PROBLEMS OF THE CORRELATION OF PRIVATE AND PUBLIC INTERESTS WHILE IMPLEMENTING THE FREEDOM OF WILL OF THE PARTIES TO THE EMPLOYMENT CONTRACT IN UKRAINE IN TERMSOF THE COVID-19 PANDEMIC

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ABSTRACT

The problems of the correlation of private and public interests while implementing the freedom of will of the parties to the employment contract in Ukraine in terms of the COVID-19 pandemic have been studied in the article; and propositions for their solution have been substantiated. Having studied the statistic data that demonstrates the negative consequences from the COVID-19 pandemic in the world for the realization of labor rights, the authors have characterized the potential threats to the labor rights of employees and employers in Ukraine and indicate the ways of their origin. The authors have substantiated the opinion that the legislation of Ukraine was not ready for effective regulation of labor rights and their implementation in these conditions. It has been concluded that: the parties to the employment contract have become dependent on government measures to curb the spread of the pandemic; the social dialogue in the context of the COVID-19 pandemic is the legal construction that is able to balance private and public interests, to find a point of their intersection that would suit both the state and a particular entity on the legal regulation of relations in the field of hired labor.

Keywords: An Interest, Freedom of Will, An Employment Contract, An Employee, An Employer, Right to Labor, Labor Rights, Social Dialogue.

INTRODUCTION

The pandemic announced by the World Health Organization on March 11, 2020 in regard to the spread of COVID-19 in the world has challenged humanity in all spheres of its activity:

starting from domestic communication to the realization of human rights, in particular in the field of labor (WHO). According to the sectoral and regional information about pandemic consequences provided in the research accomplished by the International Labor Organization (ILO), COVID-19 is described as “the worst global crisis since World War II” (ILO, 2020). Hence, the measures aimed at combating the spread of the virus used almost all over the world andassociated with the restriction of human contact, have negatively affected the economy and the labor market and, as a consequence, the realization of human rights to labor. According to the

report of the ILO, the COVID-19 pandemic has caused a catastrophic effect on the employment and wages in the world. More than four out of five people (81 percent) of the total workforce (3.3 billion) suffer currently from full or partial liquidation of jobs (ILO, 2020).

Science cannot stay away from solving these problems and must offer the ways to solve them. Therefore, the issues of ensuring the realization of labor rights in order to ensure the possibility of earning a living, to prevent the spread of poverty in the world and the violation of social justice, become especially relevant in the modern scientific research.

MAIN TEXT

All countries, regardless of the level of development of their economies faced the problem of ensuring human rights at the present day. According to ILO Director-General Guy Ryder, "employees and companies are facing a catastrophe in both developed and developing economics' countries" [3]. It is obvious that the employment of the population, which: (a) Brought basic income to the latter; b) Provided the bulk of the budgets of most countries, mostly was affected by the effects of the pandemic. Since the pandemic deprived a person of the opportunity to be engaged in socially useful activities, which, as a rule, brought monetary income. Banning and restricting the work of trade and catering establishments, the disappearance of demand for tourist trips, the transfer of employees to the distance format of work as a characteristic of modern business processes in most countries, as K. Tomashevskyi rightlyemphasized, led to the reduction of working hours (ILO, 2020). "Workplace closures continue to disrupt labor markets around the world, leading to working hour losses that are higher than previously estimated. The estimated total working-hour losses in the second quarter of 2020 (relative to the fourth quarter of 2019) are now 17.3 per cent, or 495 million full-time equivalent (FTE) jobs, revised upward from the estimate of 14.0 per cent (400 million FTE jobs) reported in the fifth edition of the ILO Monitor. Lower-middle-income countries are the hardest hit, having experienced an estimated decline in working hours of 23.3 per cent (240 million FTE jobs) in the second quarter of the year" (Tomashevsky, 2020).

But we are talking not only about employees, but also about entrepreneurs, whose businesses have suffered as a result of those restrictive measures. They have lost the opportunity to do business due to a total ban or partial restriction on the provision of their services.

Thus, there is the issue, in this regard, about the possibility of physical survival not only from this terrible virus. It is about a person's ability to provide the basic needs for housing, food and clothing, not talking about the ability to guarantee good living standard. Moreover, the parties to the labor relationship: the employee and the employer, who have historically been on opposite sides of the barricades and whose interests were opposed to each other, found themselves in a single common boat on the pandemic waves not controlled by the state floatingto the unknown and, unfortunately, vaguely promising positive destination.

It is obvious that the current situation allows us to argue about at least two new things in the legal regulation of relations, in particular labor ones. First of all, about a certain paradox: human civilization is, so to speak, at the peak of its development, when humanism has reached its heyday, many human rights are recognized and enshrined at the state level and many opportunities are provided for their realization, but at the same time, the state must impose restrictions on their implementation, effectively prohibit them, and thus, restricting human freedom of will in favor of protecting the most important highest social values, saving humanity from physical destruction.

And secondly, as a consequence, we can rightly state about a new impetus to the discussion on the correlation between private, personal interests and public, social interests while realizing the freedom of will of the parties to the employment contract. Recent events related to the measures on preventing the spread of COVID-19 corona virus infection have opened up the problem of freedom for new research in the face of age-old debates about the balance between the common and the individual good, human rights, manifestation of its own will and freedom of decision-making, first of all, on such a seemingly simple issue as compliance with the law, which prescribes the need to wear a mask in public places. Very important, fundamental position is the understanding of the correlation between private and public interests. Namely: public interests prevail over private interests and it is currently necessary model of balance of interests for the salvation of mankind, because it is possible to save every member of society only through the collective protection. The Wall Street Journal aptly described this situation on August 6, 2020, by publishing the article entitled "The True Face of Freedom Wears a Mask", where principle position in regard to the freedom in today's complex situation was formulated: "Rational measures on combating pandemic do not limit our autonomy – they make it possible, as well as the rules that allow us to enjoy the open road" (ILO, 2020).

The substantiation of this thesis is within the plane of explaining the key role of the importance of developing the problem of freedom for humanity in general and each person in particular, part of which, in fact, is the problem of human freedom of will in law.

According to I. Nazarov, historically the word freedom has such a meaning as the absence of political and economic oppression and restrictions in socio-political life. This word has become a socio-political term, which is confirmed by numerous phrases that are widely and actively used in Ukrainian literature, journalism, for example: freedom of speech, freedom of the press. The word freedom in the phrase "freedom of will", as explained by I. S. Nazarov, is already a philosophical term to describe the possibility of expression of the subject's will in terms of awareness of the laws of nature and society (ILO, 2020).

It is these laws of development of nature and society through the rules of law today, as never before, are the primary good that is protected, and which, having a chance for salvation, can give a chance for the existence and development of private, personal good. Law regulates the relations, where the human "I" is realized, and the volitional efforts of the individual are directed on their emergence, and freedom is the content of those relations, their qualitative characteristics, the legal space that allows us to exercise certain rights and responsibilities.

It is worth mentioning the statements of V. A. Bachinin and M. I. Panov that "law is one of the specific forms of expression of the need for civilization in self-preservation and self-development. The will of the civilized community to protect itself from the dangers of internal destruction is manifested with all certainty in law. It is, in fact, the will to live, which has a superorganic character and acquires social necessity. The law, which expresses the will ofcivilized communities to self-preservation, protects, organizes and regulates their inner life. At

the same time, it ensures not only social discipline, but also the freedom of citizens, monitors not only the performance of citizens' duties, but also the observance of their rights, defends not only the interests of the state, but also the interests of individuals" (Kwame, 2020).

In the context of fighting against corona virus infection COVID-19, restrictive measures aimed at overcoming the pandemic and the spread of the virus, established by the legal norms of different world countries at different levels of economic development should be considered as a direct implementation of their modern purpose and the set social function: to protect the highest social value – the person, who the object of the state's existence. It should be noted that these measures are not directly aimed at restricting human rights, in particular labor rights, they are aimed at ensuring human life and health – the primary category that is the key in the chain of the creation and recognition of all human rights. You must have someone to protect, because there is no subject – then there will be no rights.

As we know, there have been unsuccessful attempts to develop and adopt a new codified act since Ukraine's independence, which would regulate labor relations. But the situation does not go further than the elaboration of the drafts – they are all negatively assessed by employees, trade unions and scholars, because their cornerstone is the narrowing of the centralized legal regulation of labor relations, which, as a consequence, does not lead to the seemingly expected expansion of contractual regulation, but to the unlimited power of the employer and the distortion of the concept of decent work (Protsevskyi, 2004). And if scholars, employees and trade unions, realizing the value of labor law as an instrument of social justice, understand its specificity, which has been historically crystallized, and consists, in particular, in its dualistic nature, which unites and establishes harmonious, favorable coexistence of two opposing arrays of legal norms: private and public, which broadcast different ways of influencing the will and consciousness of legal entities, then the statesmen are categorically reluctant to accept it and insist only on the private sphere of labor law, which is supposed to be a lifeline for Ukraine. In particular, it is necessary to amend the systemic approach to the regulation of labor relations by law, the transition from the so-called "over-regulation" to deregulation of labor relations, which, according to the authorities will solve the problem of attracting investment to the domestic economy and provide more opportunities for business development and expand the rights of employees (Silchenko, 2019).

However, if entrepreneurs who lobby their interests in politics and lawmaking, deliberately do not want to hear scholars and employees and their representatives, ignoring meaningful discussions on this issue, then it is no longer possible to ignore the sad objective realities of life in terms of the COVID-19 pandemic, fortunately or unfortunately revealing the problems of the realization of labor rights. This pandemic became a trigger that forced us to turn to the starting point of the origin of the problems in the field of realizing labor rights, no matter how deeply it is hidden. The realities of life point not so much on the "regulation" of labor relations by the norms adopted centrally, but to the unwillingness to make the regulation of labor relations as the subject of real agreements with employees.

The state cannot leave control levers in the sphere of the realization of labor rights. And the state, at all times, must provide support in socially useful activities through the norms of current legislation, to both parties to the employment contract to the extent that allows these entities to actually exercise their rights recognized by the state. The COVID-19 pandemic proves the need for state intervention in the regulation of labor relations through the establishment of minimum standards of labor regulation within legal norms, which are legal guarantees of ensuring labor rights of the parties to the employment contract: an employee and an employer,

the rules of the game for these entities, the space frames, where there is the real social dialogue, because the realization of these rights is the only possibility for the existence and development of human civilization, which is known to be based on labor and its results. These guarantees allow maintaining the necessary decent working conditions for employees, the problem of which is especially hotly debated in domestic science, because the basic principles of legal regulation of labor relations and other direct relations include the principle of ensuring the right of every employee to fair working conditions are not outdated Soviet norms, they are progressive international labor standards, which through the concept of decent work ensure the social justice in society and prevent poverty (Melnyk, 2017). The need for their existence as the embodiment of state intervention in the legal regulation of labor relations is emphasized by such crisis situations as now, within this pandemic.

The current legislation of Ukraine was unprepared for the effective regulation of certain labor rights and their realization in those conditions due to the complete absence both the mechanism for their regulation and in general, provided opportunities to the parties to labor relations, especially in the public sector of economy. Because, despite the legal norms established by the state, which contain minimum social standards as the starting rules of the game for employees and employers, the social dialogue in our country is not used to fill the legal space that outlines centrally established legal norms (Melnyk, 2019).

The conceptual principles of the directions for the development of modern states and their cooperation set out in this Declaration, which, in our opinion, are the tasks defined by this Declaration, should not be changed during the struggle of mankind against the COVID-19 pandemic, but should be strengthened on the contrary. In this case, it is obvious that we cannot avoid political will. This, incidentally, is confirmed by the ILO statements, which emphasize the need for large-scale, comprehensive policy measures focused on four pillars: business support, employment and income; stimulating the economy and jobs; protection of employees in their workplaces; and the social dialogue between government, employees and employers to find solutions (ILO, 2020).

Nowadays, in the context of combating the COVID-19, it is becoming clear that the state must continue to define a strict legal space by the means of imperative legal norms, so that the entities interested in creating a public product: the state, employers, employees and their trade union representatives, as well as various public institutions, create flexible structures of legal regulation of their relationships through the social dialogue in order to prevent the spread of poverty as a result of unemployment resulting from the fight against the pandemic and has a strong potential to impoverish the population due to inability to realize their right to labor (Chanysheva, 2010).

We talk about formal measures that do not prevent the violation of the rights of employees and employers, but also have the opposite effect and contribute themselves to the violations. Let's take the Law "On Amending Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Regard to the Spread of Corona virus Disease (COVID-19)" adopted by the Verkhovna Rada of Ukraine (Lukianova, 2016). The rules of internal labor regulations were erroneously perceived by parliamentarians only as a document regulating attendance at work, time of beginning and end of work and the break. Accordingly, they were regarded as an obstacle to the distance format of work. From the standpoint of labor law we should assess negatively the action, which resulted in the withdrawal the need for the employee to be subject to the rules of internal labor regulations from Part 1 of the Art. 21 of the Labor Code of Ukraine. Since it has negative perspectives on the regulation of dependent work. It

eliminates the common truth of labor law concerning the importance of internal labor regulation rules for regulating labor relations, and thus jeopardizes the effective organization of the labor process, taking into account the compliance with the rights and interests of both parties to labor legal relations.

Subject to the rules of internal labor regulations – it is a classic, distinctive feature (element) of the employment contract, which was originated not out of nowhere, but as an imminent component of that contract, due to the dominance over the external manifestation of human ability to work, which required strict regulations within contractual relations in order to prevent the exploitation of labor. As A.I. Protsevskyi correctly remarked, "mutual consolidation of responsibilities of employees and employers in the rules of internal labor regulations is essential in labor law. Participation of employees in the adoption of internal labor regulations, which enshrine mutual rights and responsibilities with the employer, surely has a positivepsychological effect on the will of participants in the labor process (Chanysheva, 2010).

CONCLUSION

Nowadays, both employees and employers have become more dependent than ever on government measures to curb the spread of the pandemic and the realization of their legitimate rights and interests in the field of labor, such as the opportunity to exercise their ability to work, entrepreneurial initiative and, consequently, their interest, their will to participate in labor relations for the realization of selfhood has become directly dependent on the application of these priority measures to save the highest social value – human life and health.

It is worth noting that it was and still is especially important, in terms of the COVID-19 pandemic, to use legal norms in order to ensure optimal conditions for exercising the freedom of will of employees and employers, as far as possible, regarding their ability to work, protection of their labor rights, etc. Therefore, we must note at this stage the emphasis on the redistribution of the method of legal regulation of labor relations in Ukraine towards the imperative – state centralized regulation of relations in the field of hired labor and address the scientific and practical view into the origins of labor law as an independent branch of law. This issue is closely intertwined with the ongoing processes of codification of labor legislation in Ukraine.

It is difficult to overestimate the importance of social dialogue in addressing the issues in the field of regulating hired labor relations during the COVID-19 pandemic. The social dialogue is currently a tool that allows reconciling the interests of employees, employers and the state, to create a favorable working environment for stable strong labor relations, to prevent labor disputes, and in case of their occurrence-to facilitate their prompt resolution. Considering sucha wide range of possibilities of this tool, there is every reason to believe that the social dialoguein the context of the COVID-19 pandemic is the legal construction that can harmonize, balance private and public interests, find a point of intersection that would suit the state, and a specific entity on the legal regulation of relations in the field of hired labor.

The rules of internal labor regulations and the employee's obedience to them while performing the work are of paramount importance for the relations, where the basic socio-economic human right is realized-the human right to labor. Therefore, the removal of this organizational element from the definition of the employment contract is not a mechanical opening of the backlash for the distance format of performing the works, but a key that opens the door to the expansion of labor law by the civil law, and therefore returns the wheel of history back to the regression of legal regulation of relations, when the state did not recognize a human

being as the highest social value, when there was no social justice. Therefore, such a decision is at odds with the modern concept of human civilization, opens the way to violations of human labor rights, achieving the opposite effect from the establishment of additional legal guarantees of human rights.

REFERENCES

WHO has declared the pandemic of a new virus. News. Russian service.

ILO. (2020). ILO Monitor: COVID-19 and the world of work. Second edition Updated estimates and analysis. The ILO Monitor 2nd edition: COVID-19 and the world of work.

ILO. (2020). ILO Monitor: COVID-19 causes devastating losses in working hours and employment. International LabourOrganization. International Labour Organisation.

Tomashevsky, K. (2020). Labor migration: comparison of the legislation of the EAEU Member States, the impactof COVID-19 pandemic on it and political instability in Belarus. Legal challenges of today: international migration in the context of globalization: Materials of the I International scientific and practical online conference (Chernivtsi City, October 23, 2020) / [editor board: N. D. Hetmantseva (chief-editor), O. V. Kiriiak (responsible secretary) and others]. Chernivtsi :Yuriy Fedkovych Chernivtsi National University. Pp.28-30.

ILO. (2020). ILO Monitor: COVID-19 and the world of work. Fifth edition Updated estimates and analysis.

Kwame, A.A (2020). The True Face of Freedom Wears a Mask. *The Wall Street Journal.*

Nazarova, I.S. (2002) Freedom and will.*Stanford Encyclopedia of Philosophy*

Bachinin, V.A. (2002). *Philosophy of law: textbook.* K. : Publishing House In Yure. 472.

Protsevskyi, O.I. (2004). Is there anything to hope for? Critical view of the scholar on the draft of the new Labor Code of Ukraine. *Legal Bulletin of Ukraine*, *9*, 8-9.

Protsevskyi, O. (2005). Problems of remuneration in the draft Labor Code of Ukraine. Legal Bulletin. *47*(543). 8-9.

Protsevskyi, O. (2005). Problems of remuneration in the draft labor code of ukraine. Legal Bulletin. *48*, 8-9;

Protsevskyi, A.I. (2007). Draft Labor Code of Ukraine and European standards of remuneration. Current tendencies in the development of labor law and social guaranteeing law. Collection of articles of the scientific and theoretical conference under edition of K.N. Husov. Moscow: Publishing House, Prospekt. 403-411.

Silchenko, S. (2019). Draft Law on Labor: a boost for business or a volley of Aurora. *Legal newspaper online*.

How the Verkhovna Rada plans to reform labor legislation.HR-league.

The Rada is discussing the Labor Code. Kadrovik-01.

Melnyk, K.Y., & Tsesarsky, F.A. (2019). Environmental safety of enterprises activity as a precondition for compliance with the required working conditions. *Ekoloji, 28*(107), 463-469.

Melnyk, K.Y., & Tsesarsky, F.A. (2019). Ecological problems of chernobyl exclusion zone and their effect on labor regulations. *28*(107), 5049-5053.

The Constitution of Ukraine: Law of Ukraine dated from June 28, 1996. No. 254k / 96-VR.

The Committee on Social Policy, Employment and Pensions held a “round table” entitled: “Social dialogue as a tool for interaction between civil society and the state. The Verkhovna Rada of Ukraine.

ILO. (2008). Declaration on Social Justice for Fair Globalization.

Chanysheva, H.I. (2010). ILO Declaration on Social Justice for Fair Globalization: Content and Significance. Current issues of state and law. Issue 52. Pp. 7-11.

Lukianova, L.B. (2016). Unemployment as a socio-economic problem of Ukraine and ways to solve it. Theory and practice of professional skills in terms of purposeful learning: monograph / under edition of O. A. Dubaseniuk. Zhytomyr: Publishing House Ruta. 168-180.

On amending some legislative acts of Ukraine aimed at providing additional social and economic guarantees in regard to the spread of coronavirus disease (COVID-19): Law of Ukraine dated from March 30, 2020 No. 540-IX.

Protsevskyi, O.I. (2018). Functions of labor law / Selected works; compilors: V.O. Protsevskyi, R.I. Shabanov, O.O. Kovalenko. Kh.: H.S. Kharkiv National Pedagogical University, 61-62.