers. The case here can be easier to recognize such illegal purpose of the employer since the position of permanent workers cannot be replaced by casual workers because the employer is only permitted to recourse to the latter contract based on temporary needs and for a very short period.

3.2. Flexibility for Certain Categories of Workers

Regardless of the type of their contract, some type of workers also can be excluded from all or certain provisions of the convention according to Article 2, paragraphs 4 & 5 thereof. The exclusion mainly includes ‘public servants’ and ‘special categories of workers’ as described below.

3.2.1. Public Servants

To reach out to the conditions and to understand under which circumstances such exclusion might be done, it is necessary to refer to the exact wording of the paragraph in which the convention permits such exclusion. Article 2, paragraph 4, provides that “in so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention”.

Although the text has not mentioned public servants at all and intends to not provide examples, the preparatory work of the convention indicates that the aim of possibility to exclude this certain category of employed persons essentially targeted public servants, whose legal status in many countries better or at least equivalent to other workers respecting to job security.⁴⁰⁸ To prove this, it is worthy to mention that the original text of this paragraph proposed by the office contained the term ‘public servants’ to clarify the category of employed persons that can be

⁴⁰⁸ ILC, 67th Session, 1981, Record of Proceedings, p. 33/4.

excluded based on this paragraph.⁴⁰⁹ The competent conference committee then deleted the term in the first discussion of the text, considering that this clarification was unnecessary and to provide the case in general.⁴¹⁰

In practice, the application of this exclusion in a vast majority of countries has embodied by excluding public servants from the scope of the convention, particularly civil servants and armed forces, whose employment status are extremely governed by specific legislations under which job security enhanced better than provided in the convention.⁴¹¹ Therefore, public servants include those who engaged the administration of the state, and their status, according to the convention, shall fulfil two major conditions to be excluded from all or a particular provisions of the convention, namely, the condition of consultation and providing a level of protection at least equivalent to what have been offered by the convention.⁴¹²

The duty of consultation, thus, is the first condition that should be done with the organizations of employers and relevant employees. To illustrate the meaning of ‘consultation’ term, the competent Committee in the General Surveys pointed out that such term has different concept from mere ‘information’ and from ‘codetermination’.⁴¹³ It has stated that the term has not confined to the opinions expressed in the time of consultations, it rather includes all activities that may influence on taking a decision or take a form of participation in decision-making.⁴¹⁴ With the illustration the committee provided, the practice of the term ‘consultation’ may take different actions from a country to another country and the way to fulfill this condition may also be different between countries. The duty of consultation, however, can be a prerequisite for the second condition to assess whether the degree of protection is higher or at least equivalent to that afforded by the convention.

The second condition, which is a more crucial point for such type of exclusion, is the degree of the protection that must be, as stated before, at least equal to that codified in the convention,

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

⁴¹¹ A quick review on the legal status of civil servants and armed forces in most countries prove that such employed persons are often governed by special legislations rather than labour law provisions, for example: France, Germany, United State, Hungary, Luxembourg, Belgium, Spain, Chile, Iraq, Kuwait, Jordan, Egypt.

⁴¹² Sychenko, E., Laruccia, M., Cusciano, D., Wenpei, L., Chikireva, I., & Smit, P. (2019). Dismissal protection in the brics countries in light of ILO convention no. 158. *BRICS Law Journal*, 6(4), 34-66.

⁴¹³ ILC, 79th Session, 1992, Report III (Part 4B), para. 191.

⁴¹⁴ Ibid.

meaning that the protection given by the convention is served as minimum standards for the purpose of assessment: the protection in the same degree or in a higher degree can justify such exclusion; while the protection in a degree less than minimum standards assigned in the convention makes the exclusion illegal act.⁴¹⁵ It is noted that the convention does not require special arrangements to adopt all the same exact provisions exist in the convention to protect workers from unfair termination, this genuinely means the assessment can be done in general to reach the fact that the special arrangements as a whole provide the same or better provisions to prevent unfair termination of employment contract. Since the convention requires the competent authority to take appropriate measures for such exclusion, it is the function for the competent authority to assess in good faith whether the employed persons under a special arrangement enjoy the protection at least equivalent or better than offered in the convention.⁴¹⁶

In general, what makes public servants be in a greater position than workers in the private sector is the legal protection against dismissal.⁴¹⁷ Though the principle of dismissal based on just cause applies to public servants as well, the categories of reasons that constitute just cause to dismiss public servants are apparently not identical to those justifying dismissal of workers in the private sector.⁴¹⁸ The law, in many countries, does not justify termination of public servant employment status for economic reasons or based on the operational requirements of the undertaking as it is for workers in the private sector.⁴¹⁹ Even in case of termination based on the capacity or conduct issues, public servants enjoy better protection. In certain countries, as for example Iraq, they are appointed ‘for life’ after passing probationary period, and it is not commonplace to terminate public employees for incompetence reasons during probationary period, rather the administration often chooses the option of transferring an unqualified employee,

⁴¹⁵ ILO, 1995, op. cit., para. 62.

⁴¹⁶ In many countries, for example, Iraq, and certain other countries, where public servants have been excluded from the application of the protection afforded by the convention or by the labour law in general, the competent authority to take measures on that and to assess the process explained above is the legislative power (Parliament). This is due to the fact that the employment status of public servants shall be determined by the law enacted under the constitutional rules.

⁴¹⁷ Goldston, J. A. (2019). *Shattered hope: Guatemalan workers and the promise of democracy*. Routledge.

⁴¹⁸ Ibid.

⁴¹⁹ Since 2014, Iraq is suffering from economic crises which almost brought the government to bankruptcy, but the Civil Service law No. (24) of 1960 governing public servant employment status and the Iraqi constitution of 2005 never allowed the Iraqi government to terminate a part or a group of public servants as a step to dispose of the economic crises.

aiming to find a place where s/he can be suitable.⁴²⁰ The termination as well as based on the behavior or based on serious misconduct cannot take place unless through disciplinary proceedings which are either equivalent or stricter than what afforded for workers in the private sector.⁴²¹

3.2.2. Special Types of Workers

In almost the same wording provided in Article 2 (4) that stipulates the consultation with the organizations of employers and workers concerned, Article 2 (5) permits the exclusion of special types of workers from the application of the convention entirely or from specific provisions thereof. The above cited paragraph in the convention described those types of workers that can be excluded “as limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them”.

An argumentation to consider a degree of flexibility on certain types of workers in respect of whom special difficulties arise if they are covered by the protection afforded in the convention, was made during the drafting of the convention.⁴²² The result of the argumentation made at that stage came out by allowing member states to exclude such categories of workers from the partial or entire application of the convention, and the examples provided in that context encompassed workers engaged in family enterprises or small enterprises, workers who have reached the normal age of retirement, agricultural workers, seafarers and household servants.⁴²³ The examples given during the debate were not codified in the convention, a more flexible provision for the exclusion that can include all categories of workers in respect of which special problems of a substantial nature might arise has been adopted instead.⁴²⁴

The reason beyond this flexible approach can be different pursuant to each type of worker fallen under the provision of Article 2 (5), but the general reason appears in difficulties that arise if such type of workers covered by the protection afforded in the convention. Workers in small

⁴²⁰ Article 14 (2) in Iraqi Civil Law No. (24) of 1960, permits the administration to terminate a public employee if it is proven during one-year probation that s/he is unqualified for the position, but this article is almost unpracticable in the reality due to the fact that the administration in Iraq always provides the chance to retain the public servant by transferring him to another place instead of recourse to terminating employment status.

⁴²¹ ILO, 1995, *op. cit.*, para. 63.

⁴²² *Ibid.*, para. 67.

⁴²³ *Ibid.*

⁴²⁴ ILC, 68th Session, 1982, Report V (2), p. 18, and ILC, 68th Session, 1982, Record of Proceedings, p. 30/4.

enterprises, for example, may pose difficulties and challenges to operate small businesses if they are covered by the protection governing employment termination.⁴²⁵ The reason for excluding workers in small enterprises from afforded protection, thus, is to support the growth of such enterprises and to consider the fact that small enterprises are less capable to bear managerial and economic costs.⁴²⁶ To this end, several countries exclude workers engaged in small enterprises from the application of legislative provisions related to unfair termination. Germany has excluded businesses with less than five workers from the application of unfair termination laws.⁴²⁷ In Australia, an exclusion made to a degree that includes enterprises with fewer than 100 workers.⁴²⁸ In 2005, France also passed a new legislation under which enterprises with fewer than 20 employees can employ workers without being subject -until two years starting from their employment- to the protective rules provided by the convention No. 158.⁴²⁹ However, the court of Cassation, based on an appeal brought by a union to challenge the legitimacy of the law, upheld that this law was contradicted with the convention considering two years provided by this law could not be deemed a reasonable period under Article 2 (b).⁴³⁰ Finally, the legislation was repealed in 2008 on the basis of the Cassation court's finding.⁴³¹

Likewise, workers in small enterprises, many countries have excluded agricultural workers, domestic servants, family members, construction workers, and seafarers from the protection against unfair dismissal as they are being subject to special provisions compatible with their employment status.⁴³²

⁴²⁵ Howe, J. (2016). *Rethinking job security: a comparative analysis of unfair dismissal law in the UK, Australia and the USA*. Taylor & Francis.

⁴²⁶ Ibid.

⁴²⁷ Finkin, M. W., & Mundlak, G. (Eds.). (2015). *Comparative Labour Law*. Edward Elgar Publishing.

⁴²⁸ The exclusion of small enterprises from the application of unfair dismissal laws in Australia was done by Howard government in 2005. Prior to that, and specifically between 1997 to 2004, Howard government made proposed multiple bills on different occasions to exclude small enterprises with fewer than 15 workers and lastly proposed a bill to exclude enterprises with fewer than 20 workers from the unfair termination system. The proposed bills had not become law because they failed to pass the senate. Finally, Howard government succeeded to achieve its ambition after they gained control over the Australian Senate where they passed a bill to exclude small enterprises with fewer than 100 workers from the provisions of unfair dismissal system. See: Howe, J. (2016), 192; Finkin, M. W., & Mundlak, G. (Eds.). (2015), 278.

⁴²⁹ Ibid.

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² For example: Republic of Korea, Singapore, Spain, Sweden, Portugal, Norway, and Australia. See: ILO, 1995, op. cit., 68.

4. Final Remarks

What has been discussed in this chapter is the proof of the fact that termination rules of employment contracts have been internationally standardized. In this regard, the international instruments, namely, Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), provide significant numbers of standards and guidelines. Different perspectives have taken into consideration during the codification process of the international rules concerning termination rules. Such rules may serve various interests: that for the workers established just cause principle to deprive the employers of terminating the contract at will; that for the employers provided managerial prerogatives to protect their enterprises from unqualified workers; that for the economy kept a degree of flexibility to activate labour market. Although a balance acquisition between these opposite interests seems to be intractable, the international instruments made it possible through the right of member states to exclude some specific types of workers and contracts from the termination requirements.

The international attitude regarding employment termination has strongly adopted job security regime since the international instruments require member states to establish “just cause” principle in termination rules. None of the member states are allowed to adopt “employment-at-will” policy as being this policy contradicts the core of ILO instruments. The need of having a valid reason to terminate a worker from his/her job is an uncompromisable clause. Along with the valid reason, the international instruments also stipulate several requirements as complementary clauses to the need for a valid reason, such as giving notice, the right to defend against the allegation, and the right of appeal. However, some flexible labour rules are drawn under international standards for some types of workers and contracts, and the way to combine such flexible rules with protective rules is deliberately left for member states.

To determine what constitutes a valid reason that can justify terminating a worker, the international standards are not providing a closed list of valid reasons. Rather, they provide categories of reasons that the valid reason must belong to one of them. States, therefore, have more leeway to determine the list of valid reasons in light of the categories recognized by the international instruments. However, some specific reasons prohibited to be considered valid reasons for termination. Such reasons related to the core of human rights and prohibiting discrimination at work.

Regarding the collective dismissals, the international instruments also imposed specific procedural requirements to mitigate the social and economic impact of terminations. The Convention and Recommendation restricted the collective dismissals by stipulating consultation with workers or their representatives, as well as providing information to the competent governmental authorities.

CHAPTER III

SPECIAL REGIONAL STANDARDS ON TERMINATION OF EMPLOYMENT CONTRACT (EU STANDARDS)

After summarizing international standards to prevent unfair termination of employment contract deduced from international conventions, in particular ILO conventions and recommendations in this regard, we narrow down the study to focus on EU standards applicable within EU member states. This aims to realize the degree of interaction between international standards (ILO standards) and regional standards (EU standards), as the latter standards are only applicable to a group of developed countries. The consideration of the EU position in this regard is important to determine the degree of applicability of international standards and the way of applying such standards within EU states as developed countries. This may help to perceive to what extent international standards are successful to prevent unfair termination of the employment contract and adaptable with modern policies in developed countries. EU standards then can be served as guided standards for Iraq in the way of implementing the international standards.

Though all of EU member states are active members and supporters of the ILO, the majority of EU member states have neither ratified the Termination of Employment Convention (No. 158) nor Termination of Employment Recommendation, 1982 (No. 166) up to date. The EU states consist of two different categories in respect of the membership in ILO Convention 158 which laid down international standards to prevent unfair termination as concluded before. EU first category are member states in ILO Convention 158, including Cyprus, Finland, France, Latvia, Luxembourg, Portugal, Slovakia, Slovenia, Spain, and Sweden.⁴³³ The rest are the second category which they are non-member states in ILO Convention 158, consists of 17 states after the UK Brexit on 31 January 2020.⁴³⁴ The majority of EU states therefore are not member states in Convention No. 158. Questions arises are whether the EU has identified its own regional standards through European social charter, directives, laws, and cases apart from international standards. To what extend and in which areas the EU regional standards on employment termination are not consistent with international labour standards and why? Do EU member states provide higher-

⁴³³ Sychenko, E., Laruccia, M., Cusciano, D., Wenpei, L., Chikireva, I., & Smit, P. (2019). *Dismissal protection in the Brics countries in light of ILO Convention No. 158*. BRICS Law Journal, 6(4), 34-66.

⁴³⁴ Bulmer, S. (2020). *The member states of the European Union*. Oxford University Press, USA, p. 259.

level protection of workers than the ILO instruments? These questions have entailed an inquiry of European Union charter and laws to summarize the regional standards on employment termination, searching for the degree of incorporation with standards found in ILO instruments.

Brian Bercusson observed that ILO Conventions have played a major role in setting legal protection to prevent or to mitigate unfair termination of employment contract in many EU countries.⁴³⁵ This statement can be true, but it is not a concrete answer for the presented questions above. Therefore, to answer the presented questions and to clarify how far Brian's statement is true, an examination of EU charters, directives, regulations, and case law regarding dismissal law is needed.

1. EU Law on Termination of Employment Contract

The EU law on termination of employment contract refers to the system governing this matter and providing protection against unfair termination within the member states of the EU. The system basically provides outlines and obligatory guidelines to member states through primary sources, such as treaties, charters, directives, and regulations.⁴³⁶ In case of conflicts between national laws and EU law, the latter has primacy, and the EU competent courts shall resolve such conflicts.⁴³⁷ The following are the most significant EU legal instruments to perceive the position of workers and protection against unfair termination at the EU level.

1.1. European Social Charter

The first legal instrument that can be referred to, in this context, is the European Social Charter which was originally adopted within the framework of the Council of Europe in 1961 and then revised in 1996.⁴³⁸ The importance of this Charter in explaining the EU position regarding protection against unfair termination is twofold: first, all EU Member States have ratified European Social Charter, as this confirmed by the European Court of Justice in the case of *Kiiski*,⁴³⁹ and such a ratification brought all Member States to pursue the Charter by all appropriate means; second,

⁴³⁵ Countouris, N., Deakin, S., Freedland, M., Koukiadaki, A., & Prassl, J. (2016). *Reporto on Collective Dismissals*. International Labour Office–Genava: ILO, p. 42.

⁴³⁶ Arnall, A., & Chalmers, D. (Eds.). (2015). *The oxford handbook of European Union law*. OUP Oxford, p. 190.

⁴³⁷ Ibid.

⁴³⁸ De Schutter, O. (2016). *The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights*. AFCO Committee, p. 5.

⁴³⁹ C-1116/06 (2007) *Kiiski v Tampereen kaupunki*.

the Charter has a direct inspiration on the articulation a number of provisions of the EU Charter of Fundamental Rights initiated in 2000.⁴⁴⁰

Since the original version of the Charter adopted in 1961, there was no possibility of the Charter to be affected by ILO Convention No. 158 of 1982, but such a possibility arises when the Charter has been revised in 1996. What confirms that is the fact that the original version has not contained any direct articles to protect workers from unfair termination of employment relation, whereas the Charter after revision provides three direct articles: Article 24 to protect workers in individual cases of employment termination on the basis of “capacity or conduct or based on the operational requirements of the undertaking, establishment or service”; Article 25 to protect workers in case of the insolvency of their employer; Article 29 to ensure informing and consulting worker’s representative in cases of collective redundancies before such redundancies take place aiming to find alternatives or to mitigate either the occurrence of collective redundancy or its consequences. By comparing the content and even the wording between Article 4 in the Convention No. 158 and Article 24 in the Charter, it is observed that the latter article has been inspired by the former article where the Convention requires a valid reason for termination and considering such a reason only if it relates to capacity, conduct, or the operational requirements of the undertaking, establishment, or service. The same three categories to constitute valid reasons with using the same words have been provided in Article 24 of RESC. There is, therefore, not only effectiveness but also a similarity in wording exists between the two articles. Regarding invalid reasons for employment termination, the Appendix to the Revised European Social Charter provides a list that includes the same invalid reasons as provided by Article 5 of the ILO Convention No. 158.⁴⁴¹ The effectiveness of Convention No. 158 on the Charter is also can be seen in a degree reached to almost a similarity in articulation by comparing Article 13 in the Convention and Article 29 in the Charter. Article 29 in the Charter compel employers to not decide on collective redundancies before informing and consulting workers’ representatives for the aim presented before as the same requirement and purposes provided in Article 13 of the Convention

⁴⁴⁰ De Schutter, op. cit., p. 40.

⁴⁴¹ Peers, S., Hervey, T., Kenner, J., & Ward, A. (Eds.). (2014). *The EU Charter of fundamental rights: a commentary*. Bloomsbury Publishing, p. 817.

No. 158. All these similarities may prove that one purpose of the RESC was to bring the Council of Europe regime consistent with the ILO to provide protection against unfair termination.⁴⁴²

Though most of the EU Member States have not ratified Convention No. 158, the requirement for a valid reason or justification has become a core principle of employment termination at the EU level since Article 24 incorporated to RESC.⁴⁴³ The principle that protects workers against the abuse of managerial prerogatives, and deters the employer from the unilateral decision of firing workers at will, as is the standard in the United States.⁴⁴⁴ Moreover, it inhibits the possibility for termination by the side of the employer providing only a period of notice or compensation in lieu.⁴⁴⁵ The notion that no one shall be terminated from employment relation unless for a valid reason implies: an obligation of the employer to inform the worker about the cause of termination; an obligation to provide a chance enables the worker to defend himself; a right of the worker to challenge the cause of termination before an impartial body; and a right of appropriate remedies in case of unfair termination.⁴⁴⁶ With the stipulation of having valid reasons for termination, Article 24 in RESC explicitly provides the need for appropriate remedies of unfair termination where states on “the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief”. It also provides the right of workers to challenge the decision of termination in the last part of the article stating, “a worker who considers that his/her employment has been terminated without a valid reason shall have the right to appeal to an impartial body”. Such explicit and inherent rights then shall be guaranteed in the EU Member States legislation to protect workers in uneven degrees.

To guarantee the compliance with the European Social Charter by member states, the European Committee of Social Rights (ECSR) is assigned to be a responsible body monitoring such compliance.⁴⁴⁷ To facilitate this mission, the member states ratifying the charter must submit their reports to the committee every two years explaining the application of the Charter in their

⁴⁴² Ibid.

⁴⁴³ Ibid., p. 820.

⁴⁴⁴ Miller, K. (2001). *The American Employment-at-Will Doctrine and its Impact upon Employee Rights*. Edinburgh Law Review, 5(2), 169-185.

⁴⁴⁵ Peers, Hervey, Kenner, & Ward, op. cit., p. 819.

⁴⁴⁶ Dorssemont, F., Lörcher, K., Clauwaert, S., & Schmitt, M. (Eds.). (2019). *The Charter of Fundamental Rights of the European Union and the Employment Relation*. Bloomsbury Publishing, p. 532.

⁴⁴⁷ Phan, H. D. (2012). *A selective approach to establishing a human rights mechanism in Southeast Asia: The case for a Southeast Asian Court of Human Rights*. Brill Nijhoff, p. 38.

national laws.⁴⁴⁸ Regarding to Article 24 of RESC, the Committee during the assessment of member states' reports and in different occasions pointed out that the article above requires member states to start initiating regulations for termination of employment encompasses all workers engaged to such contract.⁴⁴⁹ The committee also pointed out the process of assessment of issued regulations whether that are in line of Article 24 depends on; the validity of the reasons for termination on the basis of general rules adheres by this Article, and remedies such as compensation provided in the event of unfair termination.⁴⁵⁰

1.2. EU Charter of Fundamental Rights

This legal instrument shall not be confused with the European Social Charter discussed before. On 7 December 2000, the European Union's Charter of Fundamental Rights (CFR) has been proclaimed by the European Parliament, the Council of Ministers, and the European Commission at the Nice summit.⁴⁵¹ Though its proclamation in 2000, it had not become legally a binding tool until the Treaty of Lisbon in 2009 came into force.⁴⁵² The Charter incorporates significant political, economic, and social rights into EU law for European Union citizens and residents. EU institutions and member states shall abide by such rights and legislate in a way compatible with the charter.⁴⁵³ In the event of the controversy, the EU courts, in particular European Court of Justice (ECJ) shall strike down legislation enacted by EU member states in contradiction to the charter.⁴⁵⁴

Concerning to workers' protection, the EU Charter contains lots of provisions which are deemed the heart of labour law in Europe: freedom of assembly (Article 12), the right to work (Article 15), the right to not be discriminated (Article 21), Workers' right to information and consultation within the undertaking (Article 27), the right of collective bargaining in case of conflict with the employers' interests (Article 28), the right to be protected in case of unjustified

⁴⁴⁸ Ibid.

⁴⁴⁹ Comité européen des Droits sociaux, Council of Europe. European Committee of Social Rights. (2007). *European Social Charter (revised): Albania, Armenia, Belgium, Bilgaria, Cyprus, Estonia, Finland, France*. Political Science, p. 69.

⁴⁵⁰ Ibid.

⁴⁵¹ Bercusson, B., & European Trade Union Institute. (2002). European labour law and the EU charter of fundamental rights: summary version. ETUI, p. 7.

⁴⁵² Kirchner, J., Morgenroth, S., & Marshall, T. (Eds.). (2016). *Transfer of Business and Acquired Employee Rights: A Practical Guide for Europe and Across the Globe*. Springer, p. 4.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid., p. 6.

dismissal (Article 30), the right to work in fair and just conditions (Article 31), prohibition of child labour and the right provided to protect young people at work (Article 32).

Article 30 includes the most relevant provision regarding our study where the Charter states “Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices”. It is drawn on Article 24 of the revised European Social Charter in 1996.⁴⁵⁵ This right, therefore, is not new, but what new is the recognition at the EU level to redefine protection against unjustified dismissal as a fundamental right while this right is rarely set out in national constitutions as a fundamental right.⁴⁵⁶ Therefore, this recognition requires member states to take measures and prerequisites necessary for protecting a right recognized as a fundamental right. Additionally, it has a great impact to take employment security into account in enacting laws aiming to give flexibility to business enterprises.⁴⁵⁷ Article 30 makes sense from the perspective of two theoretical rationales: first, a fair dismissal procedure is indispensable to protect the individual worker’s dignity, and second, it protects the worker’s autonomy by ensuring job security.⁴⁵⁸ Protection against unjustified dismissal, thereby, shall not be interpreted merely as a right to guarantee compensatory measures, but also it is a right to ensure preventative procedures before dismissal comes about.⁴⁵⁹

The earlier draft of Article 30 worded “Right to protection in cases of termination of employment”, and then redrafted to “protection against unjustified dismissal” considering the latter is a broader term to cover all sides of ‘unjustified dismissal’ including failure to provide a reasonable notice period.⁴⁶⁰ Neither the earlier nor the latter draft provided a definition of ‘unjustified dismissal’, reasons, and cases under which dismissal shall be determined unjustifiable. Rather, this function remains in the scope of national law and practice to be determined by member states. However, the EU member states shall abide by a core minimum and inherent meaning of unjustified dismissal considered in the article.⁴⁶¹ Accordingly, the degree of protection against unfair termination or unjustified dismissal varies between member states. Only two EU member

⁴⁵⁵ Kenner, J. (2012). *European Union Legislation 2011-2012*. Routledge, p. 215.

⁴⁵⁶ Bercusson, & European Trade Union Institute, op. cit., p. 63.

⁴⁵⁷ Ibid.

⁴⁵⁸ Klamert, M., Kellerbauer, M., & Tomkin, J. (Eds.). (2019). *Commentary on the EU: Treaties and the Charter of Fundamental Rights*. Oxford University Press, p. 2186.

⁴⁵⁹ Bercusson, & European Trade Union Institute, op. cit., p. 66.

⁴⁶⁰ Ibid., p. 64.

⁴⁶¹ Ibid., p. 66.

states guarantee protection against unjustified dismissal at the constitutional level which are Finland and Portugal.⁴⁶² The Constitution of Finland as has been interpreted requires not only reasons for dismissal but that the reason must be among those determined for in legislation; dismissal for a reason not provided in legislation is null and void.⁴⁶³ The other Member States in the EU also have extensive legal protection against unjustified dismissal but often provided in legislation and regulation with a legal status lower than the constitutional level.⁴⁶⁴

A question of whether the word ‘dismissal’ in the charter encompasses only a limit concept (e.g., dismissal due to misconduct or incapacity of the worker) and no other types of termination (e.g., dismissal for economic grounds as in the case of recession) may arise. Some member states differently deal with collective dismissal for economic reasons from dismissal due to personal reasons: misconduct or incapacity for a job.⁴⁶⁵ Some other member states provide exceptions to exclude certain groups of workers from the protection of the charter.⁴⁶⁶ However, Article 30 provides protection for “every worker”. The articulation of Article 30 begins with “every worker” indicates that every type of dismissal either for economic grounds or for personal issues must be justified.

Another question can be always discussed in the whole charter and Article 30 as well, is whether member states shall go through the Charter conformity test in all actions. The question, at first glance may involve the emancipation and dominance of EU law over Member States’ legislation regarding a common binding fundamental rights protection.⁴⁶⁷ But a bit distance from the principle of EU law dominance over Member States’ laws, Article 51 in the Charter indicates that not all Member States’ actions are tested and evaluated by EU law.⁴⁶⁸ From the wording of Article 51 (1), It is quite easy to observe that the applicability of the Charter extends to Member States “only when they are implementing Union law”. Any action of Member States, thereby, that has not EU dimension is not fallen under the Charter conformity test.⁴⁶⁹ However, it is often Court

⁴⁶² Ibid., p. 64.

⁴⁶³ Ibid., p. 65.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

⁴⁶⁷ Hamulák, O., & Mazák, J. (2016). The Charter of Fundamental Rights of the European Union vis-à-vis the Member States—Scope of its Application in the View of the CJEU. *Baltica*, 4, 98-115.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

of Justice that interprets the phrase “when they are implementing Union law” and determines the scope of the Charter’s impact on the Member States’ actions.⁴⁷⁰ In *Nagy*,⁴⁷¹ as for example, the European Court of Justice (ECJ) narrowly interpreted the scope of Charter’s application in general, and Article 30 in particular. The Court held that the employment termination of civil servants without any justification in accordance with the Hungarian legislation is not fallen under the direct effect of Article 30 in the Charter.⁴⁷² Thus, the Court excluded the case from its jurisdiction.⁴⁷³ However, the application of Article 30 of CFREU can be strengthened by referring to Article 24 of ESC since the latter served as the Social Constitution of Europe and it is a direct source of Article 30.⁴⁷⁴ This is what made the latter has affected the law of member states since the EU Member States have assured their correlation to fundamental social rights as designated in the European Social Charter in the Preamble of the Treaty on the European Union.⁴⁷⁵ Further, they bound themselves “to build on the European Social Charter in Article 151 of the Treaty on the Functioning of the European Union, as well as in the Preamble of the EU Charter of Fundamental Rights”.⁴⁷⁶

1.3. EU Directives

Prior to ILO Convention No. 158, EU has issued three directives regarding to termination of employment for operational requirements of the undertaking, establishment, or service.⁴⁷⁷ The three directives have been revised and amended by EU after the Convention No. 158 came into force. First, Council Directive 75/129/EEC of 17 February 1975⁴⁷⁸ subsequent by Council Directive 98/59/EC of 20 July 1998⁴⁷⁹ dealing with collective redundancies. Second, Council

⁴⁷⁰ DeVries, S., & Safradin, B. (2019). Impact of the Social and EU Charters in Times of Crisis. ETHOS Working Paper D, 6.

⁴⁷¹ ECJ, Case C-488/12, *Nagy et al. v. Kormányhivatal et al.*, ECLI:EU:C:2013:703, Judgment of 10 Oct. 2013.

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

⁴⁷⁵ 5th preambular paragraph of the EU Treaty, OJ C 83 of 30.3.2010, p. 13.

⁴⁷⁶ De Schutter, O. (2016). The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights. AFCCO Committee, p. 40.

⁴⁷⁷ Smit, P. (2013). *Pre-dismissal Procedures in terms of ILO Convention 158: South African and Comparative Perspectives*. In book: *The Role of Standards in Labour & Social Security Law International, Regional and National Perspectives* (pp.267-286).

⁴⁷⁸ Council Directive 75/129/EEC of 17 February 1975. Retrieved November 10, 2020, from <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31975L0129>

⁴⁷⁹ Council Directive 98/59/EC of 20 July 1998. Retrieved November 10, 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31998L0059>

Directive 77/187/EEC of 14 February 1977⁴⁸⁰ subsequent by Council Directive 2001/23/EC of 12 March 2001⁴⁸¹ to protect workers' rights in the event of transfers of enterprises, businesses, or parts of businesses. Third, Council Directive 80/987/EEC of 20 October 1980⁴⁸² subsequent by Directive 2002/74/EC⁴⁸³ to safeguard workers when their employers involved with insolvency. The three directives, in general, aim to strengthen the position of workers and to ensure they will not be redundant for reasons related to the operational requirements of the enterprises unless after a spectrum of legal procedures.

The EU Collective Redundancy Directive of 1975 that revised in 1998, acknowledged collective redundancies as a necessary mean to protect “a balanced economic and social development in the Community”, meanwhile aiming to ensure job security of workers in such events.⁴⁸⁴ With that goal, Articles 2 and 3 require member states adhering to a number of legal procedures, including: consultation with workers' representative before the collective redundancies take place; providing notification to the public authorities for any intended redundancies discussed with workers' representative and the notification shall be attached with significant information encompasses the reasons for the redundancies and the number of workers whose going to be redundant; providing an opportunity to workers' representative for sending any comments to the public authority regarding the collective redundancies.⁴⁸⁵ The directive also provides that states parties may enact provision, facilitating a call for assistance from experts by workers' representatives in accordance with procedures dictated at national level.⁴⁸⁶ To make the afforded protection more effective, the directive stipulates that the collective redundancies shall not enter into force unless after 30 days counting from the date of providing the notification, during

⁴⁸⁰ Council Directive 77/187/EEC of 14 February 1977. Retrieved November 10, 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31977L0187>

⁴⁸¹ Council Directive 2001/23/EC of 12 March 2001. Retrieved November 10, 2020, from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0023:EN:HTML>

⁴⁸² Council Directive 80/987/EEC of 20 October 1980. Retrieved November 10, 2020, from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31980L0987:EN:HTML>

⁴⁸³ Directive 2002/74/EC of 22 September 2002. Retrieved November 10, 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002L0074>

⁴⁸⁴ Schiek, D. (2015). *Strengthening EU rules on collective redundancies*. Retrieved November 10, 2020, from <http://qpol.qub.ac.uk/strengthening-eu-rules-on-collective-redundancies/>

⁴⁸⁵ Cosio, R., & Curcuruto, F. (Eds.). (2016). *Collective Dismissal in the European Union: A Comparative Analysis: A Comparative Analysis*. Kluwer Law International BV.

⁴⁸⁶ Arrigo, G., & Casale, G. (2003). *Glossary on labour law, industrial relations, and European Union institutions*. International Labour Organization, p, 31.

which the particular public authority seeks to find solution.⁴⁸⁷ These articles and their detailed provisions can improve workers' safeguards in the event of redundancies since they empower public authorities and workers' representatives alongside the employers to find alternatives for collective redundancies, or at least to ensure that the number of workers is not more than the necessary number to be redundant.⁴⁸⁸

The effectiveness of this directive relies on the national implementation. Moreover, a successful national implementation depends on the ability of public authorities and workers' representative to find potential alternatives of collective redundancy. In finding alternatives, public authorities, and workers' representatives together with the employers should consider workers' interest on one side, and the economic interests on the other side. Disregard one of the sides may lead to a faulty implementation of the directive. Accordingly, the solutions including alternatives of collective redundancies should be tested from the perspective of both "a balanced economy" and workers' protection. Redeployment or job sharing, as for example, could be a good choice if any of them meet the requirements of the test in accordance with the directive.

The EU Transfer of Undertakings Directive of 1977 amended in 2001, is also aiming to protect workers' position in businesses that are transferred between employers and compelling member states to adopt necessary measures for that purpose.⁴⁸⁹ Transfer of businesses, in that case, take the shape of either an entire merger between two undertaking or a partial merger when a part of a business transfer to another employer.⁴⁹⁰ Article 3 provides a high degree of safeguard to workers where ensures retaining the employment status with the same rights and obligations for workers gained before a legal transfer or merger, and such rights and obligations must remain unchanged with the transferee. In addition, the transfer shall not be solely the reason to place the workers in a less favorable position.⁴⁹¹ In Article 4, the directive emphasizes that the process of an entire merger or partial merger of business must not pose a reason for dismissal neither by the transferor nor by the transferee. Nevertheless, the article provides a certain leeway to member

⁴⁸⁷ Ibid.

⁴⁸⁸ Schiek, *op. cit.*

⁴⁸⁹ Council Directive 77/187/EEC, Art. 1, 3, & 8.

⁴⁹⁰ Ibid., Art. 1 (1).

⁴⁹¹ Busby, N., & Smith, R. (2014). *Core EU Legislation 2014-15*. Macmillan International Higher Education, p. 352.

states to exclude some categories of workers from protection provided in that event against dismissal.

Article 6 in the original directive of 1977 and Article 7 in the subsequent directive of 2001, confirm on the obligation of providing information and consultation with the workers' representative in good time before the transfer takes place. This obligation shall put on the transferor and the transferee together. The information must include “the date or proposed date of the transfer, the reasons for the transfer, the legal, economic and social implications of the transfer for the employees, any measures envisaged in relation to the employees”. The obligation of providing information and consulting with the workers’ representative is again a good safeguard for workers since the workers’ representative can supervise the process of transfer and make sure the transfer does not intentionally and arbitrarily affect the workers’ position.⁴⁹²

In case of the employer’s insolvency, Directive 80/987/EEC with its amendment Directive 2002/74/EC shall apply to protect workers. Under this directive, the payment of outstanding claims of workers arising from employment contracts shall be guaranteed whenever their employers have faced an insolvency situation.⁴⁹³ Such payments should encompass compensation for unfair termination awarded through legal proceedings in which a judgment or administrative decision in accordance with the national legislation is provided for that purpose.⁴⁹⁴ Article 3 in the amendment, requires that payment of employees’ outstanding claims arising from employment contracts including severance pay on employment termination, shall be guaranteed by guarantee institutions and obliges member states to take necessary measures to achieve this objective. However, member states have a degree of leeway to preclude claims by certain categories of workers from the application scope of this Directive, and “the option to limit the liability of the guaranteed institutions”.⁴⁹⁵

The effectiveness of EU Directives to protect workers from unfair termination relies on the national implementation by member states.⁴⁹⁶ If the national implementation does not fulfill the

⁴⁹² Ibid.

⁴⁹³ Council Directive 80/987/EEC, Art. 1 (2).

⁴⁹⁴ Official Journal of the European Union (2005). OJ C 59 of 06.03.2004. Retrieved November 12, 2020, from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:045:0009:0009:EN:PDF>

⁴⁹⁵ Directive 2002/74/EC, Art. 1 (2) & 4 (1).

⁴⁹⁶ Cremona, M., & Thies, A. (Eds.). (2014). *The European Court of Justice and external relations law: constitutional challenges*. Bloomsbury Publishing, p. 35.

ambition of Directives or if the national implementation is going through a faulty implementation, the workers then shall recourse to judicial protection where the European Court of Justice (ECJ), in the event of Directives' interpretation, provide the last word.⁴⁹⁷ Cases dealing with the interpretation of these Directives are precious and worthy to mention, we will take them into consideration later in EU Case law.

1.4. EU Case Law

Unlike most domestic legal systems in Europe, the law of the EU can be well understood and is analyzed through courts' decision. Several aspects of EU law have been improved by EU courts, most importantly by decisions of European Court of Justice (ECJ) issued in proceedings of individual cases and then extended upon upcoming similar cases.⁴⁹⁸ Through the holding of EU courts, a degree of uniformity in the implementation of EU law can also be achieved, while different implementation of member states may arise some legal conflicts.⁴⁹⁹ The importance of EU case law, thus, is to reach the right interpretation of the concerned area of EU law.

The relevant Articles in both the Charters and Directives gave rise to many cases in which different views of interpretation referred to the European Court of Justice and the European Court of Human Rights (ECtHR) for judgment. Such cases with no doubt have had a relative impact to unify standards for individual dismissal and collective redundancies at the EU level.

In *Commission v. UK*,⁵⁰⁰ the European Court of Justice ruled against the UK for breaching the Directive 75/129 issued for collective redundancy. The court's judgment concentrated on the employers' statutory obligation to inform and consult with workers before a planned collective redundancy takes place, and the need for the same obligation in the event of transferring workers from a business to another.⁵⁰¹ The United Kingdom's failure to provide protection in national laws

⁴⁹⁷ Ibid.

⁴⁹⁸ Lindholmm, J. (2014). The European Court of Justice's case law and its importance as a source of law. Retrieved February 7, 2022, from <https://www.umu.se/en/research/projects/the-european-court-of-justice-s-case-law-and-its-importance-as-a-source-of-law/>

⁴⁹⁹ Jacob, M. (2014). Precedents and case-based reasoning in the European Court of Justice: unfinished business. Cambridge University Press, p. 7.

⁵⁰⁰ C-382/92 [1994]. *Commission v UK*.

⁵⁰¹ Ibid.

by means of information and consultation as required by Directive 75/129 recognized as a breach of Articles 2 & 3 thereof.⁵⁰²

The ECJ in *Francovich v. Italy*,⁵⁰³ did not acknowledge only the state's breach of the Insolvency Directive 80/987/EEC, it rather held the state's liability to compensate individuals whose reason for their loss in case of the employer's insolvency refer to the member state's failure to incorporate an EU directive into national law. In a judgment provided against the Italian state based on a claim brought by Mr. Francovich, who had been paid nothing after his employer had gone bankrupt, the ECJ decided on the Italian government liability to compensate the complainant as a result of the non-compliance to the EU Insolvency Directive.⁵⁰⁴ In reasoning its decision, the court indicated that a member state's infringement undermines the full effectiveness of community law and diminishes the right of individuals, this what makes the state to be liable for compensation.⁵⁰⁵ The court further held the reparation should be given on the basis of national rules on liability, for that purpose the legal proceedings shall be established in each member state enabling individuals to get reparation for rights derived from community law.⁵⁰⁶ Such legal proceedings should be not less favorable than those designated for similar domestic claims, meanwhile, they must not be formulated in a form that the reparation under thereof seems to be impossible or unduly difficult.⁵⁰⁷

Francovich established the principle of state liability and confirmed substantive rights for workers in certain circumstances at the EU level.⁵⁰⁸ It can be noticed that its foremost attention has been extending the applicability of protection derived from EU law to European workers.⁵⁰⁹ However, the state liability and the ability of individuals to obtain reparation from the state depends on the fulfillment of three conditions: first, the existence of a right conferred to individuals in the directive; second, the possibility to perceive the right in the wording of the directive; and third, the

⁵⁰² Ibid.

⁵⁰³ C-6/90 [1991] ECR I-5357, *Francovich v Italy*.

⁵⁰⁴ Ibid., para. 5.

⁵⁰⁵ Ibid., para. 33.

⁵⁰⁶ Ibid., para. 41-42.

⁵⁰⁷ Ibid., para. 43.

⁵⁰⁸ Berry, E., Homewood, M. J., & Bogusz, B. (2019). *Complete EU law: text, cases, and materials*. Oxford University Press, USA, p. 202.

⁵⁰⁹ Ibid.

establishment of a causal link between the state's failure to implement the directive and the individuals' damage.⁵¹⁰

The protection offered to workers by Directive 77/187/EEC in case of transfer of undertaking, has also been confirmed by case law. In *Allen v Amalgamated Construction*,⁵¹¹ a question to whether the Transfer Directive applies in principle to a transfer between two firms belonging to the same group and operated by the same owner, arose to the European Court of Justice. The ECJ held in favor of the claimants by extending the applicability of the Transfer Directive to a business transfer even between two firms within a group where they are involved in the same work and retain the same ownership, management, and premises.⁵¹² The court rationalizes its judgment by referring to the fact that subsidiary firms in a group were separated from each other in legal personality and in employment relations with their workers.⁵¹³ Thus, workers entitled to keep their previous terms in employment relationships with the employers prior to the transfer as provided by the EU Transfer Directive.

The *Hamburg case* is also worthy to mention in which the ECJ interpreted Directive 98/59/EC in favor of dismissed workers and found a faulty implementation of German legislation on collective redundancies by the German Federal Labour Court.⁵¹⁴ The case initiated before the Hamburg Labour Court after an employer decided to close his Bakery department and dismiss the bakery workers in August 2004, but had not notified the job center and the workers' representative until February 2005.⁵¹⁵ The ECJ held that the notification of collective dismissal required by Directive 98/59/EC should be fulfilled in time when the employer expresses his intention to dismiss workers, not after the decision takes place, on that basis, the workers claimed for considering their dismissal ineffective since the employer did not comply with the obligation of Collective Redundancy Directive as interpreted by the ECJ.⁵¹⁶ The Federal Labour Court in 2007, rejected to apply the ECJ judgment on the basis that it is for the national court to decide upon such issues, not for the ECJ, however, the German Constitutional Court in 2014 decided in favor of the

⁵¹⁰ C-6/90 [1991] ECR I-5357, at para. 40.

⁵¹¹ C-234/98 [1999]. *Allen and Others v Amalgamated Construction Co. Ltd.*

⁵¹² *Ibid.*, at para. 21.

⁵¹³ *Ibid.*, para. 31.

⁵¹⁴ Schiek, *op. cit.*

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*

bakery workers and upheld ineffectiveness of their dismissal under EU law as interpreted by the ECJ.⁵¹⁷

Regarding dismissal without reason, a remarkable judgment of ECtHR held against Hungary, in *K.M.C. v. Hungary*.⁵¹⁸ The case initiated after a legislative change made by Hungary in labour law related to the status of Hungarian civil servants.⁵¹⁹ The major change was the implementation of Act No. LVIII of 2010 repealing the statutory reasons for dismissal, and enabling employers to dismiss civil servants without grounds.⁵²⁰ The motivating reasons were not sufficient to justify that change, as only referred to the idea that the previous provisions “contributed to the low efficiency and bad reputation of public administration”.⁵²¹ In the hearing process, the ECtHR ruled against Hungary, reasoning that the Hungarian Act authorizing dismissal without giving valid reasons is in violation of Article 6 ECHR since the application of the Act deprives civil servants to challenge the dismissal in an impartial hearing.⁵²² The court has obviously made a connection between Article 6 ECHR, Article 30 CFR, and Article 24 RESC to compel Hungary stipulating valid reasons to terminate civil servants in their employment.⁵²³ Along with that, the Hungarian Constitutional Court also held against the Act and announced its unconstitutionality for the same reason reached by ECtHR.⁵²⁴ The Act was eventually abolished and substituted by Act CXCIX OF 2011 in favor of civil servants, as the latter proceeded to stipulate grounds for dismissal in a detailed list.⁵²⁵

2. EU Flexibility Approach

Despite the establishment of job security regime at the EU level subsequent by employment protection legislation within member states, the EU simultaneously stepped forward towards flexibility approach dealing with labour market. The term of flexibility in the labour market has grown along with economic efficiency as an economic approach in reaction to the rigidity in the

⁵¹⁷ Ibid.

⁵¹⁸ *K.M.C. v. Hungary* 19554/11, [2012] ECHR 1563.

⁵¹⁹ Stelkens, U., & Andrijauskaitė, A. (Eds.). (2020). *Good Administration and the Council of Europe: Law, Principles, and Effectiveness*. Oxford University Press, p. 463.

⁵²⁰ Ibid.

⁵²¹ Ibid.

⁵²² *K.M.C. case* (n.78) at [33]-[34].

⁵²³ Peers, S., Hervey, T., Kenner, J., & Ward, A. (Eds.). (2014). *The EU Charter of fundamental rights: a commentary*. Bloomsbury Publishing, p. 820.

⁵²⁴ Stelkens, & Andrijauskaitė, op. cit., p. 46.

⁵²⁵ Ibid.

market resulted from the application of job security provisions. Later on, this approach has become a dominant modern policy that integrated with the provisions of labour laws.⁵²⁶ Generally speaking, the argumentation over labour market flexibility has begun in the 1980s within the European Union in response to a high level of unemployment rate, especially, in those member states that adopted social protections of employees in a form which obstacle the operation of labour markets.⁵²⁷ The policy, then, entails reducing the scope of job security provided to workers through a spectrum of protection legislation. With respect to that point, evidence from multiple European states has proven that firms under fewer regulations regarding hiring and firing will supply more job opportunities for workers. In the United States, where employers are free –with certain exceptions- to terminate the employment contract, the debate on labour market flexibility was not considerably subsist compared to Europe.⁵²⁸ This because Americans were already familiar with the flexible approach in labour market resulted from their employment-at-will doctrine.”⁵²⁹

The question that may soon come to mind asks whether the policy of labour market flexibility is an alternative for job security and to what degree it may replace the latter policy to modernize labour law. The question in other words may ask, does the flexibility approach inhibit job security provisions? To answer that question, we need to examine whether the justifications of this policy contrast with the justifications of job security, or it has objective reasons to minimize the scope of job security. What is obvious from the historical background is that the emergence of the flexible approach in labour market does not depend on conflicted argumentations with what has been debated for job security. Rather, it depends on some basic economic argumentations, as its perception can be justified from a purely economic perspective. One can observe that the flexible approach in labour market intends to re-examine the scope of worker's protection based on labour market fluctuations. The aim, thus, does not intend to ruin the base of security for

⁵²⁶ Rajah, M. (2019). From Third World to First: A Case Study of Labour Laws in a Changing Singapore. *Labour Law Journal*, 70(1), 42–63. Retrieved November 15, 2020, from

<http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=lgs&AN=135012247&site=eds-live>

⁵²⁷ Simon Deakin, Hannah Reed, The Contested Meaning of Labour Market Flexibility: Economic Theory and The Discourse of The European Integration, ESRC Centre for Business Research, University of Cambridge, Working Paper No. 162, p 1. Available at: https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp162.pdf Accessed: 24-04- 2019

⁵²⁸ Aringa, C. D. (1991). *Labour market flexibility: The case of Italy*. International Institute for Labour Studies, P.O. Box 6, CH-1211 Geneva 22, Switzerland.

⁵²⁹ Houseman, op. cit.

workers. From the reasons that led to the construct of this approach, our hypothesis can be more proven, and those reasons could be debated in the following points:

2.1. Unemployment and Worker Turnover

In the early 80s, several of economic issues manifested and challenged the notion of job security and its provisions.⁵³⁰ The challenges have initiated with examining provisions that aim to decrease the ability of firms to hire and fire employees. Although severance pay, compensation for dismissal, and other job security provisions were purposely enacted to protect workers and to prevent employers from unfair termination, these provisions have also negatively impacted workers by reducing their ability to find new jobs.⁵³¹ The assumption that job security forms to hire and fire workers will reduce employment is widely accepted; by contrast, the demand for labour market flexibility by reviewing these laws is strongly enhanced. This was an outcome of restrictive rules which drive employers to think about costs in case of dismissal, and taking on new staff.⁵³² Then, the result of that thinking took its way towards minimizing job opportunities and labour turnover.

In other words, the downside of job security provisions from the perspective of employment mobility can be indicated by referring to the challenges that countries encounter while boosting job opportunities for unemployed workers. Such challenges will be arisen along with the application of regulations backed by job security, particularly, the application of regulations on fixed-term contracts, the average costs of notice periods, and severance pay that should be given to workers whose contracts are terminated.

Many research shows that fixed-term contracts are an indispensable mechanism for employment growth since they facilitate offering many job opportunities and allow businesses to respond the unforeseen fluctuations in the labour market.⁵³³ With fixed-term contracts, firms can substitute workers on holiday, maternity, sick leave, and hire workers with advanced skills to

⁵³⁰ Kugler, A. D. (2004). The Effect of Job Security Regulations on Labour Market Flexibility; Evidence from the Colombian Labour Market Reform. *University of Chicago Press*, Volume ISBN: 0-226-32282-3, URL. Retrieved November 15, 2020, from <http://www.nber.org/chapters/c10070>

⁵³¹ Ibid.

⁵³² Hogan, S., & Ragan, C. (1995). Job Security and Labour Market Flexibility. *Canadian Public Policy / Analyse De Politiques*, 21(2), 174-186. doi:10.2307/3551592. Retrieved November 15, 2020, from www.jstor.org/stable/3551592.

⁵³³ ILO. (2003). *Flexibilizing Employment: An Overview*. International Labour Office, Geneva.

accomplish specific projects.⁵³⁴ In addition, this type of contract stimulates employers to hire unskilled workers, especially young people who have been under struggle to find a job, this paved a way for new workers to enter the job easily, allowing them to obtain “experience and giving access to professional networks that will eventually help them to find permanent jobs.”⁵³⁵ Such benefits for fixed-term contracts as presented in promoting a dynamic labour market and boosting job vacancies will be distorted with the application of job security regulations on fixed-term contracts. This is the objective reason that made some European countries cope with fixed-term contracts even for permanent activities to activate labour market and minimize the rate of unemployment, such as Denmark, the United Kingdom, Ireland, and Germany.⁵³⁶

From another side, the average costs of severance pay and notice periods for employees who have been terminated from the job make employers to assess termination costs based on those factors, and to calculate how termination costs are expensive. The assessment of termination costs will be more expensive in those countries where termination rules require more compensation in case of unjustified dismissal. In Spain, for instance, the maximum compensation can be reached to 12 months’ salary of the worker, if the employer can justify the dismissal, while the amount might be increased up to 42 months’ salary when the employer has failed to provide sufficient reasons for dismissal and turns to be unjustified.⁵³⁷ The termination costs, then, are the most fear that employers take it into account in firing employees. The situation could be more difficult in case of redundancy where a group of workers might be fired following the downturn of the economy; this situation increases costs more and more. Consequently, the higher redundancy costs reflect a negative impact on employer’s decision when hiring new staff during an upturn of economy, because firms may think about redundancy costs when they are forced to lay off workers

⁵³⁴ Employment Flexibility Index (2018), Lithuanian Free Market Institute, p. 4. Available at: <file:///H:/Flexibility-Index-2018.pdf> Accessed: 16-11-2020.

⁵³⁵ Ibid., p. 5.

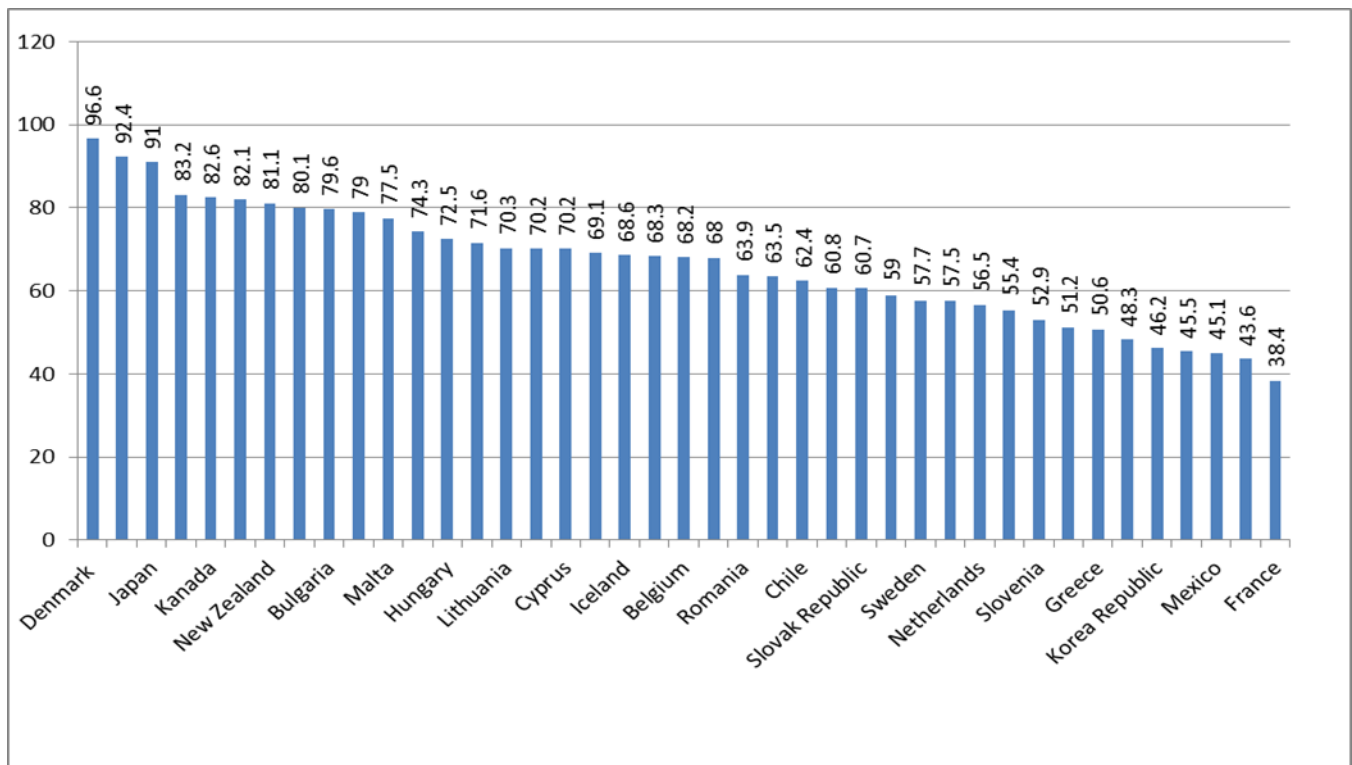
⁵³⁶ These are not exclusive list of countries where such flexible provisions enacted. They are only selected as examples of developed countries not all. Ibid., p. 23.

⁵³⁷ European Commission Directorate General Employment, Social Affairs and Equal Opportunities Unit D2, (2006) “Termination of employment relationships Legal situation in the Member States of the European Union” p. 78. Available at: file:///C:/Users/opac/AppData/Local/Temp/termination_emp_relation_report_updated_en.pdf Accessed: 16-11-2020.

in the future.⁵³⁸ This is what curbed hiring new workers and decrease the rate of employment under job security regulations.

The World Bank⁵³⁹ released a data titled “Employment Flexibility Index: EU and OECD countries, 2018” reflecting a quantitative comparison of regulatory approaches on employment regulation in EU and OECD countries. The data depends on hiring policy, the ability to access fixed-term contracts, working hours, termination rules and redundancy costs.⁵⁴⁰ It aims to classify EU and OECD countries based on specific criteria of employment flexibility. According to the data, higher ranks of the “Employment Flexibility Index” indicate more flexible labour provisions.

Figure 1. “Employment Flexibility Index: EU and OECD countries, 2018”⁵⁴¹



⁵³⁸ Dolado, J., García-Serrano, C., & Jimeno, J. (2002). Drawing Lessons from the Boom of Temporary Jobs in Spain. *The Economic Journal*, 112(480), F270-F295. Retrieved November 16, 2020, from <http://www.jstor.org/stable/798375>

⁵³⁹ An international organization consists of five institutions, and mainly aims to reduce poverty in the developing world.

⁵⁴⁰ Employment Flexibility Index 2018, Lithuanian Free Market Institute, p. 4-5. Available at: https://en.lfri.lt/wp-content/uploads/2017/12/Employment-Flexibility-Index-2018_LFMI.pdf Accessed: 16-11-2020.

⁵⁴¹ Ibid., p. 6.

The data ultimately shows that many European Countries have started to flexibilize regulatory policies on employment strategy and reduce the level of protection, particularly, regarding regulation on fixed-term contracts, termination rules and redundancy costs. In the total ranking, Denmark, the United Kingdom, Ireland, Czech Republic, Bulgaria, and Switzerland possess from the top ten positions. Meanwhile, some European Countries, especially, France, Luxembourg, and Portugal remain in the lowest level due to retain many restrictive rules on hiring and firing policy with high level of protections provided to employees.

Denmark as a sample of the EU member states in the list indicates that it ranked first for labour legislation flexibility in 2018, mostly due to the following reasons:

- Fixed-term contracts are absolutely allowed even for permanent works, there are also no limitations on the duration of such contracts
- No compulsory rules apply on minimum wage
- Redundancy is allowed based on the law and does not require any costs
- Employers are not forced to retrain or reassign workers in cases of redundancy
- No requirements exist for employers to inform and to get approval from the competent authorities so they can dismiss employees up to nine people.⁵⁴²

In contrast, taking France as another sample of the EU member states indicates the lowest rank of flexibility approach in 2018, mainly due to the reasons below:

- Fixed-term contracts are absolutely banned for permanent tasks, it is merely allowed for temporary tasks
- Even for temporary tasks, the duration and the renewal of fixed-term contracts are restricted up to maximum 18 months
- Employers are required to retrain or reassign workers before dismissal
- Mandatory rules are in force to inform or consult a competent authority before terminating a group of nine redundant workers
- Employers are also restricted by priority rules in case of reemployment after redundancy
- The average costs of notice period are provided by law which is equivalent to “8.7 salary weeks for workers with 5 or 10 years of tenure”

⁵⁴² Ibid., p. 8.

- Severance pays also exist for redundant workers equivalent to 8.7 salary weeks for workers with 5 or 10 years of tenure.⁵⁴³

2.2. Dualism in Employment Composition

As we have seen in the first level, how job security provisions minimize job creation and then negatively impact on the rate of employment by limiting the ability of workers to access new jobs. Further debate in this area has been made from the corner of job security provisions and its negative impact on the employment structure. The structure of employment under job security will be gradually divided between young and old workers in a manner that bias employment in favor of old ones.⁵⁴⁴ This impliedly means that job security provisions may stand against young workers and discriminatory treat the different categories of workers in the outcome.

Research show that negative influence of job security on youth employment refers to the linkage between termination costs and tenure.⁵⁴⁵ A significant number of literatures examine the impact of job security on youth employment from this regard. Lazear (1990) points out to some evidence that prove inverse relationship between job security provisions and the rate of employment from young-to-older workers.⁵⁴⁶ Later on, Nickell (1997) adds further evidence on employment partiality towards young workers in countries where job security provided in a high level.⁵⁴⁷ Bertola, Blau, and Kahn (2002) also insist on that the rate of employment under job security will be decreased for young workers relative to other groups.⁵⁴⁸

The fact that the linkage between terminations costs and tenure bias employment against young workers can be tested in many countries where the period of notice and severance pay increase with job tenure. The test may consider how termination costs increased in such countries based on the seniority of workers and give more protection to senior workers. On the other hand,

⁵⁴³ Ibid., p. 17.

⁵⁴⁴ Carmen, P., & Claudio, E. (2007). Job Security and the Age Composition of Employment: Evidence from Chile. *Estudios de Economía*. Vol. 34 - N° 2, Diciembre 2007. Págs. 109-139. Retrieved November 18, 2020, from <https://scielo.conicyt.cl/pdf/ede/v34n2/art01.pdf?fbclid=IwAR229HF6mJJKwa92CPXIh9OtrhQIRTo3RROLnYWYZnaRKvV7uDBbrG7DGTI>

⁵⁴⁵ Ibid.

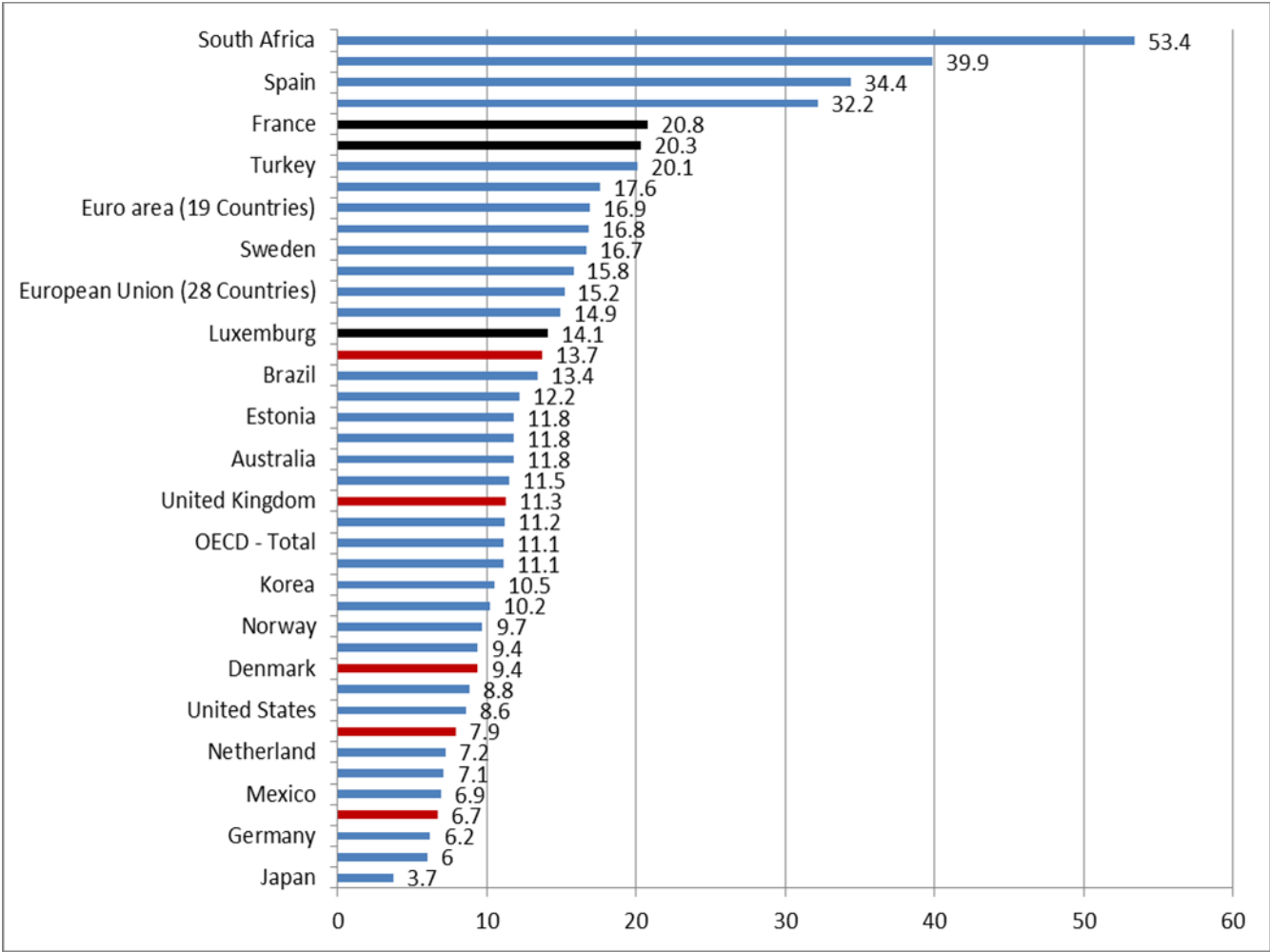
⁵⁴⁶ Avner, B., & Anat, L. (1993). *Job Search by Employed Workers: The Effects of Restrictions*. World Bank Publications, p. 15.

⁵⁴⁷ Edited by Tito, B., Agar, B., & Lars, C. (2001). *The Role of Unions in the Twenty-first Century: A Report for the Fondazione Rodolfo De Benedetti*. Oxford University Press, p. 205.

⁵⁴⁸ Blau, F. D., & Kahn, L. M. (2002). *At Home and Abroad: U.S. Labour Market Performance in International Perspective*. Russell Sage Foundation, p. 149.

this means that young workers, who have shorter tenure relative to others in firms, are less protected. In practice, firms always tend to fire workers with minimum costs, especially, when firms are reluctant to downsize the employment during downturn. The consideration of minimum costs, of course, inspires firms to terminate workers with shorter tenure who cost less severance payment. Thus, termination costs based on tenure and seniority rules as designed pursuant to job security requirements are likely to have a contribution in increasing the potentiality of dismissal for young workers. The following data may test and prove what have been said in this section.

Figure 2. Youth Unemployment Rate⁵⁴⁹



⁵⁴⁹ Annual data released by OECD in 2018 on youth unemployment rate in OECD countries. Available at: <https://data.oecd.org/unemp/youth-unemployment-rate.htm#indicator-chart> Accessed: 18-11-2020.

The data proves the fact that job security provisions bias employment in favor of old workers and increase the rate of youth unemployment, considering two groups of European countries in conjunction with figure 1. Though the data indicates the rate of youth unemployment in 41 member states of OECD, we only focus on two small groups of states that deemed to be relevant with our purpose in this study. The first group (Red colored) includes Denmark, the United Kingdom, Ireland, Czech Republic, and Switzerland in the top ten ranks of employment flexibility, particularly, in respect of redundancy and termination costs, while the second group (Black colored) includes France, Luxemburg, and Portugal that have the lowest rank of employment flexibility according to figure 1.

Table 1. Youth unemployment rate in a group of countries with flexible employment approach in 2018

Countries in figure 1.	Youth unemployment rate according to figure 2.
Denmark	9.4 %
United Kingdom	11.3 %
Czech Republic	6.7 %
Switzerland	7.9 %

Table 2. Youth unemployment rate in a group of countries with rigid employment approach in 2018

Countries in figure 1.	Youth unemployment rate according to figure 2.
France	20.8 %
Luxemburg	20.3 %
Portugal	14.1 %

In general, the comparison between table 1 & 2 proves that unemployment rate among young workers is much higher in second group countries where job security provisions are highly valuable and requires too many costs in case of terminating workers based on tenure. Comparatively, the rates get decreased in the first group countries in which the flexibility approach restricts the provisions of job security. Ultimately, this proves the hypothesis saying that job security regulations bring the dualism in employment composition by treating young and old workers in different manner.

3. EU Flexicurity Approach

The term of flexicurity refers to a combined policy of labour market flexibility and job security as a welfare state model. Owing to the fact that neither the policy of flexibility to dynamic the market not the policy of job security to protect workers can be adopted separately, the flexicurity has combined the two of them to reinforce an acceptable degree of flexibility and security in the labour market.⁵⁵⁰ The empirical evidence shows, from one side, how a literal application of job security provisions restrict the market in offering new jobs and how such application increases the cost of termination, leading the institutions to keep old workers for avoiding termination costs, and resulting in a decrease of hiring youngers.⁵⁵¹ From the other side, it shows an absolute application of flexible approach can also negatively impact workers to lose their jobs in an easy way, in particular, vulnerable groups. Between these twofold expectations, a balance between flexibility and security is a distinctive element of flexicurity and a key challenge for workers and employers under this policy.⁵⁵² Such a balance essentially concentrates on the reduction of negative impacts resulting from an application of job security and flexibility in a labour market. Flexicurity, thus, is an integrated model to mitigate the downsides of the two concerned policies.

3.1. Historical Background

Almost a unanimous opinion can be found in research made in that area to introduce flexicurity as a European phenomenon, as being a part of European policy debate in recent decades. Gorter tries

⁵⁵⁰ Burroni, L., & Keune, M. (2011). *Flexicurity: A conceptual critique*. European Journal of Industrial Relations, 17(1), 75-91.

⁵⁵¹ As pointed out in Figure (1) & (2).

⁵⁵² Wilthagen, T., & Tros, F. (2004). *The concept of 'flexicurity': a new approach to regulating employment and labour markets*. Transfer: European Review of labour and research, 10(2), 166-186.

to describe the policy of flexicurity as an exclusive Dutch phenomenon.⁵⁵³ But indeed, this policy can also be observed in some national and international systems elsewhere. The debate over the concept of flexicurity at the academic and political levels goes back to the 1990s.⁵⁵⁴ In this period, European labour markets approach the flexicurity model to respond the demand of firms, national governments, and the European Union for further flexibility on one hand, and to respond, the demand of workers and trade unions for providing security of workers, on the other hand.⁵⁵⁵

In reaction to economic and social demands, the EU has experienced several ways. According to Goetschy, the history of EU, in dealing with a phenomenon where a social and economic perspective involved, can be distinguished into three stages.⁵⁵⁶ As she pointed out the EU, in the first stage, concentrates on economic policies enhancing market integration, fair competition, and labour mobility. The social policies, in that stage, were marginal and frequently served economic goals.

This outlook slightly changed with the beginning of the second stage that took place after the Maastricht Treaty of 1992.⁵⁵⁷ The new EU approach provides more leeway for social measures. Nonetheless, social measures were still used to pave the way for economic demands and to increase the rate of acceptance with such demands.⁵⁵⁸ Since the Maastricht Treaty has offered incentives to develop economic and social dimensions together, it was possible for EU to make collective bargaining that leads to the great outcome as regards to the social dimensions.⁵⁵⁹ Despite that opportunity, however, the EU trend in this stage did not achieve an admirable progress in the social dimensions.⁵⁶⁰

Goetschy finalizes the stages by introducing the Amsterdam Treaty of 1997, as the beginning of the third stage. An impressive turning point, in that stage, was the possibility to set European employment aims since Employment Title was incorporated in the Amsterdam

⁵⁵³ Ibid., p. 8.

⁵⁵⁴ Viebrock, E., & Clasen, J. (2009). *Flexicurity and welfare reform: a review*. *Socio-Economic Review*, 7(2), 305-331.

⁵⁵⁵ Ibid.

⁵⁵⁶ Goetschy, J. (2007). *The Implications of the Lisbon Strategy for the Future of Social Europe: 'On the Road' or 'New Age'?*. *International Journal of Comparative Labour Law and Industrial Relations*, 23(4), 499-523.

⁵⁵⁷ LAURSEN, F. (1993). *The Maastricht Treaty: Implications for the Nordic Countries*. *Cooperation and Conflict*, 28(2), 115-141. Retrieved November 27, 2020, from <http://www.jstor.org/stable/45083890>

⁵⁵⁸ Goetschy, op. cit.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.

Treaty.⁵⁶¹ This mission has been done soon after the arrangement of Employment Title as a European Employment Strategy (EES). As the EES included the Open Method of Coordination, in which the European-wide goals can be determined and permitting member states for flexible implementation.⁵⁶² More integration of economic and social goals has accomplished due to a high level of coordination between social and economic agenda.⁵⁶³ In particular, the integration was further emphasized by the integration of the employment guidelines with modern economic policies.⁵⁶⁴ Such integration can be marked as flexicurity policy in the employment guidelines.

Back in 2000, the Lisbon Agenda⁵⁶⁵ has also targeted flexicurity as a key issue of the European Employment Strategy (EES) and as a central challenge to the European Social Model.⁵⁶⁶ Moreover, the function of the EU has been formulated in the Lisbon Agenda of 2000, in a form that primarily takes the promotion of both flexibility and security into consideration, as the goal is “to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”.⁵⁶⁷ Following that, the Council of European Union in (Brussels, 2007), underlines on the term of flexicurity as a concept should be drafted in light of the specific needs of each member states, the Council as well as emphasizes on the implementation the Lisbon Strategy in order to modernize labour markets where the enhancement of flexibility and security is possible together.⁵⁶⁸

Along with the EU formal institutions, the International Labour Organization (ILO) devoted great attention to the matter and began research on the flexicurity since 2000 but has never provided any formal definition of that term.⁵⁶⁹ The 7th European Regional Meeting of ILO in 2005

⁵⁶¹ Amsterdam Treaty officially concluded in 1997 to amend the Treaty on European Union, but it came into force in 1999. It also brought substantial changes to the Maastricht Treaty signed in 1992. Text of “Treaty of Amsterdam” Retrieved November 27, 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11997D/TXT>

⁵⁶² Goetschy, op. cit.

⁵⁶³ Ibid

⁵⁶⁴ Ibid.

⁵⁶⁵ The Lisbon Process or Lisbon Agenda was a strategic plan set out by the European Council to develop the economy of the European Union between 2000 and 2010.

⁵⁶⁶ Wilthagen, & Tros, op. cit., p. 2.

⁵⁶⁷ Ibid.

⁵⁶⁸ Council of the European Union. (2007). Towards Common Principles of Flexicurity, Draft Council Conclusions. Brussels: Council of the European Union. Retrieved November 27, 2020, from <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016201%202007%20INIT>

⁵⁶⁹ ILO: Committee on Employment and Social Policy. (2009). *Combining flexibility and security for decent work*. GB306-ESP_3-1_ [2009-10-0227-1] -En.doc, p. 2.

has been devoted to the issues: flexibility–stability–security nexus.⁵⁷⁰ As a consequence of the meeting, the ILO participants reached a common perspective summarized in the necessity of the policy of flexibility and security for enterprises and for workers due to the rapid changes faced EU labour markets as a result of globalization.⁵⁷¹ The meeting result also emphasized that crucial elements to reach a balanced model consists of flexibility and security are “tripartite social dialogue in the framework of broader national macroeconomic strategies, collective bargaining, and respect of labour legislation”.⁵⁷²

At the national level, the Dutch and Danish flexicurity model formulated during the 1990s up to 2005 can be referred to as two well-known models within the EU. In Netherlands, the first step initiated towards flexicurity by the Minister of Social Affairs and Employment at the end of 1995, as he prepared a memorandum named ‘Flexibility and Security’ to strike a balance between thereof.⁵⁷³ Besides that, continuous initiatives of the social partners, aiming to reconcile the interests of employers and workers, resulted to draft what the so-called ‘Flexibility and Security Bill’ in 1997.⁵⁷⁴ The bill was very much welcomed by the Dutch government and after the hearing process by the parliament for the bill, a new legislation came into force on 1 January 1999 in which the bill of flexibility and security have been incorporated.⁵⁷⁵

The history of the Danish flexicurity model is also relatively new and exactly goes back to the mid of 1990s, when the term used for the first time by the sociologist Hans Adriaansens, and then the Danish policymakers devoted attention to that concept.⁵⁷⁶ The Danish flexicurity approach, nowadays, is well-known as a ‘golden triangle’ which combined flexibility and security within three basic elements that can be referred to as one of the best practices flexicurity models.⁵⁷⁷

⁵⁷⁰ Conclusions of the Seventh European Regional Meeting, ILO, Budapest, 2005 (ERM/VII/D.6), para. 18.

⁵⁷¹ Ibid.

⁵⁷² Ibid.

⁵⁷³ Wilthagen, & Tros, op. cit., p. 8.

⁵⁷⁴ Van Oorschot, W. (2004). *Balancing work and welfare: activation and flexicurity policies in The Netherlands, 1980–2000*. International Journal of Social Welfare, 13(1), 15-27.

⁵⁷⁵ Wilthagen, & Tros, op. cit., p. 10.

⁵⁷⁶ Ilsøe, A. (2007). *The Danish flexicurity model—A lesson for the US*. Center for Transatlantic Relations at SAIS. Working Paper May.

⁵⁷⁷ Madsen, P.K. (2004): *The Danish model of “flexicurity” : experiences and lessons*, TRANSFER. European Review of Labour and Research, 10(2), pp. 187-207.

3.2. Flexicurity in the Context of EU Soft Law (Open Method of Coordination)

Besides the binding instruments, EU has developed non-binding instruments, the so-called soft law to address contemporary issues. As has been noted from the historical background, the concept of flexicurity was achieved within the context of soft law, the instrument that does not adhere member states to legal commitments.⁵⁷⁸ It rather provides contributions in form of guidelines, opinions, and recommendations.⁵⁷⁹ From terminology perspective, the name of soft law may lead to a controversial debate as long as the law is a bound tool in its nature, the status of non-binding tools, accordingly, shall not be referred to the realm of law. However, Article 288 of the Treaty on the Functioning of the European Union states considers regulations, directives, decisions followed by recommendations and opinions, recognizing the two latter as non-binding instruments.

Despite its lack of binding force, soft law can achieve some legal consequences.⁵⁸⁰ The importance of soft law, thereby, derived from its potential influence in practice. Such influence can be observed in the development of policies and norms in fields where member states willingly do not wish to be bound with measures imposed by hard law.⁵⁸¹ Soft law is voluntary solutions to deal with phenomena that likely seem not to gain progress if it is dealt with by binding instruments. What gives the power to soft law is its flexibility and accessibility for member states whenever they are not able reaching to binding measures.⁵⁸² Thus, it is an alternative trend that can be used to address vague issues where the EU lacks capacity to adopt a hard law measure.

In the context of labour law, in particular termination of employment part, the role of soft law is notable. Due to many variables, the secondary policies, norms, and strategies to restate employment termination has been developed by soft law. The European Employment Strategy (EES), in this regard, is a leading soft law strategy that gradually incorporated the concept of flexicurity into the employment policies of the EU countries.⁵⁸³ EES has given the priority to four aspects as essential matters to work on, which encompassed: boosting employability to activate

⁵⁷⁸ Foster, N. (2020). *EU law directions*. Oxford University Press, p. 122.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ Westerman, P., Hage, J., Kirste, S., & Mackor, A. R. (Eds.). (2018). *Legal validity and soft law* (Vol. 122). Springer, p. 20.

⁵⁸¹ *Ibid.*

⁵⁸² Eliantonio, M., Korkea-aho, E., & Stefan, O. (Eds.). (2021). *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*. Bloomsbury Publishing. p. 149.

⁵⁸³ Nicolaisen, H., & Kavli, H. C. (Eds.). (2019). *Dualisation of Part-time Work: The Development of Labour Market Insiders and Outsiders*. Policy Press, p. 43.

labour market; expanding entrepreneurship to create more jobs; supporting the adaptability to make businesses and their employees flexible in work arrangements; and reinforcing equal opportunities to provide equal chances for men and women.⁵⁸⁴ Apart from the confirmation on the social side of employment policies as can be seen in the assertion on equal opportunities for men and women, the strategy mainly focused on the flexibilization of labour market.⁵⁸⁵ Such flexibilization in the context of the aforementioned pillars shall undoubtedly ease the termination rules of employment accompanied by unemployment benefits.⁵⁸⁶ Referring to employability as the ability of workers to transfer from a job to another, regardless of the consideration of their current status as being they are fired or have the will to gain a better position, may not be attained with a high degree of employment protection. As the indicators reveal, the vitality of labour market to reinstate workers with new positions will be notably decreased in case of the presence of stringent rules on hiring and firing.⁵⁸⁷ This is because that the stringent protective rules, as such termination costs, render the firms to not hire workers during economic upturn, thinking for the termination costs that should be paid for firing workers during downturn.⁵⁸⁸ A reduction in the degree of protection, therefore, is a step forward towards employability. The adaptability, from the other side, as drawn up by the strategy is also another fundamental principle leading to flexible labour market, the perception that the workers' flexibility within an undertaking is a base key for the businesses' adaptability with rapid global changes.⁵⁸⁹ The businesses' ability to such an organizational set-up cannot be conceivable unless after the necessary response of law to enable a smooth employment termination as an evitable outcome of market dynamics.⁵⁹⁰ Workers' social protection, in this context, lies in the quick potentiality to access the labour market, instead of the internal arrangement pursuant to a particular employment situation.

⁵⁸⁴ Damro, C., Heins, E., & Scott, D. (Eds.). (2021). *European Futures: Challenges and Crossroads for the European Union of 2050* (Vol. 1). Routledge, p. 61.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid.

⁵⁸⁷ As pointed out in: Figure 1. "Employment Flexibility Index: EU and OECD countries, 2018" in this study.

⁵⁸⁸ As pointed out in: Figure 2. "Youth Unemployment Rate" in this study.

⁵⁸⁹ Bazzani, T. (2018). *European Employment Policies: Key Concepts, Domestic Implementation, Current Challenges* (Vol. 77). BWV Verlag, p. 52.

⁵⁹⁰ Ibid.

To reap its goals, the EES has invented secondary methods and strategies at EU level, as for example, the Open Method of Coordination (OMC).⁵⁹¹ The EES through the implementation of the OMC, a soft law method for policymaking, has achieved sustainability in employment more and more. This method came on stage as a necessary process to achieve the goals of the EES, the fact that the EES goals need a common work and an exchange of internal practices between Member States. For that end and further for gaining common standards on flexicurity, the European Council in 2007 decided to apply the OMC, targeting to share any progress in its Member States.⁵⁹² The purpose of the OMC, therefore, is not to evaluate employment policies of Member States, but rather to arrange contribution in process of policy making and sharing practices that gained success to overcome employment crises.⁵⁹³

Following the open method of coordination at EU level was a notable step forward that made all Member States formalize national employment policies towards flexicurity.⁵⁹⁴ This acquisition refers to the fact that the method did not oblige states to take formal legal actions as required by the traditional way and recommended by theoretical studies but transferred states to the destination reached by the best practical experiences instead. All states are motivated to reorganize and adjust their employment systems towards flexicurity approach. Meanwhile, they contribute to progress the paradigm of flexicurity through the sharing of advanced practices made in that area.⁵⁹⁵

3.3. Flexicurity Concept: Definitions and Models

The concept of flexicurity is not much clear as the concept of security and flexibility are. The concept is relatively new, and this could be a reason for the ambiguity of its features. The other reason, as pointed out in some academic research, is related to the core of the concept itself, as being a concept that has unclear elements. However, different definitions from different angles can be identified to illustrate this concept. It has been said, the idea of flexicurity “is that security is a

⁵⁹¹ The OMC was first initiated to improve employment strategy at EU level in the agenda of the Amsterdam Treaty of 1997, but then its concept widely adopted to cover social inclusion, immigration, consumer care, asylum seekers, pensions, culture, education, and research, as well as it has been recommended to be used in health.

⁵⁹² Stone, K. V., & Arthurs, H. (Eds.). (2013). *Rethinking workplace regulation: Beyond the standard contract of employment*. Russell Sage Foundation, p. 214.

⁵⁹³ Craig, P., & de Búrca, G. (2020). *EU Law: Text, Cases, and Materials UK Version*. Oxford University Press, USA, p. 209.

⁵⁹⁴ Magone, J. M. (2013). *Contemporary European politics: a comparative introduction*. Routledge, p. 548.

⁵⁹⁵ Ibid.

precondition for flexibility, and flexibility a precondition for security”.⁵⁹⁶ This is a very broad and vague definition that cannot be considered unless to limit the application of the security in an absolute manner, and flexibility as well. The degree of limitation on security and flexibility, otherwise, remains unclear according to this definition.

More accurately, Wilthagen and Tros define flexicurity as “a policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, work organization and labour relations on the one hand, and to enhance security – employment and social security – notably for weaker groups in and outside the labour market, on the other hand”.⁵⁹⁷ The view of these scholars emphasizes the notion that flexicurity tends to reconcile between two strong demands: one for additional flexibilization of the labour market from the perspective of competitive concerns; the other for the protection of workers from the perspective of social security, particularly for vulnerable workers. Accordingly, the idea of flexicurity is that security and flexibility must not be considered as opposites but as complementary.

As it is obvious in the European labour law, the flexicurity is a trade-off strategy and designed within the four components: flexible approach of contractual relationships; social security benefits to support those who have been terminated from their jobs; lifelong learning and an active labour market to re-hire workers.⁵⁹⁸ It can be noted that the four components compose basic outlines, while there is no concrete standard or specific plan on how this policy should be operated in the member states.⁵⁹⁹ Though the notion of flexicurity has been defined and described in many legal documents and scientific researches, uncertainty still exists. In practice, no one can exactly introduce the concept of flexicurity in an applicable standard or action plan. This is the challenge that poses a difficulty to incorporate the policy of flexicurity with labour law at an international level. The way to implement this policy, thereby, remains for the state’s pathway at the national level.

⁵⁹⁶ Bekker, S., Wilthagen, T., Madsen, P. K., Zhou, J., Rogowski, R., Keune, M., & Tangian, A. (2008). *Flexicurity—a European approach to labour market policy*. *Intereconomics*, 43(2), 68-111.

⁵⁹⁷ *Ibid.*, p. 4.

⁵⁹⁸ Tavits, G. (2014). *Estonian Employment Contracts Act: Cornerstone in Applying the Flexicurity in Estonia?* *Juridiskā zinātne / Law*, No. 6, 2014, Pp. 176–186.

⁵⁹⁹ *Ibid.*, p. 178.

Notwithstanding this fact, flexicurity in some European Countries, as for example in Netherland and Denmark, is tailored based on specific characteristics and pillars. Through those characteristics and pillars, Netherlands and Denmark have relatively given a concept to flexicurity. The following is a quick review of the Dutch and Danish flexicurity model, aiming to gain a relative concept of flexicurity and to know the range of transferability of these models to other countries.

3.3.1. Dutch Flexicurity Model

As cited before, the Netherlands, by taking the first step forward, moved towards flexicurity in 1995, and then the ‘Flexibility and Security Act’ of 1999 formally promulgated in which the flexicurity approach has been incorporated. Prior to that, the Dutch labour market was characterized by the duality in dealing with workers, particularly, in the way to protect them.⁶⁰⁰ For the permanent workers, very strong employment protection legislation (EPL) was applied, while to protect workers in flexible employment, the law was very vulnerable.⁶⁰¹ In other words, workers in open-end contracts⁶⁰² were granted a high level of job security due to compelling employers to be bound by a very strict dismissal law.⁶⁰³ Pursuant to dismissal law in the Netherlands, any unilateral termination at the initiative of the employer could not be passed unless after advance permission from the public employment service or after taking a judicial decision to dissolve the contract of employment.⁶⁰⁴ In addition to that, dismissal law was also requiring ‘severe reasons’ to terminate permanent workers from their job.⁶⁰⁵ This was the case, while temporary agency workers and workers in flexible employment were put in a position lacks even to a minimum level of security.⁶⁰⁶

⁶⁰⁰ Bruurmijn, W. (2017). Flexicurity Measures in the Netherlands and Germany. Retrieved November 29, 2020, from

https://www.researchgate.net/publication/315825577_Flexicurity_Measures_in_the_Netherlands_and_Germany

⁶⁰¹ Ibid., p. 4.

⁶⁰² An open-end contract refers to a type of contract in which the date of termination is not determined.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid.

⁶⁰⁵ Ibid.

⁶⁰⁶ Viebrock, & Clasen, op. cit., p. 315

The strict regulation on dismissal for standard workers on one hand, and the vulnerable situation for non-standard workers,⁶⁰⁷ on the other hand, brought a great distance between the legal positions of the two types of workers. As a consequence of this duality, the employers were seeking for temporary workers whose contracts were governed by an absolute flexibility approach.⁶⁰⁸ The Dutch labour market then involved with a structural problem of employment in which the large share refers to the temporary workers who lack income and job security.⁶⁰⁹ This was the fact that led to the proliferation of flexicurity in a form that can bear the interests of employers and workers from one side, and strengthen both competitiveness and social security from the other side.

From the presented facts, at least two cornerstones can be identified to understand the Dutch flexicurity model. The first cornerstone concentrates on the combination of atypical works with social security rights; this is what the so-called “normalization of atypical works”. Likewise, workers in standard employment, the Dutch new labour law provides social security rights to atypical and flexible works without compromising flexibility approach.⁶¹⁰ The endeavor, in this regard, takes its way to impose certain limitations on the flexibilization of the labour market. As for instance, the government has taken measures to secure work, care, and education for non-standard workers.⁶¹¹ For that purpose, a voluntary savings scheme established to save an amount of workers’ salary to cover periods of leave for care, education, or other upcoming reasons.⁶¹² The right to training, supplementary pensions, and wage guarantees have been given to the temporary agency workers as part of active labour market programs.⁶¹³ In a nutshell, the level of security has been increased for temporary contracts as a trade-off with a large level of flexibility in the labour market.

The second cornerstone that must be taken into consideration to understand the Dutch model of flexicurity is the changes made to the dismissal law and regulations. The Dutch complicated dual system of dismissal law provided strong protection to the permanent workers,

⁶⁰⁷ Non-standard workers are a general term encompasses all workers who have not permanent employment status, such as part-time, temporary employment and on-call work; temporary agency work and other employment relationships that have temporary status.

⁶⁰⁸ Bruurmijn, op. cit., p. 5.

⁶⁰⁹ Ibid.

⁶¹⁰ Bovenberg, L., Wilthagen, T., & Bekker, S. (2008). *Flexicurity: lessons and proposals from the Netherlands*. CESifo DICE Report, 6(4), 9-14.

⁶¹¹ Ibid., p. 10.

⁶¹² Ibid.

⁶¹³ Ibid.

whereas temporary workers were faced with a zero level of security under the same system of dismissal law.⁶¹⁴ This problem was reached out in the ‘Flexibility and Security Bill’ of 1997, in which a slight reduction of protection for permanent workers suggested, and an improvement in the level of dismissal protection for temporary workers introduced.⁶¹⁵

These two cornerstones have finally shaped the flexicurity model in the Netherlands and took their way to the first legislation enacted in 1999.

3.3.2. Danish Flexicurity Model

The Danish policymakers have shaped and tailored flexicurity in a unique model by combining three elements: a flexible approach to hiring and firing, supportive benefits for unemployment and active labour market policies.⁶¹⁶ This combination is globally known as the ‘Golden Triangle’ to underline the success of the Danish flexicurity model as a combination strategy between the flexibility and security in the labour market.⁶¹⁷ At first glance, the three elements can theoretically inspire how the Danish model of flexicurity is really strong, and to what extent can satisfy employers and workers in an active labour market.

The model aims to promote a high level of labour mobility by compromising employment protection from a high-level to low-level protection.⁶¹⁸ Simultaneously, the model indemnifies low employment protection through generous benefits to support unemployment and through activation of labour market to improve employment skills, aiming to re-hire unemployed persons.⁶¹⁹

Under the Danish model, the concept of job security is soon substituted by employment security.⁶²⁰ The idea is that a high level of labour mobility switches the concept of security as being necessary to secure employment availability, rather than to retain occupied jobs with specific employers. This is an inevitable and purposeful outcome for the implementation of the three combined elements. The rationality of this outcome refers to combining a high level of flexibility

⁶¹⁴ Viebrock, & Clasen, op. cit., p. 315.

⁶¹⁵ Ibid.

⁶¹⁶ Viebrock, & Clasen, op. cit., p. 313

⁶¹⁷ Ilsøe, op. cit., p. 8.

⁶¹⁸ Andersen, S. K., & Simonsen, M. M. (2007). *The Danish flexicurity model: the role of the collective bargaining system*. Icfai University Press.

⁶¹⁹ Ibid.

⁶²⁰ Viebrock, & Clasen, op. cit., p. 314.

with a high level of security as well. While the first element has designed to serve a high level of flexibility, the second and third elements have designed to serve a level of security.

An extension of the flexibility side can be reached at a high level in the Danish model since the first element gives more leeway to the firms for hiring and firing workers through flexible rules, in particular easy rules on firing.⁶²¹ Only a little protection exists against dismissal,⁶²² meaning that the claim for unfair termination of employment is narrowly permitted. Firms are motivated to hire workers because they can fire them again in upcoming situations, under which the firms need to terminate workers' contracts.⁶²³ Therefore, the motivation of employers to hire workers depends on their ability to access a system that includes a high level of flexibility to fire workers at the same time. Such a system is relatively built based on the reduction of the worker's protection against dismissal. The reduction of worker's protection is a crucial means to flexibilize labour market since the second element constitutes a high level of security that guarantees the worker to obtain substantial income compensation if fired.⁶²⁴ The second element, thereby, is state contributions in the form of economic support for the unemployed workers.⁶²⁵ These contributions are provided as income security for a transitional period starts from the date of firing to the date of re-hiring, but the supported period is up to four years as a maximum.⁶²⁶

The third contributed element in the triangle is the active labour market policies, which are essentially designed to ease the transition of workers from unemployment status to employment. This activation is about all programs that create incentives for re-joining the unemployed workers to the labour market, as for example, training courses to upgrade the skills that should meet the demand of labour market.⁶²⁷ In that sense, every unemployed person is obliged immediately after losing his/her job to participate in compulsory meetings at the local 'job center'.⁶²⁸ The job centers perform the function of retraining unemployed along with the local firms targeting the demand of the local labour market.⁶²⁹ In order to compel all unemployed persons to participate in such

⁶²¹ Zhou, J. (2008). *Denmark's flexicurity model: The answer for Europe?* Intereconomics, 43(2), 78-82.

⁶²² Ibid.

⁶²³ Ilsøe, op. cit., p. 8.

⁶²⁴ Ibid.

⁶²⁵ Kongshøj Madsen, P. (2008). *Flexicurity in Danish: A model for labour market reform in Europe?* Intereconomics, 43(2), 74-78.

⁶²⁶ Ilsøe, op. cit., p. 9.

⁶²⁷ Zhou, op. cit., p. 80.

⁶²⁸ Ilsøe, op. cit., p. 10.

⁶²⁹ Ibid.

mandatory training, the Danish policymakers set the eligibility to get income security conditioned by the willingness of the unemployed person to participate in the training.⁶³⁰

The empirical approach towards the Danish flexicurity model proves that the way of combining flexibility and security according to this model is not only theoretically conceivable but also practically suitable. Since the application of this unique policy, data shows a substantial increase in employment rates in both Danish public and private sectors, whereas the rate of unemployment decreased from approximately more than 12% in 1993 to just about 5% in 2001.⁶³¹ In a recent empirical study released by the World Bank in 2018, titled “Youth Unemployment Rate” among OECD countries, Denmark has been classified as one of the ten top countries where the unemployment rate of young people is relatively low compared to other countries.⁶³² According to the study, Denmark only recorded 9.4% in the youth unemployment rate, while the UK, which is also located in the ten top-ranked countries and known as a country where the flexibility approach extends to a higher degree than Denmark, recorded 11.3% in the youth unemployment rate. While job security has a negative impact on the youth employment rate, the result of this empirical study illustrates that the Danish model performance to decline the rate of unemployment between youngsters is even better than the performance of the British flexibility approach.

In sum, the novelty and the applicability are the two major characteristics of the Danish flexicurity model that brought the attention of several international studies in the last two decades.

3.4. Flexicurity: Towards Employment Security and Income Security

As has been noted, the academic and institutional definitions have not given concrete rules on the flexicurity and the way to apply such policy in the labour market. Rather, the flexicurity can be shaped based on the different facts and situations, as the Dutch and Danish flexicurity models confirm that.

Apart from the degree of uncertainty and ambiguity in the concept of flexicurity, we can reach the central meaning of flexicurity in the point that focuses on the promotion of employment

⁶³⁰ Ibid.

⁶³¹ Viebrock, & Clasen, op. cit., p. 314.

⁶³² Figure (2) in this study pointed out this empirical study in detail.

and income security to stabilize labour market. The employment and income security, therefore, is a common aim and the last destination for the policy of flexicurity and its different models. In comparison between the Dutch and Danish flexicurity models, we can conclude to the different facts that led to flexicurity and to the different measures that have been taken to apply this policy, while the same aim can be concluded as the two different models being aimed to concentrate on employment and income security.

The perception of employment security is strongly connected with the necessity of labour market to a high level of labour mobility.⁶³³ The idea is that a high level of labour mobility creates new jobs and then allows sufficient job allocation for workers. This subsequently provides employment security for workers as being able to find new jobs and retain their income after losing their jobs.⁶³⁴ Since the provisions of job security preserve the worker's job with a specific company for lifelong or for a long duration of time, it restricts the ability of the labour market to create new jobs and minimizes the rate of labour mobility.⁶³⁵ In this regard, the outcome of job security is not compatible with the idea of economic efficiency which partially depends on the easy access to labour market by workers.⁶³⁶ This economic perspective, therefore, is an essential reason to substitute job security by employment security.

With respect to workers, employment security ultimately will serve workers better than job security. This is since job security provisions relatively distinguish between types of workers. In this sense, workers whose employment relationships are based on open-ended contracts and called as 'insiders' are fully benefited from job security provisions, while 'outsiders' whose employment relationships are established based on other types of contract, such as fixed-term contracts, are benefited much less of job security provisions.⁶³⁷ The fact in most countries is that atypical employment contracts, particularly, fixed-term contracts will automatically come to the end when an agreed date is expired, meaning that the worker must leave the job without being protected

⁶³³ OECD. Publishing, & Organisation for Economic Co-operation and Development. (2010). *The OECD innovation strategy: getting a head start on tomorrow*. Organisation for Economic Co-operation and Development.

⁶³⁴ *Ibid.*, p. 74.

⁶³⁵ Glynn, T. P., Arnow-Richman, R. S., & Sullivan, C. A. (2019). *Employment Law: Private Ordering and Its Limitations*. Wolters Kluwer Law & Business.

⁶³⁶ Greve, B. (2018). *Social and Labour market policy: the basics*. Routledge.

⁶³⁷ Zekic, N. (2016). *Job security or employment security: What's in a name?* *European Labour Law Journal*, 7(4), 548-575.

because there is no dismissal in that cases.⁶³⁸ To reap the benefit of atypical employment contracts and to avoid the termination costs of open-ended contracts, employers try to mostly sign atypical contracts and nowadays the number of such contracts has been increased.⁶³⁹ Consequently, a significant number of workers might be harmed by job security as being vulnerable groups who are not included by protection against dismissal.⁶⁴⁰ In addition, it is not easy for such workers to access new jobs where job security relatively restricts the market to offer new jobs. Hence, the situation according to the employment security trend would be better for workers at least in the ability of the labour market to offer a new job as soon as possible after termination date.

The notion of employment security as a modern alternative of job security decreases the scope of protection provided to workers against dismissal and softens the termination rules of employment contract, especially, termination based on economic reasons.⁶⁴¹ Consequently, the scope of unfair termination cases will be more limited and the possibility of workers to invoke such cases will be decreased to a narrow scale. For example, a worker whose contract terminated for economic reasons, such as in a recession case in which the employer is allowed to terminate the employment contract in an easy way, cannot resort to unfair termination and claim for re-instate in the same job. Such claims might be dismissed by the court based on termination rules that require easier standards than what requires according to job security policy. This impact, however, should be positively evaluated as an acceptable trade-off for economic efficiency since it can be compensated by an active labour market where the transferability of workers from a job to another job is highly guaranteed and ensures the employment status of workers.

In the context of distinction between different kinds of security, employment security can relatively be separated from income security since the latter is workers' ability to pay for their fundamental needs without being worried for losing their income source.⁶⁴² Nowadays, income security is not solely employment based, rather, it could depend on state's contributions. Such as unemployment benefits, a temporary income provided to workers upon losing their jobs -not based

⁶³⁸ Ibid., p. 14.

⁶³⁹ Bassanini, A., Nunziata, L., & Venn, D. (2009). *Job protection legislation and productivity growth in OECD countries*. Economic policy, 24(58), 349-402.

⁶⁴⁰ Ibid.

⁶⁴¹ Zekic, op. cit., p. 17.

⁶⁴² Caputo, R. K., & Liu, L. (Eds.). (2020). *Political Activism and Basic Income Guarantee: International Experiences and Perspectives Past, Present, and Near Future*. Springer Nature, p. 59.

on their fault- till they get access new jobs.⁶⁴³ Such state programs are a core element in flexicurity concept, helping workers to keep their income security in unemployment period. Thus, unemployment period is a transitional period in which income security of workers depend on state's contributions instead of employment. Accordingly, as it is possible for workers to have employment security without job security, it is also possible for them to have income security without employment security. Nonetheless, the level of income based on the social security programs is different from what depends on a decent employment.⁶⁴⁴ This means despite the distinction; the concept of employment security remains in strong correlation with the concept of income security under flexicurity model.

3.5. Flexicurity: Flaws and Disadvantages

Flexicurity, as has been captured from historical background and its basic models, reflects the dominant trend in the EU employment strategy undertaking high rates of employment and the potentiality of national financial systems. Despite implementing flexicurity in EU member states contemplating improvement in their labour market functioning, the model is not flawless.⁶⁴⁵ It is a commonplace that every model has downsides. An objective study to evaluate the negative impacts of each model is crucial before transferring the model and for the purpose of the right implementation of the model in other environments. A disregard for even minor negatives in each model, therefore, may result in faulty and risky implementation in other countries.

Different arguments can be read about the pros and cons of flexicurity for the employees. Ozaki claims that the flexibilization of the labour market is posing “significant erosion of employees rights in fundamentally important areas”.⁶⁴⁶ In opposite side, the report of the Employment Taskforce in 2007, indicating the advantages of flexibility for employees as it is for employers.⁶⁴⁷ Its advantages for workers embodied in assisting them to integrate their work and education and care, as for example, or to permit them to command their prioritized lifestyles.⁶⁴⁸

⁶⁴³ Gschwind, L. (2021). *Generous to Workers≠ Generous to All: Implications of European Unemployment Benefit Systems for the Social Protection of Immigrants*. Comparative Political Studies, 0010414021997160.

⁶⁴⁴ Muffels, R. J. (Ed.). (2014). *Flexibility and employment security in Europe*. Edward Elgar Publishing, p. 136.

⁶⁴⁵ Potužáková, Z. (2012). *Flexicurity—Pros and Cons of the Model*. *Medzinárodné vzťahy*, 10, 45.

⁶⁴⁶ TURAL, B. G. (2008). *Flexicurity and Women Unemployment*. *Ankara Bar Review*, 1(2), 9-17.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ Shields, J., Rooney, J., Brown, M., & Kaine, S. (2020). *Managing Employee Performance and Reward: Systems, Practices and Prospects*. Cambridge University Press, p. 261.

Thus, different theoretical assumptions exist concerning the impact of flexibilization, in particular for workers, but the most pragmatic trend can only be seen subsequent to the implementation of flexicurity since the assessment of labour market strategies often depends on empirical research and data.⁶⁴⁹

As it has been noted before, flexicurity is not only confined to more leeway for companies to hire and fire employees, and it does not erase open-ended contracts. It is a model to progress workers finding better jobs, easy mobility, and ideal development of skills. Such aims, of course, creates a flexible labour market and seems to respond typically economic concerns, but its expected outcomes on employment rates rises the underlying social concerns.⁶⁵⁰ From that end, some researchers initiate criticizing negative impacts of flexicurity concept, aiming to propose potential solutions during the implementation of flexicurity concept in certain countries.

Several recent studies point out to wage reductions and how the implementation of flexicurity in some countries, certainly in Southern Europe, poses increased labour market precariousness.⁶⁵¹ Among the criticizing researchers, Gialis and Taylor arguing that flexicurity policies considerably expand temporariness, the situation that increases inequality and individualizes labour market treating workers based on singular labour protection.⁶⁵² The more likely barriers to entry or re-entry labour market will be facing young workers, older persons, low-skilled workers and women recovering from maternity leave and workers with health problems.⁶⁵³ Even with the chance to labour market entry or re-entry, the mentioned categories of workers are mostly trapped in temporary contracts, while workers of prime age and high-skilled workers are captured by permanent contracts.⁶⁵⁴

A concern regarding to gender equality under flexicurity model has extensively argued by several researchers. Jepsen is one of those who evidently examines the linkage between the

⁶⁴⁹ TURAL, op. cit.

⁶⁵⁰ Flaschel, P., & Greiner, A. (2012). *Flexicurity Capitalism: Foundations, Problems, and Perspectives*. OUP USA, p. 123.

⁶⁵¹ Santos-Larrazabal, J., & Basterretxea, I. (2021). Intercooperation, flexicurity and their impact on workers: The case of Fagor Electrodómicos. *Annals of Public and Cooperative Economics*.

⁶⁵² Gialis, S., & Taylor, M. (2016). *A regional account of flexibilization across the EU: The 'flexible contractual arrangements' composite index and the impact of recession*. *Social Indicators Research*, 128(3), 1121-1146.

⁶⁵³ ILO. (2007). Can the European social model survive? Is flexicurity the answer? Retrieved February 10, 2022, from https://www.ilo.org/global/publications/world-of-work-magazine/articles/WCMS_082052/lang--en/index.htm

⁶⁵⁴ Ibid.

flexicurity elements and gender equality, increasing the doubt of flexicurity's negative impact on gender equality.⁶⁵⁵ The argumentation of Jepsen and more other debaters in this regard focuses on that aspect of flexicurity that is likely to favor men than women.⁶⁵⁶ Hence, their argumentation built on the logic inspiring that a disregard of gender analysis in the structure of flexicurity leads to deprive women to a greater extent than men from the chance to gain employment security, being one of the final targets of the model.⁶⁵⁷ The most concerned flexicurity's element in this regard that needs a gender analysis is lifelong learning and its impact on contractual cause. Lifelong learning strategy as designed under flexicurity approach may imply that workers must bear responsibility to improve and update their skills to obtain a permanent employment contract. It might be concluded from that worker can also be expected to bear a part of lifelong learning costs, for instance by investing his/her time.⁶⁵⁸ Since women, in general, is more stuck with home responsibility including childcare than men, their opportunity, consequently, to access lifelong learning is less than men.⁶⁵⁹ Statistical data indicates women who taking care of children younger than seven years of age exert 23.4 hours per week on paid work and 43 hours per week on unpaid housework, while men with the same circumstance exert 36.4 hours per week on paid work and 26 hours per week on unpaid housework.⁶⁶⁰ This confirms what previously said that women who bear greater housework responsibility might have neither energy nor spare time to improve their skills. Further, in the context of lifelong learning strategy, providing online learning is a prominent trend in society. This trend is more flexible and offers the opportunity to learn from a distance as well as inspires workers to spend their spare time in online courses for gaining more employability. This is, however, may also pose a risk for women because of lack of spare time and "will offer women poorer opportunities than men".⁶⁶¹ This is the disadvantage of flexicurity inspires that women's position in the labour market should be supported.

⁶⁵⁵ Keune, M., & Serrano, A. (2014). Deconstructing flexicurity and developing alternative approaches. *Routledge*, London, p. 74.

⁶⁵⁶ Ibid.

⁶⁵⁷ Ulander-Wanman, C. (2012). *A Gender Perspective on Flexicurity and the Swedish Employment Protection Act*. *feminists@ law*, 2(1).

⁶⁵⁸ Saar, E., & Ure, O. B. (Eds.). (2013). *Lifelong learning in Europe*. Edward Elgar Publishing.

⁶⁵⁹ Ibid.

⁶⁶⁰ Ulander, op. cit.

⁶⁶¹ Ibid.

4. Final Remarks

Based on what has been discussed in this chapter, it is evident that the EU model for termination of employment and protection provided against unfair termination is a quite developed model. The EU model as has been noticed is compatible with the international standards concluded from ILO instruments. Regardless of being membership in ILO, the international instruments designed by ILO have greatly impacted the termination rules of employment contract in most EU countries. Nowadays, EU has enough legal instruments to protect workers from being fired unfairly, and to support labour market efficiency. The EU legal instruments have not gone far from international standards, they rather developed the standards and provided a balanced model for security and flexibility together. Such a balance is what called flexicurity in the EU countries, and the following are the main points to understand this balance:

- 1) The concept of security and labour market flexibility must be understood as an appropriate governmental reaction from the perspective of different circumstances, in which the adoption of each one of them is necessary to answer such circumstances in that stage. This perception inspires that those policies are not opposites but complementary.
- 2) The concept of security might not be abandoned by the government due to its connection with the workers' fundamental rights at work and the nature of employment contract. Rather, it should be balanced by the policy of labour market flexibility and formulated in a combined model the so-called flexicurity.
- 3) Termination costs in the various labour laws inside and outside EU countries are one of the most controversial provisions from the perspective of labour market flexibility. It is suggested by this paper to reduce such costs to the degree that would be acceptable and do not rigid the labour market activity, as described in some countries through empirical data.
- 4) To make a balance between both sides; security and flexibility, it is a governmental function depending on the relevant institutional reports to specify which provisions of job security are the most controversial and restrictive rules in the market that should be reduced to a lower degree.
- 5) In the articulation of termination rules pursuant to flexicurity policy, two sides must be taken into consideration: the basic rights at work under which the workers can struggle unfair termination in an acceptable degree; economic efficiency that provides a flexible

market in which the workers have the chance to find jobs based on the equal requirements which do not merely benefit a specific group of workers.

- 6) Apart from the degree of uncertainty and ambiguity in the concept of flexicurity, we can reach the central meaning of flexicurity in the point that focuses on the promotion of employment and income security to stabilize labour market. The employment and income security, therefore, is a common aim and the last destination for the policy of flexicurity and its different models.
- 7) In the context of distinction between different kinds of security, employment security can relatively be separated from income security since the latter is workers' ability to pay for their fundamental needs without being worried for losing their income source. Nowadays, income security is not solely employment based, rather, it could depend on state's contributions. Such as unemployment benefits, a temporary income provided to workers upon losing their jobs -not based on their fault- till they get access new jobs.
- 8) The appropriate model of flexicurity is unique to each country, relying on the workers' conditions in employment contracts, the ability of labour market to react to the social and economic changes and the governmental will to allocate funds for balancing measures.
- 9) Despite implementing flexicurity in EU member states contemplating improvement in their labour market functioning, the model is not flawless. Different arguments can be read about the pros and cons of flexicurity for the employees. Therefore, an objective study to evaluate the negative impacts of flexicurity model is crucial before transferring it and for the purpose of the right implementation of the model in other environments, such as Iraq.

CHAPTER IV

IRAQI LABOUR LAW; RECENT AMENDMENTS ON TERMINATION OF EMPLOYMENT CONTRACT

After the discussion over the international standards on termination of employment contract and the application of such standards in the EU countries as a developed model, we start examining Iraqi labour law in this matter. The aim of this chapter is primarily to discuss whether Iraqi labour law has reached international standards regarding termination of employment contract. It also aims whether the protection provided for workers in Iraqi labour law is balanced by a degree of flexibility to keep the activity of labour market.

Since Iraq is a civil law country, we should concentrate on the legislations first, namely, labour law that has been changed and amended in Iraq multiple times. Compared to the other fields, Iraqi labour law has been changed rapidly in reaction to unstable political situations. However, Iraq still is not a good example for promoting decent work. Workers likewise many other parts of the society are a vulnerable group.⁶⁶² They are deprived of their basic rights including the right to not be dismissed unfairly. Most of the workers do not trust the private sector in Iraq, they rather prefer to get job opportunities in the public sector. The main reason behind this fact refers to the Iraqi labour market which is not a secure market for workers. Meanwhile, it is not a flexible market where a worker can easily find a new job following the loss of his/her previous job.

In the last decade, Iraq took further actions towards the global changes in the labour market to boost the private sectors and to provide more protection against dismissal in such sectors. The most recent action in this area, is the passage of Iraqi Labour Code No. 37 of (2015) and the new draft of Iraqi Social Security Code of (2020). Therefore, in this chapter, we focus on such Iraqi new legal instruments to conclude the recent amendments on termination of employment compared to the international standards.

⁶⁶² These facts can be reached through the official website of International Labour Organization, where a number of reports have been released about Iraq and its unstable environment for workers so far. Retrieved on September 2, 2021, from <https://www.ilo.org/global/programmes-and-projects/prospects/countries/iraq/lang--en/index.htm>

1. Historical Developments in Termination Rules

Iraqi membership in ILO has been started in 1932, since then Iraq has ratified 68 International Labour Conventions,⁶⁶³ including the eight fundamental Conventions.⁶⁶⁴ Despite a long history of membership in ILO, the country still encounters many challenges dealing with workers' rights. The major challenges are linked to internal political tensions, social circumstances, and economic crises. The political instability made the country unable to take a step forward towards fostering labour market and establishment of decent work.

1.1. 1st Iraqi Labour Code

However, a major development can be seen in Iraqi labour legislation to codify workers' fundamental rights, including the right of protection against unfair termination. Four years after the Iraqi membership in ILO, Iraq enacted the first Labour Code No. 72 of 1936. This law was passed under the Monarchy system,⁶⁶⁵ the political attitude of that regime and the social situation were reflected in that law.⁶⁶⁶ For that reason, the provisions of this law were short and very simply drafted, as well as it was full of defects and loopholes.⁶⁶⁷ No provisions existed in this law to regulate termination of employment contract, meaning the law had not provided any protection for workers to retain their jobs. Consequently, the case of terminating workers remained governed by the rule of the employment contract without any legal restrictions on the employer's authority in such contracts.

⁶⁶³ International Labour Organization. Promoting decent work in Iraq. Retrieved on March 10, 2021, from official website: https://www.ilo.org/beirut/countries/iraq/WCMS_433682/lang--en/index.htm

⁶⁶⁴ The eight fundamental Conventions are:

1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
3. Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol)
4. Abolition of Forced Labour Convention, 1957 (No. 105)
5. Minimum Age Convention, 1973 (No. 138)
6. Worst Forms of Child Labour Convention, 1999 (No. 182)
7. Equal Remuneration Convention, 1951 (No. 100)
8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111). International Labour

Organization. Conventions and Recommendations. Retrieved on March 10, 2021, from: <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

⁶⁶⁵ The Monarchy system was founded in Iraq in 1921 after the collapse of the Othman Empire. Faisal bin Al-Hussein was the first king of Iraq. The Monarchy system continued in Iraq till the revolution of July 1958 which when Iraq became a republic.

⁶⁶⁶ Alkhabaz, S. (1971). *A half-century of history of the trade union movement in Iraq*, p. 47.

⁶⁶⁷ Ibid.

Following the ratification of significant numbers of ILO conventions by Iraq and the growth gained in the industrial and agricultural sectors, as well as the increase of workers in the petrol production, the need for a new labour code to protect labour forces became an urgent issue.⁶⁶⁸ Despite the major growth in various sectors to operate workers in different fields and the necessity to improve the tenets and provisions of Labour Law No. 72 of 1936, the internal political tensions especially after World War II made Iraq unable to respond to the demand of the labour force.⁶⁶⁹ The situation continued till the year 1958 when the Iraqi government adopted a new Iraqi Labour Law No. 1 of 1958.

1.2. 2nd Iraqi Labour Code

The issuance of Labour Law No. 1 of 1958, was a notable step forward in dealing with cultural and economic developments in Iraq. It came to exist after the Iraqi government realized that keeping workers in bad livelihood conditions would not only harm the labour force but inevitably harms the industrialization movement and the entire economic growth in the future.⁶⁷⁰ Even though this law codified many worker's rights especially rights related to wages, work hours, and work conditions, it did not regulate termination of employment contract in an appropriate approach. The law allocated the ninth chapter of employment termination and treated that issue in a very defective way. It had given the right to terminate permanent contracts by both parties; employer and worker only by providing one week's notice.⁶⁷¹ No article in this law requires the need for a valid reason to terminate the contract. The only requirement is giving notice, meaning the employer can fire the worker without providing a valid reason at any time. The law, therefore, had not provided any security for workers and had not given any consideration to unequal of bargaining power between the employer and the employee in the employment contract.⁶⁷²

⁶⁶⁸ Abid, & Elyas, op. cit., p. 10-23.

⁶⁶⁹ Ibid.

⁶⁷⁰ Ibrahim, A. (1976). *New Labour Law Interpretation: Individual work relationships regulation*. Part one, Baghdad, p. 11.

⁶⁷¹ Iraqi Labour Code, No. 1 of 1958. Art. 95. (Repealed)

⁶⁷² Unequal of bargaining power is one of the legal argumentations in which the imposition of restrictions on the employer's authority and providing security of workers are justified as discussed in chapter one.

1.3. 3rd Iraqi Labour Code

After the Iraqi revolution on July 14, 1958, against the Monarchy system and the foundation of the Iraqi Republic, a new Iraqi labour code soon promulgated.⁶⁷³ One year later, this law also has been substituted by Labour Code No. 1 of 1959. However, these two codes did not provide major amendments regarding the termination of employment and protection against unfair dismissal. Workers remained a vulnerable group and deprived of job security, the fact that made workers suffering from the increase of being fired arbitrarily day by day.⁶⁷⁴ The government realized the risks of that matter and passed Amendment No. 53 of 1963 to deal with termination of employment through the new provisions. This amendment was the commencement of providing protection against unfair termination of employment in Iraq. As it is written in the motivating reasons, the phenomenon of unfair termination that made workers feel instability in their livelihood, and that made the Iraqi labour market unable to provide a productive environment for qualified workers, are the main reasons beyond this amendment.⁶⁷⁵

The Amendment No. 53 vested the case of employment termination to a special committee belong to government and required a prior approval for such a committee to dismiss workers.⁶⁷⁶ Any employer willing to dismiss a worker had to submit the case to the governmental committee for consent, unless if the worker is under probationary period or had done a gross misconduct.⁶⁷⁷ The committee shall investigate the request of the employer to dismiss a worker or a group of them considering the compelling reasons for such a request and provide its decision either to accept the request or reject if there is no a valid reason for the case.⁶⁷⁸ The amendment also acknowledged the right of union membership of workers and to participate in the union activities, as well as prohibited the committee to accept dismissing any worker for such reasons.⁶⁷⁹ Though Amendment No. 53 provided a high degree of protection to workers, it had major defectives from three angles. Firstly, it deprived the employer of his/her managerial prerogatives that shall extend to dismiss

⁶⁷³ Iraqi Labour Code, No. 82 of 1958. (Repealed)

⁶⁷⁴ Alaabid, A., Elyas, Y. (2009), p. 10-23 (previously cited)

⁶⁷⁵ Labour Code Amendment, No. 53 of 1963. Last part, Issuance reasons.

⁶⁷⁶ The committee was named Termination Employment Committee, consisted of five members: a judge from Ministry of Justice acting as a head of the committee; a member from Ministry of Labour and Social Affairs; a member from Ministry of Interior; a representative of workers selected by the labour union; and a member to represent employers selected by the employer's union. Ibid, Art. 2

⁶⁷⁷ Ibid., Art. 3 & Issuance reasons, Sec. 1.

⁶⁷⁸ Ibid., Art. 6.

⁶⁷⁹ Ibid., Art. 19.

unqualified workers without the consent of the third party. Such managerial prerogatives are an indispensable tool to carry out the function of enterprises consistently. The deprivation of these prerogatives, therefore, is an undue restriction that leads to deactivate labour market. The function of law in this regard is not to deprive the employer of his/her prerogatives that necessarily adopted to manage his/her business but is to restrict and regulate them instead. Secondly, the amendment mandated the committee to accept terminating or firing a worker only if there is a valid reason, this is a positive focal point. But the loophole is it had not given any clarification on valid reasons. What constitutes a valid reason had been left for the discretion of the committee without any guidelines, such as the guidelines provided in the international standards to consider a reason as valid only if it relates to the worker's suitability, bad behavior, or the operational requirement of enterprises. Thirdly, the amendment empowered the employer to dismiss a worker without referring to the committee if the latter commits gross misconduct. This is also a meaningful and positive point in the perspective of flexibility to manage enterprises. Nevertheless, it had not determined what gross misconduct is and not provided any standards to separate it from minor misconduct. This may lead to an abusive practice by the employer since there is no limitation on such authority.

After the military coup on July 17, 1968, the Arab Socialist Ba'ath Party took the power in Iraq, and soon they promulgated a new labour code No. 151 of 1970 to repeal the previous Iraqi labour code and amendments. In the reasoning for the issuance of the new labour code, the Ba'ath Party proclaimed the necessity of Iraqi labour law renewal in order to render it to a law compatible with the new government tendency as being a socialist government.⁶⁸⁰ The Baathists also declared that the current labour code is incompatible with the international obligations of Iraq as being a ratifying country on approximately forty international labour conventions.⁶⁸¹ These were incentives and realistic points to enact a new labour law reflecting the political, social, and economic progress in Iraq.⁶⁸²

Iraqi Labour Code No. 151 expanded the degree of protection provided to workers in a way that included every type of worker and narrowed down the scope of fixed-term contracts especially

⁶⁸⁰ Iraqi Labour Code, No. 151 of 1970. Appendix, para. 1. (Repealed)

⁶⁸¹ Ibid., para. 3.

⁶⁸² Ibid.

in jobs that have permanent nature.⁶⁸³ It also developed the social security of workers, including severance allowance, and insurance provided for workers in case of illness, work injuries, or disability.⁶⁸⁴ Under this law, an effective role was provided to labour unions and collective bargaining to protect and achieve the social goals of workers.⁶⁸⁵ Regarding the termination of employment at the initiative of the employer, the law did not provide major amendments since the case of terminating workers remained within the authority of a governmental committee upon the request of the employer.⁶⁸⁶ The request should be accompanied by necessary documents justifying termination, otherwise, the committee should reject the request.⁶⁸⁷ Any termination that took place by the employer without the consent of the committee shall consider null and void.⁶⁸⁸ However, Labour Code No. 151, had given an exception to dismiss a worker at the initiative of the employer without referring to the committee. The exception is the case under which a worker is accused of committing gross misconduct.⁶⁸⁹ But, what constitutes gross misconduct was not an abandoned issue for the employer's discretion, it rather determined by the code in specific cases.⁶⁹⁰

In 1982, the Termination of Employment Convention No. 158 and Termination of Employment Recommendation No. 166 to standardize the requirement of employment termination passed by ILO. Although Iraq was not a member, the convention and recommendation had an indirect impact on Iraqi labour law to take a step forward towards international standards. The impact was reflected in the issuance of the new Labour Code No. 71 of 1987 that repealed Labour Code No. 151 of 1970. The Iraqi government realized that Code No. 151 is not any more satisfactory law for the upcoming stage and justified the issuance of the new Labour Code No. 71 to make a balance between the interest of the workers on one hand, and the interest of the employers on the other hand.⁶⁹¹ Thus, it was expected to bring a degree of flexibility along with the protection provided to workers.

⁶⁸³ Ibid., para. 8 & 9.

⁶⁸⁴ Ibid., para. 9.

⁶⁸⁵ This code had given the most articles related to labour unions; the foundation of labour unions, goals of the unions, authorities of unions, and how to affiliate to them. Articles 196 - 243 were devoted to provisions regarding labour unions.

⁶⁸⁶ Ibid., Art. 26 (d).

⁶⁸⁷ Ibid., Art. 42 (1).

⁶⁸⁸ Ibid., Art. 30 (d).

⁶⁸⁹ Ibid., Art. 34.

⁶⁹⁰ Ibid.

⁶⁹¹ Iraqi Labour Code, No. 71 of 1987. Issuance reasons, para. 1.

Regarding the termination of employment, Labour Code No. 71 abolished the termination employment committee belong to the government was established by the previous labour laws to decide upon the termination cases. In addition, the code expanded the managerial prerogative of the employer to a level that includes the right of terminating a worker from his/her job without referring to a third party, but subject to an appeal before the court instead.⁶⁹² Notwithstanding, the code was not successful to deal with termination of employment provisions. Like the previous Iraqi labour laws, it had many defectives and legal loopholes that can be realized at the first glance. According to that law, the worker was not able to terminate a fixed-term contract even with giving notice.⁶⁹³ A fixed-term contract could only be terminated with the expiration of its period.⁶⁹⁴ Moreover, the provisions to regulate terminating permanent contracts had more defective than the provisions of fixed-term contracts. The employer had been given the right to terminate employment contract only in two situations; first was related to the termination based on the operational requirements of an enterprise, and second was related to dismissal as a right to punish a worker who commits gross misconduct.⁶⁹⁵ Regardless of the two previous cases, the employer had no right to terminate a permanent contract for reasons related to the worker's capacity or misconduct to a degree lower than the gross misconduct, such as disobedience of the reasonable and lawful orders, or the breach of contractual obligations.⁶⁹⁶ The latter cases were not enough reasons to terminate a permanent contract by the employer even with giving notice.⁶⁹⁷ Another defective side was related to the employment termination based on the operational requirements of enterprises. The law had given the right to the employer to downsize an enterprise or to shut down it, and consequently to dismiss a worker or group of workers without giving a notice period.⁶⁹⁸ Terminating of employment, in that case, will bring a surprise for workers since the termination can be done without giving notice. Furthermore, the law did not require the approval of competent authorities upon the action of downsizing or closing an undertaking.⁶⁹⁹ The

⁶⁹² Ibid., Art. 139

⁶⁹³ Elyas, Y. (1989). *A brief interpretation of Labour Code No. 71 of 1987*. Administrative institute – Rasafa, p. 127.

⁶⁹⁴ Ibid.

⁶⁹⁵ Labour Code, No. 71 of 1987. Art. 36 (6), 39, & 127.

⁶⁹⁶ Elyas, op. cit., p. 118.

⁶⁹⁷ No article in Labour Code No. 71 stated on giving notice as a prerequisite for employment termination, except Art. 36 (3) that had given the right of the worker to terminate only a permanent contract with a notice period for at least one month.

⁶⁹⁸ Ibid., Art. 36 (6) & 39.

⁶⁹⁹ The only requirement provided in that law for a case of downsizing or an entire close of an undertaking was to notify by the labour minister. Ibid, Art 39.

termination of employment contract, thereby, in the two mentioned cases was subjected to the discretion of the employer as long as the law had not suspended the validity of the decision on the fulfillment of procedural and substantial conditions.⁷⁰⁰ Having no requirement to get approval pursuant to such conditions may pave a way for the employer to dismiss a group of workers, alleging the need for his/her enterprise to get downsized avoiding unfair termination claims.

With major loopholes in Labour Code No. 71 of 1987 as pointed out before, the enforcement of this law prolonged even to after the collapse of the Ba'ath regime in 2003. The collapse of the Ba'ath regime was the outset of Iraqi legislation's amendment in all aspects as an inevitable need following the collapse of the Iraqi dictatorial regime and the foundation of a new Iraqi government based on the respect of human rights principles. The efforts have been commenced from the Constitutional law and a new Iraqi Constitution came into force in 2005.⁷⁰¹ The new Iraqi Constitution brought significant changes in the ideology of the government, since then the socialist ideology as a governmental approach has been repealed.⁷⁰² Regarding labour and laborers, the new Iraqi Constitution provides the right to work, and the regulation of the relationship between employers and workers based on the modern economic trends considering the social justice principles, as well as the right of union establishment.⁷⁰³ Subsequent to the promulgation of the new constitution, many laws in Iraq have been amended rapidly. However, the complicated political situation in Iraq did not give an opportunity to amend Iraqi labour law till 2015 when the elaboration of a new law initiated.⁷⁰⁴ In the same year, Labour Code N. 71 of 1987 substituted by the new Labour Code No. 37 of 2015.⁷⁰⁵ The latter law brought significant amendments, in particular, related to the termination of employment contract and the way to deal

⁷⁰⁰ Elyas, Y. (1980). *Iraqi Labour Law*. Part one, p. 381-386.

⁷⁰¹ The new Iraqi Constitution passed by a referendum, held on October 15, 2005. After gaining the vote of the majority with yes, it was promulgated December 28, 2005, in the Official Gazette of Iraq. Morrow, J. (2005). Iraq's Constitutional Process II: An Opportunity Lost. United States Institute of Peace, Retrieved on March 17, 2021, from: <https://www.usip.org/sites/default/files/sr155.pdf>

⁷⁰² The system of government is a democratic, federal, representative, parliamentary republic. Iraqi Constitution of 2005. Art. 1

⁷⁰³ Ibid., Art. 22 (First, Second, & Third).

⁷⁰⁴ ILO. (2016). *ILO in Iraq: Iraq and Decent Work*. Retrieved on March 17, 2021 from:

https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_444514.pdf

⁷⁰⁵ Kurdistan Region as a recognized region by the Iraqi Constitution still implement Labour Code No. 71 of 1987, because the Legislative power belongs to Kurdistan Region have not passed the enforcement decision yet to bring the new Labour Code No. 37 of 2015 into force.

with unfair termination that would be taken into consideration in this study as the last amendments in that matter.

2. Recent Terms Against Unfair Termination

The recent Labour Code No. 37 of 2015 deals with termination of employment contracts in various articles. The provisions derived from the related articles are different in accordance with the type of the contract and the contractual party who is initiating to terminate the contract. Hence, to reach out to the provisions and terms of employment termination in Iraq, we concentrate on the termination rules in each indefinite term contract and fixed-term contract, as well as in contracts begin with probationary period. Moreover, we try to split the rule of termination once occurs based on mutual agreement of the employer and the worker as being different from the termination on the initiative of the employer or the worker.

2.1. Indefinite Term Contract Termination

A contract shall be deemed an indefinite contract if it is generated for an indefinite period, meaning the parties of the contract either agreed on the terms of the contract without stipulating any period, or they agreed that the period of the contract remains indefinite.⁷⁰⁶ It is also commonplace that a contract generated for a specific term, but then turns to an indefinite term contract. This will be the case when the agreed period of a contract comes to an end, but the contractual parties reticently continue their relationship or they make a new agreement to renew the contract for an indefinite time.⁷⁰⁷ Even if the renew of a fixed-term contract carried out for the same specific time period that determined in the original agreement, the contract turns to an indefinite term contract after a specific number of renewals.⁷⁰⁸

Iraqi Labour Code distinguished indefinite contracts from fixed-term contracts, prohibiting the latter in businesses that are continuous in nature, unless if the business requires additional workers for a specific period or specific task.⁷⁰⁹ Indefinite contracts, therefore, are usual contracts in permanent businesses or activities, and fixed-term contracts are exceptional contracts only for

⁷⁰⁶ Mahmood, S. J. (2007). *Unjustified termination of employment contract according to the Oman Labour Law*. Shtat for publication and software, Cairo, p. 80.

⁷⁰⁷ Yahya, A. (1989). *Labour Law Interpretation*. Arab Nahza House for publishing, Cairo, p. 303.

⁷⁰⁸ Ibid.

⁷⁰⁹ Iraqi Labour Code, No. 37 of 2015. Art. 38 (2).

a specific task or period. In addition, Article (38) Section (4) deemed a contract which is renewed for more than once an indefinite contract. Accordingly, indefinite contracts include contracts initiated in permanent jobs without considering time and contracts which are fixed for a definite period but then renewed more than once.

A contract, regardless of being indefinite by origin or by renewal, will not last forever and might be terminated. Since this type of contract does not depend on the time which means it will not come to an end after a specific period, its termination depends on the mutual agreement or the will of one of the parties.

2.1.1. Termination Based on the Will of the Parties (Mutual Agreement)

With a bilateral agreement, an indefinite contract can be terminated at any time. Article 43, Section (First/ e), providing the right of both parties to make an agreement for terminating their employment contract, stating that such contract can be terminated “if the parties agreed in writing to terminate the contract”.

The legal foundation of the termination based on the mutual agreement is rooted in the principle of “freedom of contract”.⁷¹⁰ As long as parties are free to form a contract, they are also free to terminate it. The agreement to terminate the contract, in this case, may achieve after the request of the employer and the acceptance of the worker. Or the scenario may initiate by the worker’s request to quit the contract and then accepted by the employer. The request of the worker to terminate the contract is the so-called request of “resignation”.⁷¹¹ It may not be easy to reach a mutual agreement especially when the request for termination has risks for one of the parties. To avoid or mitigate risks, the parties may negotiate before reaching an agreement. During the negotiation process, one of the parties may conditionally accept the termination, such as, a compensation request by the worker as a condition to accept the request of the employer to terminate the contract.⁷¹² Thus, a mutual agreement to terminate an indefinite contract may include new terms and conditions as being a new agreement after the formation of the contract.

⁷¹⁰ Honeyball, S. (2015). *Great Debates in Employment Law*. Macmillan International Higher Education, p. 127.

⁷¹¹ Shanb, L. (1976). *Labour Law Interpretation*. 3rd Edition, Cairo, p. 439.

⁷¹² Mahmood, op. cit., p. 267.

At first glance, mutual agreement is a presumption that the employment contract is not unfairly terminated since it has been done upon the will of both parties.⁷¹³ But the fact often can be different for the worker, considering his/her acceptance to terminate the contract might be expressed under the pressure of the employer. The prospect of the worker's will to be expressed under the threat or coercion of the employer is highly expected, especially if the termination targets the employer's interest.

To avoid unfair termination based on the above prospect, Article 43 (First/ e) stipulates that the agreement to terminate the contract must be in writing. Therefore, formality is a prerequisite for validity of a mutual agreement to terminate a contract. The importance of this formality is to demonstrate the actual common will of parties especially the worker when the debate takes place on whether the termination was rightly mutual.⁷¹⁴ The absence of this formality as stipulated by law renders termination to be void.⁷¹⁵ Accordingly, when a dispute arises between an employer and employee concerning the validity of the termination, the employer's allegation for having mutual agreement shall not be heard, and then the termination shall be considered unfairly done if the employer does not possess a written document.

2.1.2. Termination at the Initiative of the Worker

Apart from mutual agreement, an indefinite contract can be unilaterally terminated by the worker. The law retains the right of the worker to terminate a contract without the need of the employer's acceptance to enable the worker achieving a better position or better wage. Any provision contrary to that will lead to deprive workers from the chance to obtain a better livelihood through searching for new opportunities and compel them to continue their current job even with unsuitable circumstances. However, the law imposes some commitments on the worker who unilaterally initiates to terminate a contract since the unilateral termination of contract contains unwanted consequences for the employer.⁷¹⁶ For instance, the employer may lose a qualified and skilled

⁷¹³ The city the City Law School. (2018). *Employment Law in Practice*. Oxford University Press, p. 135.

⁷¹⁴ Article (26) in Iraqi Labour Code, No. (151) of 1970 (repealed) stipulated that the mutual agreement for termination of employment contract shall be authenticated by the worker before the trade union. This was an additional formality to ensure the actuality of the will of the worker.

⁷¹⁵ Elyas, 1989. Op. cit., p. 115.

⁷¹⁶ Shanb, op. cit., p. 393.

worker whose termination of his/her contract likely causes an impede in the normal flow of the employer's undertaking.

To mitigate unwanted consequences, Article 43, Section (First/ h), permits the worker to resign himself and unilaterally terminate the contract “on the condition to provide a notice (30) days at least before terminating the contract; if the worker leaves the job without providing a notice period or before the expiry of the period stipulated in the contract, the worker must pay compensation, which is equivalent to the amount of the notice period or the remaining of it, to the employer”. The notice shall be directed from the worker to the employer and provided in writing.⁷¹⁷ Oral notice or notice provided in a vague manner that is not explicitly express the wish to terminate the contract shall not be considered.⁷¹⁸

Once a worker provides notice, the contract will not come to an end instantly, it rather remains in force and obliges the parties during notice period. Nevertheless, the contract will be terminated spontaneously after the notice period without the need for any additional procedure.⁷¹⁹

The violation of the notice procedure and its period as stipulated by law renders the termination to be described as an unfair termination. Such as, if a worker leaves the job without providing notice to the employer or if s/he provides a notice but leaves the job before the completion of 30 days.⁷²⁰ In such cases, the worker who violated the requirement of providing notice is obliged to “pay compensation, which is equivalent to the amount of the notice period or the remaining of it to the employer”⁷²¹ as a remedy for unfair termination.

Despite stipulation of notice, a worker can unilaterally terminate a contract without being committed to provide an advance notice in the following cases:

- a) “If the employer breaches one of his/her commitments set forth in the law, labour internal regulations, an individual or collective employment contract”.⁷²²

⁷¹⁷ Al-Harbi, N. (2014). *The Option of the Employer to Terminate an Individual Employment Contract*. Middle East University, p. 31.

⁷¹⁸ Ibid.

⁷¹⁹ Elyas, op. cit., p. 116.

⁷²⁰ Ibid.

⁷²¹ Iraqi Labour Code, No. 37 of 2015. Art. 43, Sec. (First - 8).

⁷²² Ibid., Art. 49, Sec. (First - 1).

What is worth noting is the word of ‘commitment’ in the text is not described as being substantial commitment and the ‘breach’ of such commitment is not conditioned to be gross. A breach of the commitment by the employer in any type or at any level is enough to release the worker from the duty to provide notice for terminating a contract.

- b) “If the employer commits a felony or misdemeanor against the worker or one of the members of his/her family either during or outside working hours”.⁷²³

It is clear from the text, the assault that permits the worker to terminate the contract must be in the type of felony or misdemeanor. Accordingly, an employer’s infraction against those mentioned in the text does not authorize the worker to terminate a contract without providing notice. However, the law does not specify a certain type of felony or misdemeanor for implementation of the text. Any type of felony or misdemeanor can be a ground for that purpose without the need to affiliate the felony or misdemeanor to a certain group of crimes as those described with dishonorable crimes.

- c) “If there is a serious danger threatening the safety or health of the worker, on the condition that the employer is aware of the existence of the danger and has not taken any action to eliminate it”⁷²⁴.

The ‘serious danger’ as presented in the context shall be imminent to harm the safety or the health of the worker. In contrast, circumstances which entail a danger in a degree that does not reach to be described as serious do not justify termination of employment contract based on the permission of the article. Even a danger solely is not enough to implement the rule of the text if it does not constitute a threat for the worker, or if the danger is truly serious but the employer is not aware of such a circumstance. Therefore, a worker is impliedly required to inform the employer of having such a circumstance, if the employer neglect despite the informing him, the worker has the right to terminate the contract without an advance notice.

⁷²³ Ibid., at Art. 49, Sec. (First - 2).

⁷²⁴ Ibid., Art. 49, Sec. (First - 3).

2.1.3. Termination at the Initiative of the Employer

Keeping in mind that employment termination at the initiative of the employer is more likely to accompany expected damages for the worker including monetary loss, the law requires stringent rules for such termination.⁷²⁵ To protect the worker from risks, thereby, Iraqi labour law limits the will of the employer to terminate an indefinite contract and inhibit termination at the initiative of the employer unless if there is a valid reason justifying that.⁷²⁶ This shall not be understood that an employer is exempted from providing notice if he has a valid reason to terminate a contract. A 30 days' notice is also required before the termination by the employer.⁷²⁷ Therefore, the major difference between termination at the initiative of the employer and the worker is that the latter can resign himself even for no reason as clarified before, while the former merely can do if there is a valid reason. And the common requirement is providing 30 days' notice to the party whose contract will be terminated.

The prospect of unfair termination is very high if the employer is absolutely empowered to terminate employment contract whenever he wants. The law curbs this probability through considering the termination is lawful only if it depends on a valid reason. Iraqi labour law summarized valid reasons for that purpose, and devoted Articles (43, 141, & 143) dealing with that issue. Thus, a reason to justify a unilateral termination by the employer shall be embodied in one of the following cases.

2.1.3.1. Termination for Reasons Related to the Conduct of the Worker.

Article (43), Section (Second/ e, f, & h), permit the employer to unilaterally terminate an employment contract in the following cases:

- 1) "When the worker carrying out behavior that breaches his/her duties set forth in the employment contract.
- 2) If the worker pretends a false personality or presents forged documents.

⁷²⁵ Kera, H. (1983). *Labour Law Basics: Contract of Employment*. Ma'arf publishing, Alexandria, p. 754.

⁷²⁶ Iraqi Labour Code does not contain an explicit text requiring a valid reason for termination at the initiative of the employer. However, this provision can be derived implicitly from the texts that allow the employer to terminate employment contract merely in specific cases.

⁷²⁷ Labour Code, No. 37 of 2015. Art. 44.

- 3) If the worker, based on a final decision of the court, has engaged in serious wrongdoing, and causes exorbitant damages to the business, workers, or production”.

The three above cases include misconduct of the worker either based on the violation of contractual commitments or committing illegal acts and wrongdoing. Accordingly, the worker’s misconduct leading to legitimize termination of his/her contract takes two forms; first is a refrain of performing a duty imposed by the contract, and second is carrying out an action which is legally prohibited.

It does not matter whether the breach of the duties set forth in the contract is fundamental or minor breach. A breach at any level is enough to be described as misconduct whenever the duty is stipulated in the contract and the worker has failed to fulfill it because of a reason refers to him. If the breach or failure to fulfill duties of a contract caused by “force majeure”⁷²⁸ or any other reasons that the worker has not contributed in, it cannot be classified as a worker’s misconduct.

A worker’s “illegal acts or wrongdoing”⁷²⁹ also justify terminating an employment contract as described in the second and third cases without the need to mention such prohibited acts in the contract as long as they are prohibited by law. However, not every illegal act gives ground for employment termination, as the second case merely deemed an act that entails pretending a fake personality or submitting forged documents is the case that poses the worker’s misconduct and empowers the employer to terminate the contract. For wrongdoing, moreover, it should be proved in accordance with a final decision of the court, stating the act that immensely harms an employer’s business, workers, or production is serious wrongdoing.

A question arises is whether illegal acts or wrongdoings constituting the worker’s misconduct are exclusively introduced for the purpose of termination. Or the list is not a closed list, it rather encompasses every illegal act or wrongdoing in nature. In this regard, Article (143/ First), provides that “the employment contract of any worker may not be terminated as a result of an error he committed unless otherwise specified in the provisions of this law, except if this error

⁷²⁸ Art. (43 / First), Sec. (9), considers an employment contract comes to an end automatically in case of force majeure.

⁷²⁹ Illegal acts or wrongdoing can be the two terms for the same meaning in general. However, in legal terminology, the two terms can be used for different concepts. Illegal acts often refer to crimes that punishable by law. While wrongdoing, especially in common law jurisdiction, is an underlying concept of a civil wrong that harms a claimant and makes him worthy of money damages resulting from tortious. In the mentioned article above, the Iraqi Labour Code has taken this conceptual meaning into consideration between illegal acts and wrongdoing, stipulating for the latter to be proven by a final decision of the court if it is used as a justification of employment termination.

is repeated once or several times, and the employer had already warned the worker in writing in this regard, subject to the provisions of Article (43/ Second) of this law”.⁷³⁰ From this article, it is clear that the list of illegal acts and wrongdoing constituting the worker’s misconduct is not a closed list. Any error of a worker including an illegal act or wrongdoing may constitute a reason for terminating a worker’s employment on the two conditions. First, the worker’s error should be repeated at least once, meaning the error does not legitimize employment termination for the first time. Second, a written warning explaining the error and the result of repeating such error shall be directed to the worker by the employer before the termination decision takes place. Nevertheless, the above conditions are not prerequisites for employment termination pursuant to misconduct articulated in Article (43/ Second).

It is worthy to point out that an employment termination based on bad behavior or misconduct does not refrain the worker from obtaining a notice period. The law still provided such right as provided in Article (44) stating “Upon the fulfillment of one of the cases provided in Article (43/ Second) of this law, the employer must give an advance notice in writing to the worker whose contract will be terminated; in case of not providing such a notice, the worker shall be entitled to compensation in lieu of notice; the notice period shall not be less than 30 days before the termination”.⁷³¹ Thereby, the prospect of unfair termination and the claim for remedy is foreseeable if an employer terminates the worker’s contract for reasons related to misconduct without giving notice. The remedy for such a case as provided in the above article is compensation equivalent to the required period of notice.

2.1.3.2. Termination for Reasons Related to the Worker’s Capacity.

One of the loopholes of the former Iraqi Labour Code No. (71) of 1987 was not containing an article empowering the employer to terminate an employment contract for reasons related to the bad performance of the worker. It only permits the employer to test the capacity of the worker and to terminate his/her contract if he has failed to show the skills required for a particular position

⁷³⁰ The Official Website of International Labour Organization (ILO). (2015). *Unofficial English Translation of Iraqi Labour Code, No. (37) of 2015*. Retrieved on May 20, 2021 from: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=96652

⁷³¹ The notice period stipulated in this article shall be deemed as a minimum notice period. Accordingly, no provision exists in Iraqi law preventing the employer to give notice more than 30 days based on a contractual agreement.

during a probationary period.⁷³² Unsatisfactory performance of a worker, therefore, does not constitute a valid reason for employment termination after the expiration of the probation.

To be compatible with international standards, the current Iraqi labour Code rectifying this tendency, permitting an employment termination based on the incapability or insufficiency of the worker even after the expiration of the probationary period. In this regard, Article (143/ Second) provides that “A worker’s employment contract may not be terminated for unsatisfactory performance, unless the employer has given him necessary instructions in addition to a written warning, and the worker continues to perform his/her job in unsatisfactory manner for 30 days from the date of the warning”.⁷³³ This article has two folds: first, it exceptionally permits termination of employment as a result of unsatisfactory performance at work, considering the interest of employers to retain only qualified workers to protect the quality of their business; second, the permission is narrowly provided since it depends on the condition of the fulfillment of three criteria as obviously listed in the article. The legality of an employment termination in this case, therefore, depends on the fulfillment of the three criteria together; the employer’s obligation to provide necessary instructions, giving a warning in writing to provide a second chance for the warned worker, and the worker’s continuance of performing duties in unsatisfactory form. The default of the application of the listed criteria or one of them renders the employment termination to be illegal decision and raises the claim for unfair termination.

Despite the development that the Iraqi Labour Code obtained in this regard, the article that provided such exceptional permission for employment termination still has a defect and deserved to be criticized. The article does not require a reasonable notice period to notify the worker before termination of an employment contract resulting from unsatisfactory performance. This attitude can be criticized from the perspective of flexicurity, a policy that always try to provide a balance between the interests of the employer and the worker as well. If the interest of the employers and enterprises compel the necessity to terminate unqualified worker, the interest of the latter, from

⁷³² Article (31) provides “it is permissible, as long as stipulated in the employment contract, to subject a worker to a trial period no more than 3 months in maximum for the purpose of testing his/her occupational qualifications, good conduct and suitability at work”. A worker’s contract, in contrast, may be terminated if he has failed to pass the suitability test during probation.

⁷³³ This article inspired by Termination of Employment Recommendation, 1982 (No. 166), II. Standards of General Application, para. 8, provides that “the employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his/her duties unsatisfactorily after a reasonable period of time for improvement has elapsed”.

the other side, also compels the need of a reasonable notice period for such termination. The Iraqi legislator, perhaps, considers giving a written warning mentioned in the article as a notice period. What support this prospectively is that the article provides 30 days after the date of the warning as a second chance of the worker, after that the employer has the right to terminate the contract if the worker continuously performs his/her duties at the same previous level. If so, we can criticize this perspective based on the difference between the nature of notice period and a written warning to improve the workers performance, considering the purpose of the latter is to remain the contract in force if the worker rectifies his performance towards progress, while the purpose of the former is to inform the worker about the ending of the contract avoiding him from shocked consequences. It can be said that a worker is not sure whether his/her contract will be remained in force after gaining a warning in writing to improve his/her performance otherwise his/her contract will be terminated. The employer, thus, shall give a notice if he is not satisfied from the worker's performance after the 30 days from the date of warning, confirming to the worker about the termination of his/her contract in a specific day instead of an immediate termination.

2.1.3.3. Termination for Reasons Related to Operational Requirements.

Operational requirements, as reached out before, refer to the factors that set the need of an employer's enterprise including economical, technological, structural, or similar factors.⁷³⁴ As such factors play a great role in the size and dimension of the business, they play the same role in the need or the rid to the workforce. An employer, due to an economic recession or downturn in products, can be compelled to bring the employment relationship to an end.⁷³⁵ An employment termination for operational requirements, therefore, is never related to the fault of the worker. Rather, it related to the shrink of enterprises, which is not classified under unfair termination categories.

Iraqi Labour Code has taken the notion of operational requirements into consideration to rationalize termination of an employment relationship and to classify such termination as not a faulty termination. Article (43), Section (Second/ d), empowers the employer to terminate the employment relationship "if the working condition in an enterprise poses the necessity of

⁷³⁴ Deakin, S., Lele, P., & Siems, M. (2007). *The evolution of labour law: Calibrating and comparing regulatory regimes*. International Labour Review, 146(3-4), 133-162.

⁷³⁵ Rammila, D. (2019). *Dismissal for Operational Requirements in South Africa: Redesigning the Current Legislative Framework for the Fourth Industrial Age*. University of Johannesburg (South Africa).

downsizing thereof, on the condition of the Labour Minister's consent. In addition, the same article in Section (3) limits the power of the employer to close, stop working, or liquidate an enterprise, unless after the acquisition of the minister's consent. This means that the article permits the employer to recourse to such termination that is based on operational requirements leading to downsize or entire close of the establishment after the minister's consent upon thereof. The downsize means that the enterprise remains in providing services or products but in a smaller size, while the closure or liquidation means the rid of enterprise completely.⁷³⁶ Consequently, a worker or a group of them will be affected in case of downsizing an enterprise, whereas the total workers will be affected in case of closure or liquidation.

An onward improvement related to this matter can be seen in Iraqi Labour Code since the Former Iraqi Code validates employment termination in case of downsizing or closure an establishment, only on the condition of notifying the labour minister,⁷³⁷ while the current law stipulates a consent instead. Indeed, the stipulation of the Labour Minister's consent rather than a mere notification will curb unfair termination of employment contract due to the procedures that can be taken by the minister to review the reasonability of the case before giving the consent. Such procedures cannot be taken to invalidate and repeal the termination decision of the employment relationship if the employer is not required to obtain a consent from a competent authority.

The Federal Cassation Court in Iraq confirmed on the validity of employment termination based on the operational requirements only after the consent stipulated in Article (43/ Second), further the court confirmed that doing so without such consent results in unfair termination of employment that entails compensation.⁷³⁸ In case No. (172) of 2016, a plaintiff claimed, before Basrah Labour Court, for unfair termination of his/her contract by a company since the latter recourse to terminate his/her contract on the grounds of downsizing its enterprises contrary to the provision of Article (43/ Second-d) that requires the consent of labour minister on such procedure.⁷³⁹ The court held in favor of the claimant against the company, stating that the company's decision to terminate the claimant's contract is unfair and illegal since the decision lacks the consent as stipulated by law, and analyzing the necessity of such consent to check the

⁷³⁶ Elyas, op. cit., p. 117.

⁷³⁷ Labour Code, No. (71) of 1987. Article (36), Sec. (6) & Art. (39).

⁷³⁸ Al-Tamimi, G. (2019). *Summary of Labour Judiciary Principles*. Legal library, Baghdad, p. 93.

⁷³⁹ Ibid.

reality of the situation under which enterprises can be downsized.⁷⁴⁰ Upon the appeal of the company in 2017, the Federal Cassation Court upheld the decision in the case confirming the procedures to terminate the claimant's contract contrary to the form as drawn by the aforementioned article renders the decision to be described as unfair termination of employment contract.⁷⁴¹

Notwithstanding, there is still a defect in the current Iraqi Labour Code regulating this issue. This defect can be simply seen in notice that shall be giving to the worker whose contract will be terminated in a situation causes downsizing or closure an establishment. Article (44), as mentioned before, stipulates a 30 days' notice period exclusively for the cases set forth in Article (43/ Second). Since Article (43/ Second) includes the case of downsizing an enterprise and excludes the case of closure or liquidate, the 30 days' notice period, therefore, is only required for downsizing an enterprise. The case of closure or liquidation of an enterprise is regulated in accordance with Article (43/ Third), meaning that the employment termination based on the last-mentioned cases is not eligible for the rule of Article (44) requiring notice period.

Undoubtedly, the attitude of the Iraqi legislator to deal with employment termination in case of downsizing an enterprise differently from termination in case of closure or liquidation of an enterprise, requiring notice period only in the first case, is not rational. This because that employment termination in both presented cases is a surprising action for workers and it is not reasonable to provide sufficient time for finding a comparable job only in the first case, while such a chance deprived in the second case. To rectify this attitude, Article (44) should be modified in terms of the application of its rule to encompass the necessity of notice period in case of closure or liquidation of the establishment as it is in case of downsizing thereof.

2.1.3.4. Dismissal⁷⁴²

Dismissal is a disciplinary termination of the employment relationship due to a misconduct mandating an immediate expel from the job.⁷⁴³ In some jurisdictions, a misconduct to justify

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid., p. 94.

⁷⁴² The difference between this subchapter and subchapter No. 2.1.3.1. is that the first one coined in the context of "summary dismissal" in reaction for a "gross misconduct" and does not require giving notice, while the latter is to dismiss an employee who commits a misconduct but not gross in gravity and still needs to giving notice.

⁷⁴³ The term of "dismissal" has variously used in international and internal legal documents, as well as in treatises. In general, dismissal is a synonym of termination of employment as a civil action taken by the employer and force

dismissal shall be gross, otherwise, a misconduct in a lower degree, in terms of gravity, only causes a regular termination that requires notice.⁷⁴⁴ This is a tendency inspired by international standards, classifying misconduct between two major types; the one that is more dangerous in nature is classified as “serious misconduct” or “gross misconduct” results in dismissal without giving notice, and the rest with less serious is classified just as a misconduct that may cause dismissal with notice.⁷⁴⁵ A dismissal that taken to capture a serious misconduct is called a “summary dismissal” a term to describe an instant discharge of the worker in a situation under which giving notice is not reasonable.⁷⁴⁶ From this angle, the Iraqi Labour Code deals with dismissal as a sanction to react a “serious misconduct” without the need of giving notice.⁷⁴⁷ It regulates the provisions of dismissal in the chapter on disciplinary sanctions and deems such sanction the last and most stringent sanction that could be imposed on a worker who commits a misconduct which is serious in nature. Dismissal, thus, is a type of employment termination with the most unwanted consequences of the worker.

Article (141) provides that “A dismissal penalty may not be imposed on a worker, unless in the following cases:

- (1) when the worker commits a serious infraction that results in serious material damage to the employer
- (2) when the worker has disclosed a professional secret that results in serious damage to the employer based on proven evidence

the worker to leave his/her position. Such action can be taken by the employer for a variety of grounds that encompasses misconduct, incapacity of the worker, and reasons that compel the employer to dismiss the worker as an operational requirement. In this sense, the term of dismissal is very broadly used as an exact meaning of termination of the employment relationship without the differentiation between the act being a procedure to respond to the operational requirement and the act as being a disciplinary action to react to misconduct of a worker. In an accurate meaning, dismissal is a type of termination of employment that merely used for a case when a worker is being fired from a job for misconduct which is not tolerated at the workplace and deserves an immediate leave as a disciplinary punishment.

⁷⁴⁴ ILO, 1995, op. cit., para. 91.

⁷⁴⁵ C158, op. cit., Art. 11 stating that “A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his/her employment during the notice period.”

⁷⁴⁶ Juras, D., & Curic, I. E. (2018). *Employment contract's summary dismissal in law of Republic of Croatia*. Union UL Sch. Rev., 9, 293.

- (3) when the worker violates instructions respecting occupational health and safety; in case of the repeating such act, the employer shall send a notification in writing to terminate the contract without giving notice period
- (4) when the worker has been on more than one occasion during working hours in a state of obvious drunkenness or under the influence of drugs proved by a report from a competent doctor, despite being warned more than once of this behavior
- (5) when the worker, on more than one occasion, has engaged in a conduct which is not compatible with the work ethics, while he had been previously warned of this behavior
- (6) when the worker has physically attacked the employer, one of his/her bosses, or his/her colleagues at work regardless of being the attack occurred during work hours or not
- (7) when the worker has been absent in the workplace without justification for 10 consecutive days, or for 30 non-consecutive days each year
- (8) when the worker commits a misdemeanor or a felony against one of his/her colleagues at work and has been found guilty by a final decision of the court
- (9) when the worker has been sentenced, through a verdict decision of the court, to imprisonment for a period of more than one year”.⁷⁴⁸

Taking, the serious consequences of dismissal as a sanction that deprives the worker even from notice period, into consideration, the Iraqi Labour Code exclusively determines cases punishable by dismissal. The context of Article (141) is clear to inhibit dismissal unless in the cases mentioned before, meaning the list to include cases that permit dismissal is a closed list. Thereby, Article (141) constitutes an exclusive list of acts described as “serious misconduct” by the legislator, separating from the other types of misconduct not classified in this article. Any act not mentioned in the above cases shall not justify dismissal. However, if an act even not included in the list but described as misconduct in nature, it may cause termination of employment with notice on the condition the fulfillment of requirements in Article (143) and considering Article (43/ Second). To that end, the Federal Cassation Court in Iraq refused an appeal brought by a claimant whose contract has been terminated by a company on the ground of negligence in performing duties that caused losing several documents in the company and facilitated a forgery process in some other documents.⁷⁴⁹ Though the act of negligence is not classified as a ground for

⁷⁴⁸ ILO, 2015, op. cit.

⁷⁴⁹ Civil Body. Decision No. 308/2019.

dismissal, the court found that the termination decision is a rightful application of Article (43/ Second - e), validating an employment termination whenever a worker's conduct breaches his/her contractual duties.⁷⁵⁰

As long as dismissal does not require notice period in Iraqi law, the claim for unfair termination on the ground of not giving notice is not heard by the court. Such a claim, rather, may depend on the case itself, whether it is an included case by Article (141) or not. Whenever the worker has successfully proved that the case under which he got fired is not listed in the legislative list provided as grounds for dismissal, he may then claim for unfair termination if he has not been given notice pursuant to Articles (43/ Second) and (143).

2.2. Fixed-Term Contract Termination

An employment contract can be fixed for a period of time to carry out a specific job or service related to an undertaking in which the date of its termination is known or foreseen, and this date is decided in the contract.⁷⁵¹ To make it more simple, it can be defined as a contract that lasts for a period determined upon a mutual agreement and ends automatically after that period.⁷⁵² Therefore, the period is a crucial element in fixed-term contracts. Such period, in Iraqi Labour Code, shall not exceed one year⁷⁵³ and may be renewed once only.⁷⁵⁴

A general application of freedom of contract mandates both parties; the employer and employee, to determine the type of contract as fixed-term contract or indefinite term contract.⁷⁵⁵ Nonetheless, Iraqi law restricts the contractual freedom in employment relationship and accepts indefinite term contract as the primary contract, as well as prohibits the recourse to fix any period of contract in some circumstances. Article (38/ Second) providing that "in activities which are permanent in nature, no time-limit may be fixed for the contract, unless the requirements of the work imply calling upon additional workers for a fixed period and for the performance of specific work." The aim of this restriction is to ensure the worker's right to security and to prevent the employer from an underlying unfair termination on the ground of the expiration date of contract.

⁷⁵⁰ Ibid.

⁷⁵¹ Seham, N. (2016). *Fixed-Term Contract of Employment*. A master thesis submitted to Ebn-Bades University, p. 4

⁷⁵² Ibid., p. 5.

⁷⁵³ Labour Code, No. (37) of 2015. Art. (38/ First).

⁷⁵⁴ Ibid., Art. (38/ Forth).

⁷⁵⁵ Craig, C. E. (2012). *Basic Labour and Employment Law for Paralegals*. Wolters Kluwer, p. 13.

If a period fixed ‘in activities which are permanent in nature’ the contract shall be deemed as indefinite term contract considering such fixation void and null, and thereby, a claim for unfair termination arises in case of termination after that period.

A fixed-term contract will automatically come to an end after the expiration of its period without the need for a further procedure. This is a particular way to terminate fixed-term contracts only. Article (43/ First - f) confirms an automatic termination of fixed-term contracts after the expiration of its period. The article does not require notice period for such termination since the reason to rationalize giving notice is not achieved in this case. If the moment of termination is knowable or at least predictable, there is no surprising element that needs to be removed through notice.⁷⁵⁶ Notwithstanding, nothing prevents an agreement of both parties stipulating giving notice by the party who does not intend renew the contract prior to the expiration date.⁷⁵⁷ With presence of this agreement, the notice period is not a mandatory obligation according to law, but according to a contractual agreement instead.

The lawfulness of automatic termination in fixed-term contracts inhibits the worker to claim unfair termination if the employer does not renew the contract after the last date determined for the validity of contract. This statement supported by a judgment provided in a case brought to Baghdad Labour Court and then upheld by Federal Cassation Court.⁷⁵⁸ The case initiated by the worker’s claim for unfair termination after terminating his/her contract, which was signed only for one year service in a security company, and the employer has not renewed the contract after the expiration date.⁷⁵⁹ The court dismissed the claim, reasoning that the contract has been terminated not because of an employer’s fault, but it was a normal result of a fixed-term contract in which the period smoothly has come to an end.⁷⁶⁰

Aside from an automatic termination, a fixed-term contract might be terminated based on the same grounds under which an indefinite contract might be terminated as explained before.⁷⁶¹ Hence, a fixed-term contract can be terminated on a mutual agreement in writing. It can be also

⁷⁵⁶ Ghanm, E. (1961). *Labour Law*. Cairo publishing, p. 441.

⁷⁵⁷ Antoine, R. M. B. (2000). *Termination of Employment Digest*. International Labour Organization, p. 242.

⁷⁵⁸ Al-Tamimi, op. cit., p. 73.

⁷⁵⁹ Ibid.

⁷⁶⁰ Ibid., p. 74.

⁷⁶¹ Elyas, 1989, op. cit., p. 126.

terminated at the initiative of the employer for reasons related to the worker's incapacity or misconduct, or reasons refer to the operational requirements.⁷⁶²

What makes difference between indefinite term contracts and fixed-term contracts regarding termination is the permissibility of early termination of the latter by the worker. The right of the worker to early termination in indefinite term contracts with notice is indisputable. Such right even without notice is accessible in cases under which the employer's breach of his/her duties or misconduct is proven.⁷⁶³ What remains to be answered is whether the worker is entitled to early termination with reasonable notice in fixed-term contracts. Early termination means the possibility to terminate a contract before the period fixed for the contract comes to an end and without the occurrence of a reason justifying that. This is the so-called 'resignation' of the worker in his/her current job.

For the above-presented case, there are two different tendencies. The first trend tends to illegality of termination in such a case considering the contractual obligation of both parties, as this obligation established for a specific period that should not be violated or terminated within that period.⁷⁶⁴ Since the period has taken into consideration in a fixed-term contract, none of the parties may recourse to early termination.⁷⁶⁵ According to this view, early termination is definitely in contrast with the nature of fixed-term contracts. In case of such termination, therefore, the employer shall be compensated by the worker who breaches the contractual obligation. This tendency is upheld by the number of countries' labour laws.⁷⁶⁶

In contrast, the second view tends to legalize the right of the worker to early termination in fixed-term contracts with reasonable notice, arguing the reasonability of this termination to allow the worker to quit his/her job once he finds a better position.⁷⁶⁷ The worker, according to that view,

⁷⁶² likewise indefinite term contracts, fixed-term contracts may not be terminated at the initiative of the employer without a valid reason justifying termination.

⁷⁶³ Article (49/ First) provides all the cases that allow the worker to terminate employment relationship without notice as pointed out before in provisions of indefinite term contract termination. The rule of the article is general regarding the types of contracts, meaning that the application of this article encompasses indefinite term and fixed-term contracts.

⁷⁶⁴ Mahmood, op. cit., p. 68.

⁷⁶⁵ Ibid.

⁷⁶⁶ Egyptian Labour Code, No. (12) of 2003. Article (104); Kuwait Labour Code, No. (6) of 2010. Art. (47); Oman Labour Code, No. (34) of 2003. Art. (41); Hungarian Labour Code, Act I of 2012. Sec. (67/2).

⁷⁶⁷ Seham, N. (2016), p. 13 (previously cited)

is not liable to provide indemnity since he is permitted to do so. This tendency has also been adopted by the number of countries' labour laws.⁷⁶⁸

Taking flexicurity into consideration, a balanced trend might be found between the two different approaches to establish the third tendency. It can be said, the worker is entitled to early termination in fixed-term contracts without being liable for compensation, unless if his/her termination of the contract damages the employer in clear instances.⁷⁶⁹ Accordingly, the worker's liability to compensate the employer arises merely upon the request of the latter, proving damages before the court. This entails the amount of compensation to be proportionate with damage. Failure to prove damage, thus, exempts the worker from being liable for monetary compensation. Our preference for this tendency depends on the fact that it considers and balances the interests of both parties.

The attitude of the Iraqi Labour Code in Article (43), Section (First/ h) is consistent with the first tendency. The article renders the worker to bear the responsibility of paying a compensation equivalent to the amount of the notice period or the remaining of it whenever the termination is done by the worker; either without giving notice or before the period as set in the contract comes to an end. The compensation is set in the article on the basis of the presumption that early termination often causes damage, and the worker cannot prove otherwise. In addition, the amount of the compensation has also been set not based on the proportion of damage, rather it is set as a fixed amount equivalent to the amount of 30 days' notice period or what has been remained in this amount.

Keeping what has been discussed as a balanced trend in mind, we strongly criticize the attitude of the Iraqi Labour Law to reorganize the right of the worker to resign himself even in fixed-term contracts without bearing monetary loss unless if the employer proves thereof.

⁷⁶⁸ As for example, Algeria Labour Code, No. (90-11) of 1990. Art. (68).

⁷⁶⁹ This is the trend of Bahrain Labour Law, No. (36) of 2012. Art. (112) stating "Without prejudice to any obligations specified by any other law, if the worker terminates the employment contract, he shall only be bound to compensate the employer in the following cases:

- (1) If termination occurs in a time not suitable to the work circumstances in such a way as the employer would be incapable to find a qualified replacement worker
- (2) If termination was intended to cause the employer damages
- (3) If termination caused the employer serious damage."

2.3. Probationary Contract Termination

Probation is a trial period to test a new employee for a particular position. It is commonplace for many employers to stipulate that the contract begins with probation based on a mutual agreement with the employee. During the probationary period, more flexible standards are given to review unfair termination. Notwithstanding, a degree of protection insofar as it safeguards employees from the risk of unfair termination shall be granted. As indicated earlier, the international conventions related to termination of employment contracts does not compel states to commit to any international standard for probationary employees. States, consequently, are free to deal with this subject based on their own rules and standards. In doing so, most states do not require stringent rules to terminate an employee who has been employed according to a contract which includes a probation clause.⁷⁷⁰ The stringent rules can be seen in the statutory laws for regular employees, such as, strict justification of termination, giving notice, and severance payment.⁷⁷¹ Such rules, which mostly do not exist for probationary employees, would be a guarantee for regular workers, especially when the case of unfair dismissal arises from the termination. This fact makes the possibility of claiming unfair termination by probationary employees too low. Like many jurisdictions, Iraqi labour law does not require either strict justifications or severance payment to terminate an employee during probation periods. Rather, it requires giving notice seven days prior to termination.⁷⁷² Iraqi Labour Code No. 37 of 2015 provides only one article including two sections on probationary periods. Sections 2 and 3 in Article 37 are devoted to dealing with probationary employees that can be analyzed as follow.

2.3.1. Scope of Probationary Period

The probationary period is not a mandatory requirement under the law; meanwhile, it is the right of the employer to stipulate a trial period.⁷⁷³ However, the employer's right to set such a period is not absolute. Section 2 provides that "The contract of employment can be started with the probationary period upon an agreement between parties if the worker does not possess any

⁷⁷⁰ OECD (2018), Good Jobs for All in a Changing World of Work: *The OECD Jobs Strategy*, OECD Publishing, Paris. Retrieved June 6, 2021, from <https://doi.org/10.1787/9789264308817-en>.

⁷⁷¹ Philip M. & Thomas M. (2006). *International Labour and Employment Law: A Partial Guide*. American Bar Association, p. 161.

⁷⁷² Giving notice in Iraqi labour law articulated in Art. 37 Sec. 3 that will be discussed later.

⁷⁷³ Kasassbeh, F. (2012). Compliance with Philosophy of Exemption from Notification at Termination of Contract: Study in Light of Jordanian Labour Law. *Arab Law Quarterly*, 26(1), 1-45. Retrieved on June 6, 2021, from <http://www.jstor.org/stable/23234466>

professional certificate that proves his/her qualification or capabilities for the job entrusted to them. The probationary period must not exceed (3) months from the date of commencement of the job, and it is not permissible to put the worker under a probationary period more than one time with the same employer.⁷⁷⁴

It is noted that Iraqi labour law has restricted the right of employers to stipulate the probationary period for testing workers in terms of time frame and the type of employees who can be put under a probationary period. Accordingly, the time frame of probation shall not exceed three months to test an employee. An extension for the determined time is not allowed under any circumstances for the same employer who previously tested an employee for the three months agreed in the contract. In addition, the time period for the purpose of probation shall be mentioned in a written contract, the employer otherwise cannot benefit from the probationary period. Considering the position of employees in the employment contract, particularly in case of termination, the logic of Iraqi lawmakers related to the time frame of probationary period with the stipulation that it must be written in the contract being quite strong. This is because the probationary period is not assigned to benefit employees, it rather serves employers in which they can expel unskilled or unqualified employees for a job.⁷⁷⁵ Therefore, this power of employers should be restricted as to not be used in an abusive way against employees.

On the other side, the probationary period can merely be stipulated in the contract if the worker does not possess any professional certificate. The articulation of the provided section above basically means that with having such a certificate there is no justification for a probationary period. This is the most critical point to discuss in this regard, which may not exist in any other labour codes. The logic of Iraqi labour law is inconsistent with the basic aim of the presence of a probationary period. Since the stated aim of the probationary period is to ensure the worker's capability to undertake a particular job or to meet the recruitment conditions,⁷⁷⁶ it cannot be measured only by the presence of a certificate. The practice for a period, then, must be taken into consideration as a sole measurement for evaluating worker's qualifications regardless of the certificate. An educated person with a specific certificate still can fail during the probationary

⁷⁷⁴ Iraqi Labour Code, No. (37) of 2015. Art. 37. Sec. 2.

⁷⁷⁵ Ichino, A., & Riphahn, R. T. (2005). *The effect of employment protection on worker effort: Absenteeism during and after probation*. Journal of the European Economic Association, 3(1), 120-143.

⁷⁷⁶ Ibid.

period due to either a bad performance or not being successful in general for any other number of reasons. By contrast, an employee who did not have a chance to gain an academic level of education may fulfill the required conditions of a job and convince the employer because of having outstanding experience from a similar previous job. Further flaws in the provided section can also be seen because the notion of a professional certificate is somewhat broad and arguable in nature, while the section does not provide any characteristics of such a certificate. Moreover, it does not determine which level of certificate is required, and from which agencies –public or private- the certificate should be issued. For how long does the validity of certificate last and thereby cannot be rejected due to expiry issues. All those questions remain such controversial issues, this section, otherwise, can be interpreted that employee’s professional certificate at any level and from any kind of agencies will inhibit the employer from stipulating a probation period in the contract. Those reasonable questions inspire us to believe that it was better for Iraqi lawmakers to not make such a connection between workers’ capabilities and certificates, especially seeing that the requirements of jobs nowadays depend on private circumstances. No standard, hence, is better than testing an employee within a special job vested to them regardless of their possessing a certificate.⁷⁷⁷

2.3.2. Standards of Termination During Probationary Period

The right of the employer to terminate employment during a probationary period is also not absolute according to the Iraqi Labour Code. Section 3 Article 37 states “The employer may terminate the contract within the probationary period if it appears that the worker is not qualified for performing the job, the employer in this case must give a notice to the worker at least (7) seven days before the date of termination.”

Based on the above provision, the employer has no absolute right to terminate the contract of probationary employees. But this right is limited for a reason that must be given for termination and the reason must relate to the worker’s capacity which is not quite enough for the job.⁷⁷⁸ The possibilities for unfair termination then exist in cases where employers abuse their right to terminate probationary employees’ contracts. An employee, whose contract has been terminated,

⁷⁷⁷ Smith, J. L., Lypson, M., Silverberg, M., Weizberg, M., Murano, T., Lukela, M., & Santen, S. A. (2017). *Defining uniform processes for remediation, probation and termination in residency training*. *Western Journal of Emergency Medicine*, 18(1), 110.

⁷⁷⁸ Ewing, B. T., North, C. M., & Taylor, B. A. (2005). *The employment effects of a “good cause” discharge standard in Montana*. *ILR Review*, 59(1), 17-33.

can allege unfair termination and bring a lawsuit to the court if the employer has no reason or if the reason is not related to the bad performance of the job.⁷⁷⁹ Another possibility for unfair termination cases refers to a situation in which the worker may deny the employer's allegation of the worker's bad performance, meaning that the worker refuses the employer's evaluation, thinking that they abuse the right to terminate the contract. This is what makes the case complicated and demands more investigation to evaluate the reason of termination in the court. To address this issue, many significant questions arise that must be answered by the court. The basic question is whether the employer has an absolute right to evaluate the worker's performance and capacity for the job. If the employer has such a right, that means their power to terminate the contract is not subject to the court's supervision, and then any allegation for unfair termination by the worker will be dismissed. The right of employers to evaluate workers' performance at work shall not be absolute; otherwise, they may abuse probationary workers and terminate their contract for any reason as the result of an allegation of bad performance. Hence, the right of an absolute evaluation of employers is completely contradicted with the central notion of labour law that concentrates on providing enough protection to workers.⁷⁸⁰

Since the right of employers is not absolute to evaluate the worker's capacity for a job, there must be standards to rely on for evaluation purposes. Another question which arises now is based on which standards does the employer evaluate the workers' performance and their ability to do the job. Does the law provide any standards for such evaluation? This question remains unanswered in the Iraqi Labour Code because it does not include any standards for the evaluation process during the probationary period. Notwithstanding the fact that termination shall occur for a reason related to worker's performance at work, Section 3 adopts a lenient approach towards the standards of the evaluation process to determine whether the worker is qualified for the job during the probationary period. Whereas the standards for evaluating recruitment conditions are not set forth in the law, it remains in the hands of the employer. This is what causes fear of unfair termination of employment during probationary periods without the ability of workers to win the case. The employer may easily win the case whenever they allege that the worker has failed to

⁷⁷⁹ Summers, C. W. (1976). Individual protection against unjust dismissal: Time for a statute. *Virginia Law Review*, 481-532.

⁷⁸⁰ Bonvin, J. M. (2006). *Promoting capability for work: the role of local actors*. In *Transforming unjust structures the capability approach* (pp. 121-142). Springer, Dordrecht.

meet the recruitment conditions during the probation period, since there is no standard to assess such conditions.

With regards to “recruitment conditions” during the probation period, the regulations also do not have clear standards to be bound for employers when they decide that the employee does not meet recruitment conditions. This is the question that always could be asked during the probation period: what makes the worker fail in meeting recruitment conditions or enough capability for the job? Since a direct answer is not provided in the law, the court must come out with standards and provisions during the examination of the facts in the case.

2.3.3. Giving Notice During Probationary Period

Notification is a formal declaration given to another party explaining that you plan to repeal the contract.⁷⁸¹ The purpose of giving notice is to prevent employees from being shocked or confused about losing their jobs suddenly, and to give the chance to search for a new job before being unemployed.⁷⁸² In usual circumstances, employers must provide employees notice for terminating the contract based on what is stated in the contract and shall not be less than the legal minimum notice period, or otherwise based on the legal minimum notice period in national law. The Iraqi Labour Code compels employers to give notice of at least 1 month prior to the date of termination, and if they do not so, they must pay an indemnity to the employee whose contract has been terminated without notice.⁷⁸³

The previous rule applies to a contract that is in full effect without a probationary period. For employees under a probationary period, however, different provisions shall apply for giving notice. In general, there are different tendencies with regards to whether the employer needs to give a notice period to the worker during the probationary period. Some jurisdictions do not require giving notice to terminate the contract during the probationary period at all, such as Italy, the Netherlands,⁷⁸⁴ and Jordan.⁷⁸⁵ In some other jurisdictions, giving a notice period is restricted, such

⁷⁸¹ Tonin, M. (2009). *Employment protection legislation in central and east European countries*. SEER-South-East Europe Review for Labour and Social Affairs, (04), 477-491.

⁷⁸² Eger, T. (2003). *Opportunistic termination of employment contracts and legal protection against dismissal in Germany and the USA*. International Review of Law and Economics, 23(4), 381-403.

⁷⁸³ Iraqi Labour Code No. 37 of 2015, Art. 44.

⁷⁸⁴ European Commission (2006). *Termination of employment relationships: Legal situation in the Member States of the European Union*. Directorate General Employment, Social Affairs and Equal Opportunities Unit D2, p. 120.

⁷⁸⁵ Jordanian Labour Code No. 8 of 1996, Art. 35.

as the UK where the law does not give the right to a minimum notice period to employees who have been serving an employer for less than 1 month.⁷⁸⁶ In Iraq, giving notice was not required during the probation according to the previous Iraqi Labour Code No. 71 of 1987,⁷⁸⁷ meaning that employers could terminate the contract, in which the probation is stipulated, without giving notice. But the lawmaker's position on this issue has been switched in the current Iraqi Labour Code and attributed to the necessity of a notice period even during probation. The new Iraqi Labour Code requires a notice period during the probation at least (7) seven days before the date of termination.⁷⁸⁸

The different tendencies of lawmakers in various countries to consider or not consider notification during probation perhaps points to the diversity of lawmakers' outlooks with regards to the nature of the contract involved during probationary periods. One point of view may argue that the purpose of a notice period is to protect employees from being suddenly unemployed; in such a situation they may be disappointed and lose the chance to search for a new job prior to being fired from the previous one.⁷⁸⁹ Such a purpose does not exist during the probation, since the employee realizes, in advance, that the contract begins with the trial period and it is not in full effect, but rather it depends on the negative or positive outcome of the trial period.⁷⁹⁰ The employer, thus, will not be surprised by terminating the contract whenever they failed in the process of testing an employee's capacity to do a job.⁷⁹¹ Though this presumption can help to explain the logic of lawmakers who pretend giving notice of the trial period is unnecessary, this argument is still controversial and problematic. This is simply because the employee often prepares themselves to do what is expected, and assumes they successfully pass through the trial period. For that reason, termination of the contract in the probationary period, of course, brings a surprise or unexpected outcome to the employee. On the other hand, one may argue that the major objective point of notification is to give the worker a chance to search for a new job. And this objective point

⁷⁸⁶ Millington, P., Holland, J., & Burnett, S. (2015). *Employment Law 2015*. Oxford University Press, USA, p. 209.

⁷⁸⁷ This code remained in force in the north of Iraq, where the legislative body in the Kurdistan Region has never issued an enforcement order to replace this law by the new Iraqi Labour Code.

⁷⁸⁸ Iraqi Labour Code No. 37 of 2015, Art. 37, Sec. 3.

⁷⁸⁹ Cazes, S., & Nesporova, A. (2003, February). Employment protection legislation (EPL) and its effects on labour market performance. In ILO Conference Paper.

⁷⁹⁰ Kasassbeh, op. cit.

⁷⁹¹ Ibid.

is still meaningful for an employee that expects to be terminated from the job due to the negative outcome of the probationary period.

Another argumentation arises to explain the logic of lawmakers that deprive employees of being notified in case of termination during the probationary period. This argumentation depends on a different assumption, alleging that lawmakers intended to deny employees the right to be notified as long as the termination resulted from a deficiency or the failure of employees during the trial period.⁷⁹² On the basis of this argumentation, the failure of the employee to prove expected capabilities is a good presumption that the employer did not abuse their right to terminate the contract, and the possibility of arbitrary termination does not exist.⁷⁹³ Therefore, an employee who has failed during the trial period deserves to be dismissed and reap no benefits during the probationary period.

An impartial and neutral analysis of this assumption may also lead to the belief that this argumentation is not quite evident. There are two counter argument that may defeat the logic of the above presumption. The first counter-argumentation relies on the fact that the lawmakers, who deprive employees of being notified, did not separate the case of terminating the contract due to the failure of the worker in the probation from a case in which the contract was arbitrarily terminated by the employer.⁷⁹⁴ The second counter-argument depends on the non-relationship between giving notice and the validity of dismissal.⁷⁹⁵ Neither the validity of dismissal nor the failure or success of the worker related to giving notice. To support this, the law requires a notice period of one month before the date of termination for the regular contracts in which the probationary period is not stipulated without considering the legality of termination. Such a notice period for termination is required even in the case that the validity of the dismissal has been proven.⁷⁹⁶

With the above in mind, we can understand the logic of the Iraqi Labour Code with regards to Article 37 Section 3 which stipulates a notice period of at least seven days before the date of

⁷⁹² A. Karam (1998). *Labour Law*. 1st Edition, Amman: Dar al-Thaqafa, 75, 76; Hamdan, supra note 29, p. 201.

⁷⁹³ Ibid.

⁷⁹⁴ Kasassbeh, op. cit., p. 45.

⁷⁹⁵ Ibid.

⁷⁹⁶ Jakhelln H., & Moen K. (2017). *Labour Law in Norway*. Kluwer Law International B.V., Feb 24, 2017 – Law.

termination during the trial period, while the same article critically analyzed from the perspective of the scope and standards of termination during a probationary period as discussed before.

3. Termination of Employment Procedures

Termination procedures refer to those procedural steps that should be taken before and after the decision to discharge a worker is made. The procedures namely, the right of defense against the allegation, and the right to appeal the decision, as well as providing notification and consultation to the worker's union, in general, put several obligations on the employer, as at the same time constitute several rights for the worker. This is what we have called before pre and post termination procedures. The importance of these procedures is twofold: it guarantees the worker not to be unfairly terminated on one hand; as on the other hand, it supports the employer's decision as being made under due process.

Iraqi Labour Code contains pre and post termination procedures to ensure the legality of an employer's decision to discharge a worker. The right of the worker to defend himself has been dealt with by Article (140). The right to appeal the decision of employment termination is guaranteed by Articles (46) and (145/ Second). And lastly, the right of the worker in providing notification and consulting his/her union upon the case by the employer is provided in Article (143), Section (Forth). Notwithstanding, the drafting of some of those articles is certainly weak and lacks to reach the level of international standards. Hence, we can mark some defective aspects in analyzing the mentioned articles.

Starting from the right of defense granted to the worker to respond the allegation directed to him, this right has been granted as a basic procedural right only in case of dismissal as a disciplinary sanction. As it has been noted before, Iraqi law distinguishes the regular termination of employment on the grounds of worker's incapacity, misconduct, and operational requirements from dismissal, considering the latter a type of termination to punish the worker only in exclusive cases with the most unwanted consequences. It can also be noted from Article (140) that the right of defense only granted when the worker encounters dismissal since the disciplinary sanctions include dismissal but not the other types of termination, and the article enables the worker to

defend himself only before imposing disciplinary sanctions.⁷⁹⁷ By contrast, the procedure of terminating a worker due to incapacity or misconduct which is not reached to a level deemed to be ‘serious misconduct’ does not require giving a chance for the worker to defend against the allegation. This is, of course, contradicting the international standards requiring such procedural right not only in dismissal as a case of punishment but in all termination cases instead, “unless the employer cannot reasonably be expected to provide this opportunity”.⁷⁹⁸

In addition to the right of defense, further measures shall be taken to guarantee the prevention of unfair termination, especially, based on the operational requirements. In this regard, the international standards insist on the necessity of notifying the workers’ representatives that must include an explanation about the reason of termination, the number of affected workers before an action to terminate the employment relationship take place.⁷⁹⁹ Moreover, the workers’ representative shall be consulted,⁸⁰⁰ aiming to find alternatives for termination of the employment relationship, or at least to mitigate the number of affected workers. The Iraqi Labour Code provides this guarantee but in very weak articulation. Article (143/ Forth) states that “the employer may consult with the workers’ representatives before taking a final decision on termination of any employment contract”. It is noticed that the article permits an employer to take a consultation with the workers’ representatives which means it is an optional step instead of taking it as a mandatory measure to protect workers from being unfairly fired. It is much better for the Iraqi Labour Code to re-define the employer’s obligation to consult with the workers’ representatives as a mandatory obligation prior to the final decision regarding an employment termination for operational requirements.

Nonetheless, a positive side can also be seen regarding the procedure to appeal the decision of termination since the Iraqi Labour Code goes further beyond the international standards in this regard. Article (46/ First) enables the terminated worker to appeal the decision before the committee of employment termination⁸⁰¹ or the court during 30 days from the date in which the

⁷⁹⁷ An exact wording of Article (140) provides that “it is not permissible to impose any disciplinary sanction on the worker, unless after giving a chance to defend himself against the allegation made, with presence a representative of his/her union”.

⁷⁹⁸ C158, op. cit., Art. 7.

⁷⁹⁹ Ibid., Art. 13, Sec. (1/ a).

⁸⁰⁰ Ibid., Art. 13, Sec. (1/ b).

⁸⁰¹ The committee of employment termination, according to Article (46/ First), shall be constituted by labour minister through a particular instruction issued for that purpose.

worker has been notified of the decision; if the worker has not submitted an appeal during that period, he is deemed to waive his/her right. To provide a further guarantee, the same Article in Section (Second), renders the decision of the committee subject to another appeal before the labour court within 30 days starting from the date of notifying the worker by the committee's decision. For the case of dismissal particularly, Article (145/ Second) provides the right to appeal the decision of dismissal before the labour court within 30 days starting from the date in which the worker has been notified of the decision; moreover, the decision of the labour court is again subject to an appeal before the Federal Cassation Court within 30 days from the date of providing notification to the worker. This means that all the types of employment termination including dismissal can be appealed before impartial bodies twice.⁸⁰² It is also noticed that the duration to submit the appeal is set in the above articles, meaning an appeal after the set duration which is 30 days will be rejected. This is also in line with the international standards considering the right of appeal is waived if it is not exercised by the worker "within a reasonable period of time after termination".⁸⁰³

In the process of reviewing the legality of termination after the appeal is made, the Iraqi Labour Code rests the burden of proof on the employer.⁸⁰⁴ Therefore, to convince the committee or the court that the termination is legally practiced, the employer must prove the reason under which the termination is made. The same rule is set forth in Article (145/ Third), mandating the employer to prove the violation of the worker as a reason for dismissal. Failure to prove an adequate reason in the case often drives the impartial body, whose mission is to receive and review the appeal, to decide in favor of the terminated worker.⁸⁰⁵ The attitude of Iraqi law, in this regard, is also compatible with the international standards, resting the burden of proof on the employer when he initiates to terminate an employment relationship.⁸⁰⁶

⁸⁰² The impartiality of the body that performs the mission to check the legality of termination can be measured by the biasness of the body as linked to neither the employer nor the worker. From this notion, any administrative body created by the employer inside his/her undertaking to review the legality of the termination shall not substitute the right of the worker to appeal before the third party.

⁸⁰³ C158, op. cit., Art. 8, Sec. 3.

⁸⁰⁴ Ibid., Art. 46, Sec. 3.

⁸⁰⁵ International Labour Office. Bureau for Gender Equality, & International Labour Office. International Labour Standards Department. (2006). *Gender Equality and Decent Work: Selected ILO Conventions and Recommendations Promoting Gender Equality*. International Labour Organization, p. 108.

⁸⁰⁶ C158, op. cit., Art. 9, Sec. 2 (a).

4. Remedies for Unfair Termination

It has been obvious that unfair termination of employment relationships often occurs from the side of the employer as being the strong party that may abuse his/her prerogatives against the worker. To avoid this prospect, Iraqi law considers termination at the initiative of the employer is practicable merely if it depends on a valid reason with a reasonable notice period assessed by 30 days excluding dismissal as a disciplinary case does not require a notice. Termination, thus, would be unfair if occurred either without a valid reason or without giving notice. A valid reason does not entitle the employer to terminate a worker's contract without giving notice and vice versa.⁸⁰⁷ This means that a remedy shall be provided if termination lacks a valid reason or notice period.

Iraqi law provides the remedy for termination which is unfairly practiced by the employer due to the lack of a valid reason or notice period. Article (44) contains the remedy for not giving notice, stating that "upon the fulfillment of one of the cases provided in Article (43/ Second) of this law, the employer must give an advance notice in writing to the worker whose contract will be terminated; in case of not providing such a notice, the worker shall be entitled to compensation in lieu of notice; the notice period shall not be less than 30 days before the termination". The provision of this article solely provides 'compensation' as a remedy in lieu of notice. Since, 30 days is a minimum period notice for termination, the remedy also shall not be less than 30 days of the worker's wage.⁸⁰⁸ There is no choice of reinstatement in such a case, accordingly, the terminated worker, who has not been given notice, is not entitled to seek reinstatement.⁸⁰⁹

More choices are available as a remedy for termination lacks a valid reason. Article (47) provides reinstatement as the first remedy wherein Section (First) stating "if the Committee of Terminating Employment or the Court found that the termination was not depended on one of the reasons set forth in Article (43) of this law, it must decide to reinstate the worker and to pay him the whole salary for that period in which the contract is terminated". The term of reinstatement

⁸⁰⁷ ILO, 1995, op. cit., para. 76.

⁸⁰⁸ If a contract contains an article stipulating a notice period for more than 30 days, the employer shall be abided by, and pay a compensation equivalent to the number of days determined as a notice period in case of violation thereof.

⁸⁰⁹ Even the international provisions, as for instance, Article (11) in Convention No. (158) of 1982, has not given the choice of reinstatement since termination in that case is unfair only because of not following a fair procedure. This fault can be redressed by a compensation rather than reinstatement.

simply means enabling a worker to re-possess the position s/he had prior to termination.⁸¹⁰ In Article (48), the second choice for remedy can be found wherein Section (Second/ B), provides that “if the worker does not request reinstatement or if the Committee of terminating employment or the Court decides that the reinstatement is not possible or not appropriate, a decision shall be made to pay a compensation not less than the twice amount set forth in Article (47) of this law”. The articulation of both cited articles in this paragraph indicates that reinstatement is the essential remedy for termination which is not backed up by valid reasons as listed in Article (43), and the compensation is an alternative remedy provided upon the rejection of the worker to reinstate or upon the decision of the committee or the court on not the applicability of reinstatement.

It is not permissible for the worker to demand both remedies: reinstatement, and compensation, together. This prevention confirmed by the Federal Cassation Court in case No. 788.⁸¹¹ The terminated worker, in this case, claimed for unfair termination, demanding for compensation after his reinstatement and receiving the salary of his terminated period.⁸¹² Basrah Labour Court dismissed the claim for compensation, reasoning that the essential remedy as previously provided to reinstate the worker along with receiving back his salaries for the period in which the worker's job terminated inhibits the prospect of obtaining more compensation.⁸¹³ In response to the appeal of the worker, the Federal Cassation Court upheld the decision and confirmed not applicability of the demand for compensation after the reinstatement of the worker and receiving back his salaries for the terminated period as an essential remedy for unfair termination.⁸¹⁴

The remedy to reinstate the worker, however, shall not be considered by the committee or the court if it is not demanded by the worker himself. The committee or the court must consider the request of the worker first whether the request is seeking for reinstatement or compensation. Even if the reinstatement is applicable, it should be neglected by the committee or the court as long as the worker is not seeking for. This is what drawn up by the context of Article (48), Section (Second/ B), and confirmed by the Iraqi judiciary attitude. In a case brought before Basrah Labour

⁸¹⁰ Mantouvalou, V. (Ed.). (2015). *The Right to Work: Legal and Philosophical Perspectives*. Bloomsbury Publishing, p. 259.

⁸¹¹ Al-Tamimi, op. cit., p. 51.

⁸¹² Ibid.

⁸¹³ Ibid., p. 52.

⁸¹⁴ Ibid.

Court, a worker claimed that his contract's termination was unfair as this termination done for downsizing the employer's business without the consent of labour minister that required by law on such termination.⁸¹⁵ The terminated worker demanded adequate compensation as a remedy for unfair termination. In decision No. (172) of 2017, the court found the rightness of the claim and decided (3700000) Iraqi dinars compensation for the worker.⁸¹⁶ Although the court found the termination was unfair being its process lacks the consent of the labour minister, the court did not reinstate the worker since he did not request doing so.⁸¹⁷ In the process of appeal, the Federal Cassation Court approved the decision of Basrah Labour Court, deciding the termination occurred in contradiction with the rule of Article (43/ Second) of the Iraqi Labour Code.⁸¹⁸ The last court, in addition, asserted the legality of compensation as long as the worker did not request reinstatement in his claim.⁸¹⁹

The remedy to reinstate is also not an applicable choice even if the worker requests it, but the committee or the court finds that such a choice is not possible or not appropriate.⁸²⁰ The term of 'not possible' or 'not appropriate' are mentioned in Article (48) without describing the situation that makes reinstatement of a worker is not possible or not appropriate. The definition of such terms, therefore, remains to the discretion of the committee or the court to determine the cases in which the choice of reinstatement is 'not possible' or 'not appropriate'. It might be no longer 'possible' to issue a decree for reinstatement if the position that was in the possession of a worker is no longer obtainable.⁸²¹ This can be a case when the employer's enterprise encounters liquidation.⁸²² Reinstatement may be in some cases possible but not appropriate. This case may arise when the position is still available, but the employer expresses his/her tension regarding the employment relationship after reinstatement, being not a productive and viable relationship due to losing of trust and confidence in the worker.⁸²³ However, the degree of an expressed tension, to

⁸¹⁵ Ibid., p. 93.

⁸¹⁶ Ibid.

⁸¹⁷ Ibid.

⁸¹⁸ Ibid., p. 94.

⁸¹⁹ Ibid

⁸²⁰ This is derived from the last part of Art. (48), Sec. (Second/ B) as cited before.

⁸²¹ Mila, T. (2018). *Reinstatement except when 'not reasonably practicable' – a discussion of s 193(2)(c) of the LRA*. Retrieved June 18, 2021, from <https://www.derebus.org.za/reinstatement-except-when-not-reasonably-practicable-a-discussion-of-s-1932c-of-the-lra/>

⁸²² Ibid.

⁸²³ Saharay, H. K. (2014). *Textbook on labour & Industrial Law*. Universal Law Publishing, p. 228.

render reinstatement inappropriate choice, shall be feasible and rational, and it is subject to the assessment of the committee or the court for that purpose.⁸²⁴

5. Final Remarks

The chapter reveals a rapid change in Iraqi labour law through several legislations and partial amendments. Within the themes that have been subjected to amend, termination rules were often in agenda and primarily changed. However, most amendments to develop employment termination rules in Iraq have not smoothly done pursuant to the labour market fluctuations. Rather, the amendments accompanied by the political trends and reflected the ideology of the ruling party. Here are the focal points underpin this chapter:

- 1) In the first Labour Code No. 72, the ideology of the Monarchy system has been reflected. Workers remained a vulnerable group without legal protection until the Ba'ath party took the power in 1968. Since then, labour codes and their amendments reflected Socialist ideology as being an adopted ideology by the Ba'ath party.
- 2) Iraqi Labour system started providing protection to workers and incorporated with very restricted termination rules. Till the year 2003 in which the Ba'ath party has been collapsed, the Iraqi Labour Codes were very protective for workers, containing undue restrictions on termination of employment contracts. This rendered termination to be categorized as unfair termination once it occurs beyond imposed restrictions.
- 3) The situation prolonged even after the collapse of the Ba'ath party and the labour market remained governed by the Labour Code No. (71) of 1987, one of the restrictive laws that lack the ability to respond labour market needs.
- 4) Aiming to respond such needs particularly to minimize the rate of unemployment increasing day by day, Iraq promulgated the last Labour Code No. (37) of 2015, the code that we have tested in this study considering international and EU standards.
- 5) In issuing the Labour Code No. 37, the Iraqi legislative body have also misunderstood the needs of labour market. Though some positive amendments, the Code lacks a balance between security to protect workers, and flexibility to activate labour market.

⁸²⁴ Ibid.

- 6) Instead of employment security, the Code mainly retains the concept of job security. In this regard, the code includes the most crucial international standards governing workers' protection as such standards guaranteed a high degree of protection against unfair termination.
- 7) Iraqi labour system, in general, has not been impacted by at-will employment doctrine since the government often interfered to restrict the will of contractual parties and provide more protection for workers, while an attention to liberalize labour rules for sake of economic efficiency was always absent in the Iraqi labour laws.
- 8) The result indicates that the Code lacks flexibility side and had not taken benefits from international provisions drew to keep a degree of flexibility, such as the exceptions afforded in Convention No. 158, Article (2) thereof.

CHAPTER V

RESULTS AND DISCUSSION

Despite uniform issues raised in case of terminating an employment contract, the provisions to regulate such termination and what has been portrayed as unfair termination are not steady, and substantially different. This differentiation primarily refers to the different policies and doctrines adopted by states to deal with this matter. The provisions of terminating an employment contract, thereby, shall be analyzed by reference to the based policies and doctrines under which significant numbers of argumentation presented that help to clarify rules set for termination. The rightness of termination rules basically depends on the strength of argumentation each policy endorsed and the degree of involvement in preventing unfair termination.

The notion of unfair termination is extremely tied with the protection given to the worker from being fired, as this protection draws up the boundaries between what may constitute unfair termination and what may not. Under the policy of job security, the boundary of unfair termination is quite extended due to the broad protection, rendering the termination to be unfair whenever practiced contrary to such protection. The need for a valid reason to justify termination, an advanced notice period, pre and post fair procedures in case of discharge a worker are the main protection to guarantee an appropriate practice of termination. Violation of the said protection arises the ability to claim for unfair termination, meaning the scope of such claim is broadly drawn up and encompasses every single case that occurred beyond those limitations. In contrast to what has been described, the at-will employment doctrine narrowed down the scope of unfair termination due to the deficiency of workers protection as a trade-off to the efficiency of labour market in this doctrine. Efficiency as an indispensable element dominates worker protection to activate labour market under which the economic system smoothly flows, and workers can easily access to labour market. This is an underlying target in the doctrine, simplifying procedures of termination to a degree that can be practiced even for no reason. The result for not requiring a reason to terminate an employment relationship is the ability of the employer to do so at any time without being accountable for unfair termination.

At-will employment doctrine is an inherent extension of freedom of contract, the notion that promotes individual choices to engage or withdraw from contracts, and to respect such natural freedoms, it seeks to non-interference of the state in contractual relationships. As far as individuals

are free to engage in an employment contract, they should also be free to terminate their contracts without any interference from a third party. Job security argumentations, on the other side, rationalize the interference of the state in contractual relationships particularly in the employment contract to protect the worker from the abusive treatment of the employer. The idea is that inequality of bargaining power often places the worker in a weak position, the fact that leads to the dominance of the employer in filling out terms and conditions of the contract. In addition, the managerial prerogatives of the employer in this contract might not be practiced in a right way, being get away from the targeted points, and this may cause inappropriate discharge of the worker at the workplace. To regain a balance between the positions of both contractual parties, and then to protect the weak party from being abusively treated or from being arbitrarily fired, the law shall impose reasonable limitations to ensure the worker rights including exploitation of his/her position, unless an adequate reason justifies retaking thereof.

Though differences in outlooks and argumentations, at-will employment doctrine slightly getting closer to the policy of job security. This approach gained after a number of the courts in common law jurisdiction found that an absolute application of at-will employment causes a noticeable violation of the worker rights. At-will employment doctrine, thus, started to impose limitations on hiring and firing workers. To this end, the doctrine restricts the ability of the employer to fire a worker for reasons prohibited by a statutory law, as for example, discriminatory reasons, or for reasons which contradict with an established public policy or contradict with an implied contract. Based on such exceptions in the doctrine, courts initiated providing protection to the workers whose contracts have been terminated based on mentioned reasons. Consequently, the scope of unfair termination is a bit changed towards broadness.

However, the distance between job security and at-will employment doctrine regarding termination of employment contract is still distinguishable. The focal point to distinguish between them is that at-will employment permits termination for any reason or for no reason unless if a statutory law, public policy, or an implied contract invalidates the reason. While job security prevents termination unless for a valid reason subsequent by a spectrum of legal procedures to prove the presence of the reason. This reflects an effect on the procedure of appeal against the decision of termination. The general application in at-will employment presumes the validity of termination unless otherwise the invalidity of the reason proved by the worker, this places the

burden of proof to win the case on the worker. As a result, the prospect to win the claim for unfair termination is very weak due to the difficulties faced the party who bears the burden of proof. Job security, in contrast, presumes invalidity of termination unless it took place for a valid reason. Therefore, the validity of termination shall be proven, meaning the burden of proof is rested on the employer who initiated to terminate the contract contrary to the general presumption. This increases the probability to win the claim for unfair termination by the worker since the employer may not be able to prove the validity of termination or his/her evidence may not be sufficient.

The discussion over rigidity and flexibility of rules governing termination of employment contract has reached to the international level. Basic argumentations of both sides came up with international standards guiding member states to set detailed provisions of termination. In this regard, Termination of Employment Convention No. 158 of 1982 subsequent by Termination of Employment Recommendation No. 166 of 1982 contain the most known international standards for termination. As a crucial note, we should point out that the international provisions drawn up limitations merely for termination at the initiative of the employer. Termination that would be occurred based on a mutual agreement or termination at the initiative of the worker had not reached international concern. As long as the basic aim of the international conventions is to prevent unfair termination and to mitigate its downsides, there are no genuine and actual risks mandating the necessity of international rules on the two latter types of termination. This is such a normal result of the nature of the employment contract as being a contract contains unbalanced parties in terms of bargaining powers. The fact that often facilitates the dominance of the employer to manage and terminate the contract arbitrarily if s/he is not restricted by several standards. This fear is not apparently raised in cases where termination depends on a mutual agreement or a unilateral will of the worker. For mutual agreement cases, the presumption is that both parties agreed on termination after the assessment of its consequences, being not harmful to both parties. There is no justification to limit the will of contractual parties since no actual fear presented to compel one of the parties accepting serious consequences. However, there may be a prospect of the agreement being generated under duress, a case that the worker pretends accepting the termination under the pressure of the employer. Since such a case is not mostly familiar and it can be addressed by national rules, has not reached international concern. And for cases in which termination depends on the will of the worker, no actual fear presented due to the availability of alternatives relatively facilitating the replacement process of the worker by the employer.

In the two mentioned international instruments, both sides have taken into consideration; the right of workers to secure their job that mandates rigid provisions for termination on one hand, on the other hand the need of flexibility that empowers member states to exclude certain workers and contracts from established provisions. However, the international standards adhere the idea that a flexible labour market and economic interests do not justify the violation of workers' rights. Considering this end, the provisions of the international instruments codified job security requirements beginning with prevention of terminating an employment relationship unless if a valid reason justifying that and ending with requiring a spectrum of legal procedures to guarantee the right of worker from not being unfairly fired. Moreover, they contain provisions on decent remedies in case of unfair termination. The exceptions from such provisions are provided insofar as possible to flexibilize labour market. It can be said that the international standards derived from the two mentioned instruments adopted the right of worker in security as general rule and flexibility as an exception in certain cases. The aim is basically to deem the three different interests; the interest of the worker in providing security, the interest of the employer in retaining his/her prerogatives to manage his/her enterprise, and the interest of the national economy to activate labour market.

The applicability of international standards with multiple aims has been tested in this study within developed countries. In doing so, we tested the applicability of the international standards and the degree of their integration with EU standards as a developed model. The question raised was whether EU standards in this regard are in line with standards found in ILO instruments. If so, what are the degree of integration between them. If not, how the EU member states whose ratified ILO instruments adhere standards of ILO and EU simultaneously. In answering these questions, we examined EU legal tools including EU charters, directives, regulations, and case law. As a result, we found that EU legal tools regarding termination of employment relationships have substantially integrated with ILO tools. Though only ten EU member states have ratified ILO instruments regarding termination of employment, namely Cyprus, Finland, France, Latvia, Luxembourg, Portugal, Slovakia, Slovenia, Spain, and Sweden, the provisions of termination in the other rest EU countries have indirectly integrated with ILO standards through the EU legal tools. In the first rank, European Social Charter has integrated with ILO instruments in respect to termination, where the revision of ESC added Article 24 confirming protection of workers as the same provided in wording of Article 4 in Convention No. 158. Article 24 then inspired EU Charter

of Fundamental Rights towards giving the same protection against unjustified dismissal in Article 30 thereof. The degree of integration between European Social Charter and EU Charter of Fundamental Rights with Convention No. 158 has reached to the similarity even in articulation of texts preventing termination unless for valid reasons related to capacity, behavior, or operational requirements. The same integration at the level of similarity in wording can be seen where the Appendix of RESC provided a list of invalid reasons for termination similar to that list provided in Article 5 of Convention No. 158. Furthermore, Article 25 of RESC protected workers in case of the employer's insolvency plus Article 29 to inform and consult the workers' representatives before collective redundancies, the same procedures that previously required in Article 13 of Convention No. 158, aiming to find the best alternatives or at least to minimize the number of affected workers and mitigate unwanted consequences.

The role of Convention No. 158 and Recommendation No. 166 is also not minor to revise EU Directives regarding termination of employment and the outset of unfair termination laws in EU member states. The three main EU Directives to deal with termination each in different circumstances have been revised and modified in light of Convention No. 158. First, Directive 75/129/EEC of 17 February 1975 to deal with collective redundancies modified by Directive 98/59/EC of 20 July 1998 adding the requirement of providing notification and consultation to the workers' representatives before taking any decision on collective redundancies. Those are the most substantial procedures invented at the international level by Article 13 of Convention No. 158. Second, Directive 77/187/EEC of 14 February 1977 to protect workers' rights in the event of transfers of enterprises, businesses, or parts of businesses modified by Directive 2001/23/EC of 12 March 2001. The subsequent directive ensures retaining employment status including rights and obligations of the worker in case of transfer or merger between enterprises or a part thereof and remaining those rights and obligations as they were before that process. It renders the termination to be unfair if it solely depends on the transfer or merger process. However, the directive has provided a degree of flexibility to exclude some workers from such protection. Third, Directive 80/987/EEC of 20 October 1980 to safeguard workers when their employers involved with insolvency modified by Directive 2002/74/EC. The directive guaranteed receiving the payments that according to the employment contracts awarded for workers in case of the employer's insolvency, this includes the payment for unfair termination awarded to the workers through legal proceedings. In general, the three directives after the modification inspired by ILO instruments,

especially by Convention No. 158 to strengthen the position of workers and to prevent making them redundant unless after fair procedures.

The application of the protection as provided in EU Charters and Council Directives has evidently confirmed through several case law. The holding of the European Court of Justice and the European Court of Human Rights (ECtHR) in several cases oblige EU member states to incorporate their national laws with protection provided for workers within EU Charters and Directives. In *Commission v UK*, the European Court of Justice held against the UK for not having national laws compelling employers to inform and consult with workers' representatives before collective redundancies as stipulated by Directive 75/129. In *Francovich v Italy*, the same court found the state's liability to compensate workers whose reason for their loss in case of the employer's insolvency refers to the member state's failure to incorporate with Directive 80/987/EEC. In *Allen v Amalgamated Construction*, the ECJ extended the application of the Transfer Directive 77/187/EEC to a level that encompasses a transfer between two firms belonging to the same group and operated by the same owner, and accordingly the protection in this directive includes a worker whose employment status is transferable between such firms. In *Hamburg case*, the ECJ concluded its decision confirming the notification send to workers' representative as required by Directive 98/59/EC should be in a reasonable time. On that basis, the German Constitutional Court in 2014 decided in favor of the bakery workers and upheld ineffectiveness of their dismissal under EU law as interpreted by the ECJ. A remarkable judgment also has been found in *K.M.C. v. Hungary*, in which the ECtHR ruled against Hungary for violating protection clause against unjustified dismissal guaranteed by Article 6 ECHR, Article 24 RESC, and Article 30 CFR. The court found that the Hungarian Act No. LVIII of 2010 authorizing dismissal without giving a valid reason is in violation of the mentioned articles enacted at the EU level. Following to that judgement, the Hungarian Constitutional Court abolished the Act and announced its unconstitutionality for the same reason reached by ECtHR.

Besides job security as has been found in the previous legal tools, the EU countries liberalized and modernized their labour laws in terms of flexibility so they could improve their economies. The necessity for flexibility in employment relationships especially in hiring and firing methods is increasing due to objective reasons in the labour market. Among those reasons, an increased rate of unemployment and dualism in employment composition between young and

elderly workers were the most compelled reasons to flexibilize laws and regulations. By connecting Figure (1) “Employment Flexibility Index” and Figure (2) “Young Unemployment Rate” both presented in chapter 4, we found a direct relationship between flexible approach in hiring and firing and the rate of employment especially youth employment. Figure (1) indicated to a vary level of governmental intervention in labour market, starting from the most flexible approach to the most rigid approach in 2018. Figure (2) indicated to the rate of unemployment within young workers in the same year and within the same countries considered in figure (1). In the EU countries where the value of flexibility increased, the rate of youth employment has notably increased as can be seen in figure (2) indicating a low-rate degree of youth unemployment in EU countries approaching to less governmental intervention in labour market. The rate of youth employment has less increased in EU countries where the employment relationships have less categorized under flexible approach. Consequently, the relationship between employment protection legislation and the rate of employment is an inverse relationship, whenever the first increases the second decreases and vice versa. In Table (1) we have taken a group of countries with most flexible labour market into consideration, namely Denmark, United Kingdom, Czech Republic, and Switzerland. For purpose of comparison, we created Table (2) considering a group of countries with less flexible labour market, namely France, Luxemburg, and Portugal, as both tables were presented in chapter 4. The result of comparison indicated that the rate of youth unemployment rate in the first group due to flexible approach in employment relations is much less than the rate of youth unemployment in the second group of countries. In Denmark, employment flexibility index shows 96.6 and thereby the rate of youth unemployment decreased to 9.4%, while in France, the flexibility index only shows 38.4, resulting an increase of youth unemployment to 20.8% rate. Almost the same result can be seen by comparison between other mentioned countries in the two groups.

The result also indicated that the EU countries whose ratified Convention No. 158 and bound by its provisions have less stepped forward to flexibilize their labour laws. The group of countries, whose employment flexibility indexes were in a low score in Table (2), are all listed in the ten EU countries that ratified Convention No. 158. In those countries, the rate of youth unemployment was much higher than the EU countries who are not bound by Convention No. 158 and their employment flexibility index indicates high scores. Does it mean that the ILO instruments especially Convention No. 158 impedes EU member states to have adequate steps towards

flexibility and responding market needs. If it is the case, our hypothesis about the applicability of ILO standards in the developed countries will be ruined. However, this part of the result can be argued and interpreted by referring to the criteria under which employment flexibility index categorizing EU countries from higher to lower scores of flexibilities. And then, those criteria shall be analyzed to know whether they can be adopted from the perspective of ILO standards to deal with termination of employment relationships.

The most remarkable criteria under which employment flexibility index was revealed in Figure (2) are: first, the state non prohibition of fixed-term contracts for permanent tasks and no limitation on the length of such contracts as well as the ability to renewal without restrictions, second, the state non requirement to compel employers to inform and get approval from the third party in case of dismissal up to nine workers. There are further criteria we did not mentioned since they are not substantially related to termination of employment and protection of workers. Accordingly, Denmark has ranked the highest score in the flexibility index within EU countries because no restrictions imposed on fixed-term contracts for permanent tasks, including the length and the renewal of such contracts, and no regulation exists to inform and getting approval from competent authorities to dismiss workers up to nine persons. In contrast, France has ranked the lowest score in the index due to imposing limitations on fixed-term contracts as such contracts are not allowed for permanent tasks and obliged employers to inform and then getting approval from competent authorities before terminating a group of nine workers.

To assess provided criteria, we must refer to the provisions of Convention No. 158, so to realize whether the provisions of the convention prohibit such criteria under which states flexibility approach categorized. Regarding fixed-term contracts in which the date of terminating the contract is already determined even for permanent tasks, no provisions in the convention inhibit member states to normalize and allow such contracts. In addition, the convention permits all member states to exclude fixed-term contracts from the protection provided pursuant to its provisions, as Article 2, Section 2 (a), explicitly expresses such permission to exclude “workers engaged under a contract of employment for a specified period of time or a specified task”. The need for “adequate safeguards” as required in the convention Article 2 (3) thereof to prevent the recourse of fixed-term contracts aiming to evade the protection generating from this convention, may not be solely interpreted in a way that mandates member states to ban fixed-term contracts in permanent tasks.

Rather, it can be interpreted in different ways to set other safeguards that do not impede member states to reap the benefits of fixed-term contracts even in permanent tasks. Thus, the state-mandated regulation to restrict fixed-term contracts in permanent tasks, as is the case in France and the other countries where employment flexibility index indicated a low score, is not a mandatory safeguard imposed by Convention No. 158. Instead, it is only a means to implement adequate safeguards that can be replaced by other means.

The other criteria regarding the ability to terminate up to nine workers without being obliged to inform and to get approval from the third party and considering countries allowing doing so as more flexible countries than those do not permit such termination unless after informing and getting approval from the third party, are also can be argued from the perspective of the Convention's provisions. This criterion depends on the desire of many jurisdictions to exclude small businesses from unfair termination laws. The debate here is whether Convention 158 includes a provision to allow or prohibit such desire. This criterion measures flexibility in view of small businesses and to what extent those types of businesses are free from employment protection legislation. There is some provision in Convention 158 that underpins this measurement, as Article 2 (5) permits member states to exclude from the protection afforded by the Convention workers in respect of which special problems of a substantial nature arise in the light of ... the size or nature of the undertaking that employs them. The desire for this exclusion to activate small businesses was raised during the drafting of the Convention and the rationality of this desire finally brought Article 2 (5) into existence on the basis that workers protection in small businesses is likely to pose difficulties to operate small businesses in labour market.⁸²⁵ Thus, we found that nothing in ILO instruments, especially in Convention 158, presents to inhibit flexibility criteria, instead, there is leeway in great areas where countries can establish flexible criteria and reap their benefits in labour market.

The debate over job security and labour market flexibility in the EU has not led to a trade-off between such policies. Each one of them is a fundamental tool and plays a great role in its area. Leading countries in the employment flexibility index remain bound by the basic principles of employment protection afforded in EU legal tools, namely EU Charters, Directives, and Case law. The two policies in the EU member states, therefore, got integrated and formulated in a new model

⁸²⁵ ILO, 1995, *op. cit.*, para. 67.

which is known as flexicurity. The idea is that by virtue of soft law especially the Open Method of Cooperation (OMC), the EU has collected the best practices of its member to implement flexibility and security together in employment strategy. The result has developed the perception of job security and flexibility as both formulated into the flexicurity model.

Job security has been replaced by employment security under the EU flexicurity approach. The notion that boosts employability facilitating the ability of workers to transfer from a job to another in labour market, rather than stick to the current job. Workers' protection, in this model, lies in a rapid capability to access labour market after being out from it. This protection along with unemployment benefits provided to terminated workers can be described as workers' social protection that replaced protection within internal arrangements based on a particular employment situation. Ultimately, the successfulness of this model depends on the reliability of labour market in performing its intended functions to satisfy workers and employers on one hand, economic interests on the other hand.

In the context of distinction between different kinds of security, employment security can relatively be separated from income security since the latter is workers' ability to pay for their fundamental needs without being worried for losing their income source. Nowadays, income security is not solely employment based, rather, it could depend on state's contributions. Such as unemployment benefits, a temporary income provided to workers upon losing their jobs -not based on their fault- till they get access new jobs. Such state programs are a core element in flexicurity concept, helping workers to keep their income security in unemployment period. Thus, unemployment period is a transitional period in which income security of workers depend on state's contributions instead of employment. Accordingly, as it is possible for workers to have employment security without job security, it is also possible for them to have income security without employment security. Nonetheless, the level of income based on the social security programs is different from what depends on a decent employment. This means despite the distinction; the concept of employment security remains in strong correlation with the concept of income security under flexicurity model.

flexicurity is not only confined to more leeway for companies to hire and fire employees, and it does not erase open-ended contracts. It is a model to progress workers finding better jobs, easy mobility, and ideal development of skills. Such aims, of course, creates a flexible labour

market and seems to respond typically economic concerns, but its expected outcomes on employment rates rises the underlying social concerns. From that end, some researchers initiate criticizing negative impacts of flexicurity concept, aiming to propose potential solutions during the implementation of flexicurity concept in certain countries. Therefore, the model is not flawless, and its negative impacts should be analyzed before transferring it to Iraq or any other countries.

The EU flexicurity approach has not a specific shape or certain characteristics through which a definition can be determined for the model. This because that the approach gradually developed within soft law; the non-binding rules to share guidelines and benchmarking of member states. Another reason refers to the degree of state intervention in labour market that significantly varies between countries as the type of such intervention is also vary. In the two of best practices of flexicurity, Danish and Dutch flexicurity models, the disparity of state intervention degree and the type of intervention in labour market can simply be seen. The Dutch flexicurity model dictated state intervention through normalizing atypical contracts, strengthening the position of workers engaged in such contracts likewise the standard contracts without curbing flexibility in labour markets. While the Danish flexicurity model extended state intervention through unemployment benefits program, empowering state to impose obligations on unemployed workers and employers limiting job protection and reducing termination costs. However, the European Commission has drawn four components of flexicurity: “flexible and reliable contractual arrangements, effective active labour market policies, comprehensive lifelong learning strategies and modern social security systems”.⁸²⁶ But the application of these components, of course, will be varied and takes different shapes from a state to another due to the variation of labour market challenges, and state strategy to face challenges, as well as the state ability to provide welfare systems.

In sum, the EU flexicurity approach has proved the applicability of international standards preserving security and flexibility in a unique model. It deserves to be a reference for other jurisdictions where labour legislation lacks termination rules in a way that may serve multiple aims; protecting workers from unfair termination and activating labour market to respond objective purposes.

⁸²⁶ Bekker, S., & Mailand, M. (2019). *The European flexicurity concept and the Dutch and Danish flexicurity models: How have they managed the Great Recession?* Social Policy & Administration, 53(1), 142-155.

To this end, we analyzed termination rules in the Iraqi Labour Code in light of flexicurity as a developed model concluded from international and EU standards. From the historical background of the first Iraqi Labour code No. (72) of 1936 to the current Labour Code No. (37) of 2015, we found that termination rules in Iraq have not smoothly developed pursuant to the labour market fluctuations. The rules, rather, were and still reflect the political attitude and the ideology of the ruling party. In the first Labour Code No. 72, the ideology of the Monarchy system has been reflected. Workers remained a vulnerable group without legal protection until the Ba'ath party took the power in 1968. Since then, labour codes and their amendments reflected Socialist ideology as being an adopted ideology by the Ba'ath party. Iraqi Labour system started providing protection to workers and incorporated with very restricted termination rules. Till the year 2003 in which the Ba'ath party has been collapsed, the Iraqi Labour Codes were very protective for workers, containing undue restrictions on termination of employment contracts. This rendered termination to be categorized as unfair termination once it occurs beyond imposed restrictions. The situation prolonged even after the collapse of the Ba'ath party and the labour market remained governed by the Labour Code No. (71) of 1987, one of the restrictive laws that lack the ability to respond labour market needs. Aiming to respond such needs particularly to minimize the rate of unemployment increasing day by day, Iraq promulgated the last Labour Code No. (37) of 2015, the code that we have tested in this study in light of international and EU standards.

As the result of our test upon termination rules in the Labour Code No. 37, we found that the Iraqi legislative body in issuing this code have also misunderstood the needs of labour market. Though some positive amendments, the Code lacks a balance between security to protect workers, and flexibility to activate labour market. The Code mainly retains job security side including the most crucial international standards governing workers' protection as such standards guaranteed a high degree of protection against unfair termination. The result indicates that the Code lacks flexibility side and had not taken benefits from international provisions drew to keep a degree of flexibility, such as the exceptions afforded in Convention No. 158, Article (2) thereof. Under Code No. 37, fixed-term contracts, in which the date of termination is known, are still prohibited for permanent tasks while such contracts can be exempted from the application of protection as many EU countries did to flexibilize their labour market and reaped the benefits. Even for temporary tasks, the maximum duration, and the number of renewals of fixed-term contracts are very restrictive compared to the other jurisdictions. In addition, the Code has not permitted workers to

terminate a fixed-term contract before the expiration of its date. This makes the worker lose a chance of finding a better position and flexible transfer from a job to another.

No flexible provision provided to facilitate and operate small businesses in the Iraqi Labour Code. While many EU countries including member states in Convention 158 excluded small businesses, each up to different numbers of employees, from the protection of unfair termination laws, Iraq applied regular termination rules on small businesses. Accordingly, the employer to close such a business shall inform the competent authority and get approval to do so. Such restrictive rules do not incentive increasing small businesses which is crucial to create new jobs and decrease the rate of unemployment.

Another defective point is related to the role of trade unions before the procedure of collective redundancy takes place. As has been found that informing and consulting workers' representatives before collective redundancies is a mandatory procedure in many developed countries, aiming to find flexible alternatives to termination, such as job sharing, redeployment, or any other possible solutions. However, the Iraqi Labour Code has not considered the effectiveness of this procedure to minimize the risks of termination since it makes the consultation with the worker's representative an optional procedure for the employer before taking any decision on termination.

Regarding the probationary period in employment contracts, we also found some legal loopholes in the Iraqi Labour Code. The Code prohibits the employer to test a worker who possesses a professional certificate, such a worker thereby cannot be placed into probationary period, and s/he cannot be fired from job pursuant to the lenient termination rules applied on probationary workers. This is a unique provision to restrict the prerogative of the employer that may not be found in any other jurisdictions. The Code also lacks standards to review the legality of termination during probationary period and what constitutes unfair termination in that period. This is also a defective point from the perspective of flexicurity that does not neglect security side if it serves objective needs.

Altogether, this study found that according to the international standards and EU standards concluded in the flexicurity model, the current Iraqi Labour Code No. (37) of 2015 still needs major amendments in respect of provisions governing termination of employment contract. The

amendments shall enhance flexible labour market aiming to create new job opportunities at the first place, and in the second place reorganize the employment security aspects.

CONCLUSIONS

In this study, we have answered the essential research question presented at the beginning of this study:

“How the international standards to prevent unfair termination of employment contract have turned to the EU flexicurity model, and what makes the Iraqi Labour Law reach to this developed model”.

The results indicate that the best practice-based model to determine unfair termination of employment contract is not only depends on the protectivity of termination rules for workers who currently possess jobs but also depends on the flexibility of such rules insofar as necessary to expand employment opportunities and give more workers access to the labour market. This is a model that can serve multiple interests belong to the employer and the worker and eventually enhances economic sustainability.

Since the method to combine between the protectivity and flexibility of termination rules may vary from a state to another, the international standards provide outlines to enable states in finding their way of establishing a balanced model. The purpose of international standards to modulate termination of employment contract is twofold, to guarantee protection for workers and to increase flexibility in labour market. To guarantee protection for workers, the international standards require a spectrum of legal procedures to terminate an employment contract, namely, the need for valid reason, notice period, the right to defend against the allegation made for termination, and the right to appeal the decision of termination. As for increasing flexibility, the international standards provide leeway to exclude some types of workers and employment contracts from the protection afforded in the relevant international instruments. The latter is to ease hiring and firing process especially in small businesses and fixed-term contracts that are deemed as leading tools for increasing job opportunities and economic development. At first glance, it seems that the combination between the two different sides is insurmountable since the extension of each side causes the erasing of the other side. However, a degree of compromise from each side as much as needed for the other side may achieve a successful combined model.

The successfulness and adaptability of the international standards have been proven in developed countries, namely, in the EU countries. Even though less than a half of the EU countries

have so far ratified the relevant international instruments for the prevention of unfair termination of employment, the EU took advantage of the international standards and incorporate them into its employment strategy implemented through the Open Method of Coordination (OMC). The Europe Employment Strategy based on the OMC is designed to share best practices combined hard law employment requirements with soft law employment guidelines. The strategy introduced flexicurity as a complementary model between security and flexibility of termination rules, functioning each side to a degree that does not erase the other side.

The purpose of the EU flexicurity model is not a trade-off between security and flexibility, meaning the model is not giving up security in return for flexibility or vice versa. Rather, it is to balance and redefine the concepts of security for workers and flexibility. From this perspective, it reaps the aims of the international standards to collect opposite interests in a unique practice model.

Despite a degree of ambiguity in its concept, the EU flexicurity model can be characterized through its new formulation of security for workers and flexibility of labour market. Regarding security for workers, flexicurity is seen as a transitional model from job security to employment security. The idea is that job security and getting fired from a specific job is no longer a matter for most workers, but the matter is being able to remain in employment status instead. In other words, job security secures the job, which is currently delegated to the worker and, of course, requires strict termination rules while employment security secures employment status and easy transition from a job to another. In contrast to job security, employment security as enhanced by flexicurity tends to ease termination rules within contractual arrangements insofar as necessary for balancing security and flexibility together. Meanwhile, it reduces the fear of workers and brings their attention to the accessibility of labour market as compensation to minimize the degree of security in contractual arrangements. Many factors are engaged to establish this system in practice, in some EU countries as for example, unemployment benefits and active labour market policies, such as vocational training and helping in the job search process are the most seen factors that involved for that purpose. The factors are not exclusively provided under the EU flexicurity model, they may differ from a state to another pursuant to the social policy and the ability of state welfare programs. However, the successfulness of the EU flexicurity model depends on the workers to trust labour market, believing that they will not encounter long periods of unemployment.

In balancing security provisions by flexibility measures, the flexicurity model does not eradicate the need for grounds to terminate employment contract. But the model erasing the strictness of the grounds as much as they seem to be reasonable grounds that do not impede the operation of businesses and repeal undue procedures for termination. For small businesses, it allocates more internal flexibility by excluding a reasonable number of workers operated in such businesses from protection against unfair termination. The number reaches nine or fifteen workers in some EU countries. The exclusion of workers in small businesses from traditional protection does not contradict international standards because it can be classified under the exceptions made in Convention 158, where Article 2 (5) permits such exclusion of workers “in respect of which special problems of a substantial nature arise in the light of ... the size or nature of the undertaking that employs them”. The abolition of workers’ protection in small businesses is objectively justified since protection poses unreasonable difficulties to operate such businesses.

Another key distinction of the EU flexicurity model is resorting to atypical contracts in employment, responding to rapid progress in work organization. The emergence and normalization of fixed-term contracts that are terminated at an agreed time without following specific procedures is one of the features of this trend. At the EU level, fixed-term contracts have been introduced as a form of flexible employment where the automatic termination on the expiry date principally protects employers from unfair termination claim. Notwithstanding, this notable flexibility in fixed-term contracts is balanced by a degree of security in two ways; first is the limitations imposed to prevent the abuse of consecutive fixed-term contracts, and second is forbidding any treatment that seems to be less favorable to treat fixed-term workers than that to treat permanent workers. These are the two main measures that are taken in the Fixed-term Work Directive 99/70/EC in balance flexibility to increase labour supply and security for workers.

By taking the EU flexicurity model into account, it is evident that Iraq needs a variety of social and economic programs that play multiple roles for the benefit of worker, employers, and economy. Such programs cannot only be given under labour law rules. Rather, they should be outlined based on a system of social security, such as unemployment benefit programs, and active policies of labour market, such as centers for job search or training, lifelong learning, and rehabilitation services. In this regard, education system also may contribute and play a primary

role particularly for educating workers relating the modern labour market programs. This would be the right approach to protect workers and simultaneously to keep an active labour market.

By considering EU flexicurity model again, we have found several legal loopholes and defective points in Iraqi Labour Law regarding termination of employment contracts and what has been portrayed as unfair termination. In general, the Iraqi Labour Law has not reasonably balanced between flexibility and security for workers in articulating termination rules. It biases to strict termination rules that are not tolerable rules to modernize labour market on one hand. On the other hand, it defaults some security provisions where there are no objective reasons to erase such provisions. Therefore, in attempting to improve the Iraqi Labour Code No. (37) of 2015, so it can reach the flexicurity model, this study is finalized with the following recommendations:

- 1) Redraft Article 38 (2) in a way that permits the recourse to fixed-term contracts even in permanent activities in favor of increasing labour supply. The prevention of fixed-term contracts in this article might be switched to the prevention of the abuse of the consecutive fixed-term contracts between the same worker and the employer, and the prevention of the less favorable treatment with fixed-term workers than that with permanent workers.
- 2) To prevent the abuse of consecutive fixed-term contracts, the Iraqi Labour Code may impose limitations either on the total duration of consecutive fixed-term contracts or on the number of renewals.
- 3) Increase the total duration of fixed-term contract or the number of its renewals in temporary activities. This requires a redraft of Article 38 (1&4) that permits fixed-term contracts in temporary activities only for one year with the ability to renew such contracts only once.
- 4) Exclude small businesses from protection against unfair termination as flexible countries did to operate small businesses for supporting a sustainable economy. This requires adding provisions to permit the employer in small businesses to terminate up to nine workers without being obliged to inform and get approval from the competent authorities. The adoption of such exclusion is not in contrast with international standards, but rather is an implementation of Convention No. 158, Article 2 (5) thereof.

- 5) Provide protection for workers based on the system of social security, such as unemployment benefits for terminated workers on the condition to participate in vocational training, and establish active labour market policies, such as the establishment of professional centers to assist workers in the job search process, lifelong learning, and public work programs.
- 6) Redraft Article 43 (1/h), to enable the worker to practice early termination in fixed-term contracts without being liable for unfair termination and giving compensation, unless if such termination damages the employer in clear instances. The failure to prove damage, thus, shall dismiss the case. Prevention the right of the worker to resign himself in fixed-term contracts loses the chance of the worker to find a better position and flexible transfer from a job to another. In contrast, absolute permission to do so may damage the employer. Hence, this is a compromise between absolute permission and absolute prevention of early termination, that can balance the interests of both parties.
- 7) Giving a fundamental role to the trade unions in case of collective redundancies and impose a mandatory requirement to inform and consult with workers' representatives before the decision on collective redundancies takes place, aiming to find better alternatives to termination, such as job sharing, redeployment, or decrease the number of redundant workers. This also requires a redraft of Article 143 (4) that only provides an optional choice to consult workers' representatives in this case, instead of making it a mandatory step.
- 8) Redraft Article (44) to stipulate a notice period not only for the case of downsizing an enterprise but also for the case of closure or liquidation of an enterprise. The distinguish between the two above cases regarding giving notice seems to be a linguistic default, therefore, it only needs a linguistic correction to include both cases.
- 9) Pulling out the term "professional certificate" as a barrier to test workers and put them under probationary period in Article 37 (2), this makes the article to be more accurate due to not having a necessary connection between required suitability in a specific job and possessing a certificate.

- 10) Limit the power of the employer to fire probationary workers by establishing standards to test the employee's suitability of the job, as has been seen recently in case law. For that purpose, Article 37 (2) should be restated in a way that establishes suitability standards or requires the court to derive such standards while reviewing individual termination cases.

- 11) Restate Article (140) in a way that guarantees the right of the worker to defend himself against the allegation made not only in case of dismissal due to serious misconduct but also in case of terminating his contract because of incapacity or misconduct which is not reached to the level of serious misconduct. This is also to bring the Iraqi law compatible international standards guaranteed this right in both cases.

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List of publications related to the dissertation

Articles, studies (5)

1. **Ismail, O. A.:** Iraqi Labour Law - Recent Amendments on Termination of Employment Contract - compared to International Labour Standards.
Jog, állam, politika. 11 (2), 103-114, 2019. ISSN: 2060-4580.
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By the directives of HAS Committee on Legal and Political Sciences:

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