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ПРАВО НА РАБОТА ВО НЕПРЕДВИЛИВИ ОКОЛНОСТИ

RIGHT TO WORK IN UNFORSEEN CIRCUMSTANCES

Abstract

Three complex issues are discussed in this paper. The first set contains the definition of the right to work and its conceptual orientation. The second set concerns the legislation, in terms of domestic and international law.

The central topic of the paper concerns the protection of labor relations, the protection of contracts in the event of unforeseen circumstances. Unforeseen circumstances may occur in a specific country, but also on a larger scale such as regions and the wider community.

***Key terms:** contract of employment; labor relations, unforeseen circumstances and their influence on the labor relations, the contract of employment as a labor relation, employment policy and the role of the state*

Brief introduction

The title of this paper itself implies that a very complex question is being discussed in the following paper. Considering the fact that it is very difficult to give a comprehensive answer to all the questions in the field of labor relations, especially questions related to the right to work, and all of it to be contained in a very limited space for the purpose of this work, the paper will only discuss the key words and institutions.

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Namely, labor consists of three important key words. More precisely, this paper elaborates on three important institutions. The first one is related to the definition of labor and the right to work as constitutional right. The next issue discusses the legal framework. Given the nature of this issue, as well as the content and significance of this right, we shall divide this issue in two different levels. The first level is the domestic law as a source that is internal sources. The second level, and by no means less important, focuses on international sources. Important novelties in the work of the international acts should be underlined. For certain acts, such as ILO, there are special reviews.

The third, and very complex issue, is the right to employment; the institution of labor relations and the unforeseen circumstances. This complex issue is divided in two different parts. The first one elaborates the contract that is the legal basis for setting employment. Directly related to the contract are the unforeseen circumstances which have an impact in the realization of the right to work and the overall process of employment. All in all, it should be addressed that the labor relations should be protected in order to protect the contract itself. That is an important feature, but also a responsibility to the country, every country, itself. The before mentioned issues are discussed in this paper.

1 Definition and conceptual determination of the right to work

In the context of economic and social rights, the right to work is one of the most important rights. It represents a fundamental right in the catalogue of human rights, that is, exercising this law provides a source of livelihood for people and existence of family members. Therefore, it is not a coincidence that the constitutional and legal aspects determine that based on economic and social laws and their guarantees and implementation set the economic and social aspect of the citizen within a given society i.e. within the country itself.

When analyzing social freedom and social rights, they represent an evidence of the social functions of the state, which means an important jurisdiction in exercising these rights. Citizens meet the fundamental rights of livelihood by exercising these rights.

The meaning of the right to work is multi-dimensional for every person. Three dimensions of this right are crucial. First, this right consists of the right to employment, permanent or temporary. The second dimension is important as well, since it refers to the right of protection at work. This is the material component that is the right to profit, the

right to a salary. The income is the fundamental right to every employee. Under this law, the right to a salary is strictly determined in every national legislation with a minimal wage guarantee.

Guarantee of minimum wage as a law is sanctioned with the international law, more specifically in exact and imperative international acts. This law will be discussed in more details further in this paper. For now it is important to emphasize that the right to a guaranteed minimal wage equals is a universal law.²

Additionally, there is another thing connected to the content of the labor law. Namely, there is the issue of financial security of workers who are temporary unemployed. The stand on this issue within the labor law theories is that the question of employment, the exercise of rights under labor, permanent employment and termination of employment are inseparable from the question of the status and rights of the unemployed and in particular their employment.³

The stated facts indicate that for the labor law, as a science, but also for labor law legislation two institutions are important when it comes to employment. Regarding first of all, the concept of employed individuals and second, the concept of unemployed individuals. The said institutions recognize two different situations. According to one view, the term employed covers the individuals that engage in work that provides means of livelihood. In sense, this definition of employment defines the state of employed individual i.e. engagement of human resources. However, to create a complete definition of employment, it should be defined as state of engagement of individuals of working age and the use of material resources of specific country for socially useful and productive work.⁴ According to this criterion, criterion of employment, every country has a certain level of employment, but there is a variable yet prominent problem of unemployment.

In relation to conceptual determination of employment, in science, the question is posed whether there is a so-called full employment. Before answering this question, we opt for an important definition of the term - full employment. According to the famous scientist, V. Beveridge, full employment is the state in which the number of unfilled vacancies is not significantly below the number of unemployed

² Svetomir Škarić, *Constitutional law*, Skopje, 2015, p. 514-515.

³ PhD Vljako Brajić, *Labour law*, Beograd, 2001, p. 141.

⁴ PhD Vljako Brajić, *The issue of employment in circumstances of technological progress*, Beograd, 1972, p. 28.

individuals.⁵ In other definitions of the term, full employment is that employment in which the number of unfilled vacancies is bigger than unemployed individuals. Professor Brajic offers a wider definition of full employment. Full employment represents the state of full voluntary engagement of individuals of working age and use of material sources in a society, for the purpose of productivity and socially useful work.⁶

Accordingly, employment is counter to unemployment. Answering the posed question, in modern states, a full employment is difficult to accomplish.

The case of evaluating the state of employment and unemployment, one should start from unemployment as a process of increasing the number of employed and decreasing the number of unemployed working individuals. Based on the definitions given, with the term employed we cover the employment of new workers i.e. increasing the number of employed individuals. To have an increase in employment, every country is preoccupied with measures and means to be taken within the framework of the established policy of employment.

2 Legal regulations and guarantee the right to work (Right to employment)

The right to work is an important and fundamental right from the catalogue of economic and social rights. This right is guaranteed by the positive law of the country concerned. On the other hand, it is important for this right to have its determination in the international law.

Turning to domestic law, it is crucial to point out that it is the basic right and freedom of citizens to have relevant commitment and constitutional solutions. The fact that the human rights of specific countries envisaged to be the same constitutional matter, *materia constitutionis*, says enough of their importance and relevance to the country as well as all its citizens. Within this context we should seek the legal construct, guarantee as well as protection of the right to work.

Constitutional provisions are clear in terms of identifying and determining the right to work. Apart for defining human rights with the constitutional and legal norms, the constitutional matters at the same time represent legal remedies and mechanisms for their protection.

Therefore, *mutatis mutandis*, applies to the right to work whenever there is a need for it. This is simply because, as is well known, if

⁵ V. Beveridge: Full Employment in a Free Society, London, 1944.

⁶ PhD Vljako Brajić, Labour law, Beograd, 2001, str. 142.

one country only determined freedoms and rights, and on the other hand, offers no legal protection, the constitutional doctrine rightly underlines that such a right is not guaranteed.

Solutions in modern constitution in this regard are very clear. For example, in the Constitution of the Republic of Serbia, from 2006, foresees, among other things, to guarantee the right to work in accordance with the law. Everyone has access to all workplaces, under equal conditions.⁷ The content of the constitutional regulations are almost equal in the Constitution of Republic of Macedonia. For example, the provisions of Article 32 state that everyone has the right to work and freedom of choice on employment. Everyone has access to all workplaces, under equal conditions.⁸ The Constitution of the Republic of Albania from 1998, the provisions of Article 49, inter alia, provides that everyone has the right to earn his livelihood on the basis of lawful work that he freely chooses or accepts. Employees have the right to social protection at work.⁹

In addition to the Constitution, the question of the right to work can be regulated by package of laws in the field of employment. Primary law is the law on labor relations. One important source of labor law relations, specific to labor relations, are the collective agreements.

The approach to international law is important. There are important international instruments whose provisions stress the importance of the right to work. From the international documents, emphasis is placed on crucial documents on different levels: primarily International community level, secondly level of the European Union. At the level of the International community, as was very important and relevant documents: Universal Declaration of Human Rights of 1948 and the International Convention on Economic, Social and Cultural Rights of 1966.¹⁰

⁷ Read the contents of Article 60 of the Constitution of the Republic of Serbia from 2006.

⁸ For constitutional arrangements regarding the right to work, read the provisions of Article 32 of the Constitution of the Republic of Macedonia from 1991.

⁹ The provisions of Article 49 of the Constitution of Albania are clear. It is important to point out how the constitution of this country was adopted. Specifically, of the four known systems (modalities) for passing the constitution, namely: of a constituent assembly; home of the legislative and the referendum; The Constitution of the Republic of Albania was adopted in a combined system. This is the fourth system. The text of the Constitution was established by the Legislature at home, and as the Constitution was adopted by referendum. The Constitution was adopted in 1998.

¹⁰ Stated more specifically in the part of PhD Zoran Ivošević, Labor Law, Belgrade, 2005, p. 22.

In the framework of international law, it is important to underline the meaning of the acts of the International Labor Organization (ILO).¹¹ The International Labor Organization has an important jurisdiction in field of labor and employment relations. Its involvement its jurisdiction in terms of improving working conditions is greatly significant.¹² The highest legal act of the organization is its Constitution. Important are the provisions of the Constitution of the ILO on labor and labor relations. The Constitution, inter alia, states that "universal and lasting peace can be ensured only if it is conceived on social justice". Also in the text of the Constitution it is read that "the existing operating conditions include such injustice, hardship and trouble for so many people to cause so much discontent that threatened the peace and harmony of the world."¹³

Important acts were adopted by the ILO, creating conventions and recommendations. ILO Conventions have legal force and are binding for the Member States to bring their domestic laws in line with their provisions. The recommendations have no binding legal force. However, they carry political and moral authority.

From the European Union and European laws the following acts are important, namely The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. From this Convention, and in terms of themes that are elaborate, three provisions are important: first, prohibition of forced law (Article 4); Secondly, the trade union freedom of assembly (Article 11); and a third, non-discrimination on the basis of any status (Article 14).¹⁴

Another important document for the European laws is the European Social Charter adopted in 1961. European Social Charter determines the catalog of rights, obligations and mode control system.

¹¹The International Labor Organization was founded in 1919 by the Versailles Peace Treaty, June 28, 1919. From 1946, this organization exists as a specialized organization of the United Nations.

¹²PhD dr Zoran Ivošević, p. 22 – 23.

¹³More in: Boris Krivokapic, *Lexicon International Law*, Belgrade, 1998, p. 237.

¹⁴Discrimination in labor relations and article authors, prohibition of discrimination in labor relations and civil liability. "Legal Life", no. 11/2012.

3. Right to employment, labor relations and the effects of unforeseen circumstances

Employment and labor relations are very important institutions in every country. However, the issue of how they are exercised in practice has always been raised. The issue of unforeseen circumstances is closely related to labor relations. Unforeseen circumstances have an influence first of all in the case of self-employment, and then the employment itself and its duration. The unforeseen circumstances often happen in a country. However, they can happen even on a larger scale, such as a region, the whole Europe but also the whole international community. Two issues are raised in this paper in order to get a clearer idea. The first one is the issue of employment and the employment contract, and the second one, the unforeseen circumstances.

3.1 Beginning of employment and work contract

Prior to reflecting on the unforeseen circumstances and the status of employment, in this paper we started from the hypothesis that an employment begins based on a signed contract. A contract of employment is the legal basis-*justus titulus*. Due to the importance of the contract itself, it is important to mention the particularities of the contract. The historical development is discussed. The contract of employment has a long history, and in its development, the contract represented an inseparable segment of employment, though sometimes less and sometimes more. There have been some controversial issues in this context and in terms of the contract of employment. According to one view, the contract is linked to the Roman law.¹⁵ However, there are legal writers who believe that the contract of employment, as an institution, was created even before the Roman law and its existence should be sought even before the Roman era.¹⁶

However, it should be noted that the contract of employment in the Roman era had a limited application and different meaning from the contract in contemporary law. Therefore, the contract in terms of labor law should not be directly linked to the contract in Roman law.¹⁷

¹⁵ Read more in Fundamentals of Labor Law, self-governing system of mutual relations and the basis of problems of sociology of work by Aleksandar Baltić, PhD and Milan Despotović, PhD Belgrade, 1976, p. 17.

¹⁶ Dr. R. Živković, Problems of legal nature of the employment contract, Belgrade, 1940, mentioned on many pages.

¹⁷ The standpoint of dr. Vljeko Brajić, Labor law, cited work, p. 21-22.

The concept of a contract of employment, as an instrument of equality and equal parties, was particularly developed in the bourgeois society and its legal system. This orientation supported the ideas of Locke and Rousseau. The development of capitalism brought to the fore the property and obligation relations. These relations represent the content of the legal working, and therefore the subject of the contract of employment.

However, in the historic development of the contract of employment until the appearance of its developed conception, this contract had the elements of non-proprietary nature. Non contractual elements were mentioned for other reasons as well, two of which are important to be noted. The first reason was perceived in the intervention of the country; and the other reason is the adoption of compulsory regulations. There was also a tendency towards collective bargaining. These changes had an effect in terms of the limitations of individualism and liberalism in the economy and the law. From the legal standpoint, we should also emphasize the commitment of the limitations of party autonomy in contractual relations.¹⁸

At the end of the 18th and the beginning of 19th century, in particular civil codes there existed regulations in the contract of employment that expressed the principle of autonomy of will as well as characteristics of the obligation law and the lease agreement. The French Civil Code (1804), the Serbian Civil Code (1844), the General Property Code of Montenegro (1888) and others belong to this group of laws.

The change in labor relations in the 19th century had an effect in the legal regulation of the contract of employment. This is seen particularly in the Civil Code of Germany of 1986 and the Austrian Civil Code, in its revised text of 1916.

In the regime of socialist law, that is, upon the end of the socialist revolution until 1957, the contract of employment was the basis of the starting of employment. According to the Law on Labor relations of 1957, the contract was intended as a method of entering into a temporary employment as well as the commencement of employment with private employers. By the provisions of the Law it was envisaged that the employment agreement was based on the agreement for work.¹⁹

Based on the before mentioned solutions for the contract of employment, the contract, in the theory of labor law, is defined as an agreement in which the worker sells, or makes available, his workforce.

¹⁸ Labor Law by prof. Vljako Brajić, PhD, cited work, p. 22.

¹⁹ Labor Law by prof. Vljako Brajić, PhD, cited work, p. 22-23.

3.2 The problem of unforeseen circumstances in labor relations

If the right to work is a constitutional right, which is not even disputed, a question is raised about how the right is exercised. It is exercised by employing a person seeking a job, a person in need to secure their existence as well as the existence of family members, through a job. Labor relations begin with employment. The legal basis of employment is a contract. A contract of employment represents an important legal instrument. That is the rule. However, the legal basis may vary for specific jobs, since it depends on the nature of the job as well as the specific legislation of a particular country.

The contract of employment and the labor relations are analyzed from a particular point of view in this paper. One aspect relates to the unforeseen circumstances which may appear in the society or the country. The realization of the right to work may depend on the nature or the intensity of the circumstances. The occurrence of specific circumstances can affect the labor relations on two levels. First, it may affect the employment, in terms of obstacles in starting the employment. For example, an employer facing financial problems, in the case where there is a need for employees, but there are no conditions for employment. Another thing is important as well. Namely, unforeseen conditions may affect the status of people- employed workers. This is the case with bankruptcy. Therefore, the status of the workers may directly be linked to the unforeseen circumstances.

Unforeseen circumstances may appear on national level. The economic crisis, for example, is, undoubtedly, a relevant factor in employment, that is in the process of working in specific legal entities, or with a specific employer. In the countries on the Western Balkans there is also a political crisis. There is a connection between the before mentioned crises and the legal crisis. Therefore, the law is in crisis as well.

Unforeseen circumstances that happen outside a particular country, e.g. a region, are important as well. There are cases with war conflicts, the phenomenon of refugees, serious problems on the labor market, organized crime and its implementation on the territories of many countries. The automation and programming of machines as well as the information technology also have an influence on the economic life.²⁰

It is very important to be able to respect the contract of employment in case of unforeseen circumstances. The contract of employment

²⁰The last two phenomena are specifically described by Anthony Giddens, *Sociology*, Cambridge, 2001, p 386-387.

creates a specific legal relationship, i.e. a particular section. This is the relationship between the employer, on one hand, and the employee on the other. In our opinion, the labor relation, as a contractual relation, is based on the general principals of contract law. The principle of *pacta sunt servanda* is applied in contract law, i.e. the contract has a mandatory power for the parties involved, and *a fortiori*, the contract is their legal and factual creation.²¹

The labor relations as legal labor relations consist of specific rights and obligations. These are the obligations between the parties, which are implemented for a longer period of time, that is the duration of the employment.

Should extraordinary circumstances happen, the first response is the principle of *pacta sunt servanda* in the contract to remain in force. But it is possible the famous clause *rebus sic stantibus* to be applied as well. The application of these clauses leads to two possible solutions; the first one is termination of the contract, or the other one, revising the contract. However, the solution should be in favor of the workers. This means that the contract should be revised and the employee should remain employed.

Finally, in these circumstances and conditions in the labor relations, and due to unforeseen circumstances, the government should play an active role. The active role consists of taking appropriate means and measures for the protection of the labor rights. The measured relate to the employment policy. A successful employment policy leads to the integration into the economic policy of the country, provides a strategy for increasing employment; establishes objectives and meets the needs to adjust to the supply and demand on the labor market.²²

RESUME

The right to work is an important and fundamental right in the field of economic, social, cultural and other rights. The realization of this right allows the citizens of a particular country to meet their needs, the most important need of which is the need to provide livelihood for themselves, as well as the members of their families.

²¹Meaning of legal works more in the book: Introduction to civil law (in Albanian), Skopje, 2008, p.313-330.

²² More on this determination in Labor Law by prof. Vlajko Brajić, PhD, cited work, p. 143-144.

What is important is the legal regulative. In this paper it is stated how this regulative is provided on the level of international law and on domestic level. An important role of the international mechanisms is the power and function of the International Labor Law as well as the important documentation it brings such as the conventions and recommendations.

This paper particularly emphasizes the obligation of the state, especially in the event of unforeseen circumstances, when the state should take measures to ensure protection and employment of persons who are employed. However, the state should intervene with concrete measures for the employment of persons seeking a job and in need of a one. In this regard, each state should be preoccupied with an important goal, which is to achieve employment.

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