

Problems of Labour Legislation Codification in Belarus and Ukraine: History, Current Situation and Prospects

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Abstract Taking into account the general historical past (up to the 1990s), the paper examines current issues of codification and improvement of labour legislation in Belarus and Ukraine. The first part of the article briefly analyzes three global reforms of the Labour code of Belarus that took place in 2007-2008, 2014 and 2019-2020. Based on the generalization of legal and technical features of these three reforms, both negative trends in the development of labour law in Belarus and positive features associated with increased flexibility in regulating labour relations were identified. The second part of the paper examines the current situation of labour legislation in Ukraine, its non-compliance with the realities of the market economy. Special attention is paid to the analysis of the draft of law “On labour”, submitted by the Government to the Verkhovna Rada of Ukraine in 2019.

Keywords: labour code, codification, law, labour relations, reform, draft.

JEL Classification: K3.

Introduction

The labour legislation of the Republic of Belarus and Ukraine have common historical “roots”, since historically it was formed within the framework of the Soviet legal system from the beginning of the twentieth century. These similarities are observed in the Code of labour laws of the RSFSR of 1918, which was also applied on Belarusian and Ukrainian lands, then in the Code of labour laws of the RSFSR of 1922, which was in force in Belarus and the Code of labour laws of the Ukrainian SSR of 1922, the Code of labour of the Belarussian SSR of 1929. As a result of the USSR codification of labour legislation of the 1970s, the Basics of labour legislation of the USSR and the Union republics were first adopted in 1970. After the Basics, almost identical Code of labour laws were adopted in all the Union republics, including the Code of labour laws of the Ukrainian SSR in 1971 and Code of labour laws of the Belarussian SSR in

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1972. After gaining independence, Belarus and Ukraine took slightly different paths in improving labour legislation. In Belarus, after the reform of the Code of labour laws in 1992 and the adoption of some ordinary laws (“On collective contracts and agreements” in 1992, etc.), the idea of a new codification of labour laws was successfully implemented. As a result, the Labour code of Belarus was adopted on 26.07.1999, which came into force on 01.01.2000. One of the leaders of the group of developers of the draft of the Labour code of Belarus at the initial stage (1992-1997) was a legal scientist V. I. Krivoy. Note that in 1996 in St. Petersburg, he defended his doctoral thesis in the form of a scientific report on the problems of codification of the labour legislation of Belarus [1]. This paper will briefly analyze three reforms of the Labour code of Belarus in the beginning of XXI century: 2007-2008, 2014 and 2019-2020, and also consider the prospects for a new codification of the labour legislation of Belarus.

Ukraine initially also reformed the Code of labour laws in 1991-1992, adopted a number of ordinary laws (for example, the law “On the procedure for resolving collective labour disputes” in 1998), but it was not possible to finally adopt the Labour code of Ukraine in the Verkhovna Rada for a number of socio-political reasons. Currently, a number of drafts of the Labour code of Ukraine and drafts of the law “On labour” have been developed, one of which is considered by the current Government of Ukraine as the main one. The paper will analyze the strengths and weaknesses of this draft of law and proposes suggestions for further reform of the labour legislation of Ukraine.

1. The first reform of the Labour code of Belarus in 2007-2008

This stage of development of the Belarusian labour legislation is connected with the preparation and adoption of the Law of the Republic of Belarus of 20.07.2007 No. 272-Z “On amendments and additions to the Labour code of the Republic of Belarus” (hereinafter – the Bill or Law of 20.07.2007 No. 272-Z).

Its development was planned in 2000 and active since 2001, the initial version of the Bill that provided for the adjustment of 2/3 article of the Labour code of Belarus, in early 2003 were made by the Government in Parliament, but in June 2003 were excluded from the agenda of the Parliament. Active revision of the draft law of this Bill by the working group began after a meeting with the President of the Republic of Belarus, held on January 13, 2005 in the second half of 2006. The bill was approved in the Presidential Administration of the Republic of Belarus, National center of lawmaking activity at the President of the Republic of Belarus. This Bill was introduced by the Government in the House of Representatives of the National Assembly of the Republic of Belarus. The bill was adopted by the House of Representatives in the first reading on 04.05.2007, successfully passed in the second reading on 25.06.2007, was approved by the Council of the Republic on 29.06.2007 and was signed by the President of the Republic of Belarus on 20.07.2007.

As a result, the nearly seven-years process of drafting the bill ended with the adoption of Law No. 272-z of 20.07.2007. The reform of the Labour code of Belarus by Law No. 272-Z of 20.07.2007 was global. This is evidenced by the fact that the

Law of 20.07.2007 No. 272-Z provided for 141 points of changes and additions to the Labour code of Belarus; it corrects or excludes more than 2/3 of articles of this Code. Some chapters were completely excluded from the Code (for example, chapters 30, 38), others are set out almost in a new version (chapters 15, 39), and others are changed conceptually (for example, chapter 12 on labour and social leave). The assessment of this reform as a global one was given in the publications of a number of Belarusian legal scholars (A. Voitik, O. Kuryleva, K. Tomashevski) [1; 2].

2. Second reform of the Labour code of Belarus in 2014

Since 2010 the National center for legislation and legal research of the Republic of Belarus has been developing a draft law “On amendments and additions to certain laws of the Republic of Belarus on the regulation of labour and related relations”. On 17.05.2013 it was adopted in the first reading by the House of Representatives of the National Assembly of the Republic of Belarus. In preparation for the second reading in the Parliament, this Bill was supplemented by the draft of Law “On amendments and additions to the Labour code of the Republic of Belarus”, which makes changes to the institute of collective labour disputes. In December 2013 the Law was adopted in the second reading by the Parliament. On 8.01.2014 it was signed by the President of the Republic of Belarus and entered into force on 25.07.2014. We mention only some fundamental adjustments to the Labour code of Belarus according to this second reform:

- was revised article 8 on the application of international treaties in the sphere of labour;
- in article 14 was extended and formulated with open list of prohibited criteria of discrimination in employment relations;
- in article 17 was expanded scope of application of fixed-term contracts from individual entrepreneurs and micro organizations;
- was restricted the right of persons working on labour contracts to get the minimum compensation and severance pay upon termination of the contract at the request of the employee and others;
- many articles of chapter 35 on the resolution of collective labour disputes were set out in the new version;
- was included a new chapter 26-1 on the work of professional athletes and coaches [4].

3. Third reform of the Labour code of Belarus 2019-2020 and assessment of the prospects for new codification

The development of this law began in 2015, and its adoption lasted for four years. The initial draft law received a mostly negative assessment from the scientific community, which was the subject of an open discussion at a round table held on 20.05.2015 in the Belarusian State University. In 2017, the development of the second draft of law on amendments to the Labour code of Belarus began. Later, both drafts of laws were merged in the House of Representatives into one, in June 2018 it was adopted in the first

reading, and in June 2019 – in the second reading.

Last year the third global reform of the Labour code of Belarus was finalized with the recently adopted Law of the Republic of Belarus “On changes in the laws,” which was adopted by the House of representatives on 26th June 2019, approved by the Council of the Republic National Assembly of the Republic of Belarus on 28th June 2019 and signed by the President of the Republic of Belarus on 18th July 2019 (hereinafter – the Law of 18.07.2019 No 219-Z). This law was officially published on 27.07.2019 and entered into force on January 28, 2020.

The following facts show that the adoption of the Law of 18.07.2019 No. 219-Z can be assessed as the third global reform:

- the law includes 171 items that make adjustments to the Labour code of Belarus;
- it amended or supplemented more than 190 articles of the Code;
- two new chapters have been included: chapter 18-1 on the specifics of regulating the labour of employees with whom fixed-term labour contracts and chapter 25-1 on the specifics of working with remote workers;
- the norms of two Presidential decrees were codified: No. 29 of 26.07.1999 “On additional measures to improve labour relations, strengthen labour and performance discipline” and No. 5 of 15.12.2014 “On strengthening requirements for managerial personnel and employees of organizations»;
- the grounds for dismissal of employees at the initiative of employers have expanded, since article 42 contains those grounds that were previously used only as additional ones in the contract system of hiring, and there are twice as many disciplinary dismissals (14 instead of 7) [5].

4. The labour code of Ukraine in 1971 is an archaic source of Soviet-era law: problems of its inefficiency in the market economy

The current Code of Labour Laws Ukraine was adopted on December 10, 1971. Despite the numerous changes and additions made to it (there were 31 of them in the last five years only), its provisions are less and less in line with the socio-economic situation in the country. A dangerous (permanently enlarging) gap between the various spheres legal regulation of socio-economic activity arose. The norms are written in such a way that their provisions are oriented to a high level of formal legal protection of the employee, and it leads to adverse economic and social consequences. In addition, labour legislation has been overly politicized during a long period.

The inefficiency of the existing legal regulation of labour relations largely could be explained by the lack of a clear mechanism for implementing the norms which are set in it. There are a lot of reasons for it, among them: a) not quite clear delineation of issues that are being resolved at different levels of regulation; b) inconsistency of legal acts among themselves; c) insufficiently quick filling of gaps in the legislation; d) low level of legal techniques.

For example, the inflexible system of hiring and firing has reduced the mobility of the able-bodied part of population, it hinders both its allocation between enterprises, industries and regions, and the gradual transformation of inefficient spheres of

employment into effective ones. The concentration in the current Code of Labour Laws of economically unrealistic guarantees and benefits contributes to the emergence and further development of certain negative trends, namely:

- labour relations (especially in the commercial sector of the economy) are most often mechanically replaced by civil law ones, since the application of labour legislation in full becomes economically disadvantageous for the employer;
- the most legal protected workers (women, youth, persons with disabilities) have actually become less competitive in the labour market and are being displaced in large numbers.

Informal labour relations are widespread. An employment contract is either not concluded at all, or is concluded fictitiously, providing for a minimum level of remuneration and social guarantees, and the real working conditions are orally agreed by the parties. In addition to the rigidity of legal norms, this process is also affected by the desire of the employer to deduce income from taxation and to reduce costs connected with accruals to the wage fund. An employee in a difficult and tense situation on the labour market, for his/her part, is ready to sacrifice legal and social guarantees in exchange for getting a job, especially if the proposed real level of remuneration exceeds the average one.

Another example of the unfavorable social consequences of strict legislative regulation of labour is the fact of saving in some enterprises of an excess number of workers who are not provided with real work. The excessive complexity of the procedure of mass layoffs and a significant financial burden on the employer should be recognized as one of the main reasons for that specific form of hidden unemployment.

5. Justification of the need for new codification and adoption of the new Labour code of Ukraine

We should add to the above that, thanks to the adoption of the new Labour Code in Ukraine, it is necessary to achieve the optimal combination of the interests of workers and employers while ensuring the adequate protection of the rights and interests of workers while increasing production efficiency. Labour legislation should encourage workers to work highly productive in accordance with labour contracts and protect them from the arbitrariness by employers. However, such protection should not, on the one hand, be excessive, and on the other hand, to be an obstacle to both the development of production, the creation of new vacancies, as well as the employment of job seekers. The new Code should not only proclaim and fix the level and standards of labour protection, privileges and compensation, but rather stimulate the development of the economy, which, in its turn, will create the necessary prerequisites for real ensuring the above standards. In that case, the main condition is the accelerated implementation of the achievements of scientific and technological progress, the systematic updating of the technical base. As the experience of economically developed countries shows, it implies wide participation in the production management through representative bodies of direct producers of material goods - workers.

By the Decrees of the President of Ukraine “On urgent measures aimed at ensuring

economic growth, stimulating the development of regions and the prevention of corruption” dated September 20, 2019 No. 713/2019 and “On urgent measures aimed at implementing reforms and strengthening the state” dated November 8, 2019 No. 837/2019 the introduction and of socio-economic reforms development for the labour relations liberalization and labour legislation updating is recognized as one among the priorities of the government’s activity. That is why in the Program of Activities of the Cabinet of Ministers of Ukraine, approved by the Verkhovna Rada of Ukraine on October 4, 2019 No. 188, it is noted that liberal labour legislation provides an opportunity for employers to easily create qualitatively new jobs, promote the best workers and pay them higher salaries. In order to implement it, the subjects of the right to legislative initiative have registered in the Verkhovna Rada of Ukraine draft Labour Code of Ukraine (No. 2410), Labour Code of Ukraine (No. 2410-1), the Law of Ukraine on Labour (No. 2708), and the Law of Ukraine on Labour (No. 2708-1) and the Law of Ukraine on Labour (No. 2708-2), “On Amending Certain Legislative Acts of Ukraine (concerning certain issues of the activities of trade unions)” (No. 2681), “On Amending the Code of Labour Laws of Ukraine on additional grounds for release” (No. 2584) and some others.

6. Problematic draft law of Ukraine on labour in 2019

The main of the most discussed, of course, is the draft law of Ukraine on labour (hereinafter – Draft of law No 2708), developed by the Cabinet of Ministers and submitted to the Verkhovna Rada in 2019. The draft of Law No 2708, created by the Cabinet of Ministers is the main one among them, of course. The mentioned draft content is significantly smaller than the current Code. So, the draft does not regulate issues of labour discipline, labour protection; vacations, labour features of minors, and persons who are studying are regulated to a much lesser extent. Although a number of laws are repealed, in particular, “On Remuneration of Labour”, “On Vacations”, but far from all of their provisions are integrated into the developed draft law. It will entail the appearance of many gaps in law, which will have to be filled by using the analogy of law or the law, or through contractual regulation (collective and labour contracts).

In the Draft of law No 2708 submitted, the norm on the prohibition of discrimination contained in Art. 21 of the current Code, is saved. Additionally, it is proposed to prohibit any prejudice in the workplace and employee mobbing. Persons who have undergone this kind of treatment will be able to go to court, providing relevant facts. The employer will be required to prove their absence, that is, it is proposed to introduce a presumption of ones guilt. These proposals deserve being supported, in the conditions of clear mechanism for termination of the employment contract is maintained, which will not provide for the possibility of its arbitrary termination at the request of the employer, regardless of the desire of the employee, ones behavior and personal qualities.

We should evaluate as positive given in Art. 13 of the Draft of law No 2708 list of signs of labour relations: 1) the person is regularly paid remuneration for work performed in the interests of another person; 2) the direct performance by a person with a specific qualification, profession, occupying a certain position, work on behalf of and

under the control of the person in whose interests it is being performed; 3) the work is being performed at the workplace, determined by the person in whose interests it is being carried out, in compliance with the internal labour rules; 4) a person performs work similar by its content and nature to those which are being carried out by regular employees of the employer; 5) the organization of working conditions is provided by the person in whose interests work is being performed; 6) the duration of working time and rest time is established by the person in whose interests the work is being performed [1, p. 719-734].

According to the Draft of law No 2708, trade unions will be stripped of their status as the key representatives of employees. Undoubtedly, it violates the requirements of Articles 22 and 36 of the Constitution of Ukraine, since it leads to a narrowing of the scope and content of existing constitutional rights and freedoms of both trade unions and their members. Employees will be able to have representatives elected by the labour collective. But Draft of law No 2708 does not contain a norm that would regulate the activity of the labour collective.

The Draft of law No 2708 provides for 7 types of employment contract: indefinite; definite, which cannot last more than 5 years; short-term for up to two months; seasonal; with non-fixed working hours; students one; an employment contract with a domestic worker. A significant increase in the usage of contracts with a limited duration indicates a violation of Art. 2 of the Convention of the International Labour Organization No. 158 on the termination of employment at the initiative of the entrepreneur (1982) (hereinafter – ILO Convention No. 182), ratified by Ukraine on February 4, 1994, which covers all the sectors of economic activity and all the persons employed. When applying the provisions of the Convention, the state may exclude from all or some of its provisions the following categories of employees, namely workers: 1) hired under a contract of employment for a specified period or for performing of a certain work; 2) having a probationary period or acquiring the necessary experience, previously established and of a reasonable duration; 3) hired for a short time for performing casual work. For comparison, we note that the Republic of Belarus has not ratified ILO Convention No. 182, so it does not formally violate it, allowing for an unlimited scope of application of fixed-term labour contracts in the labour legislation.

The Draft of law No 2708 also does not fix a clear procedure for dismissal from work. These issues should be coordinated by the parties in labour or collective agreements. Dismissal will not provide for the issuance of an order, as it is being done now, but the conclusion of an additional agreement. Such an innovation is artificial in the case when it comes to dismissal on the initiative of one of the parties of the employment contract. At the risk of losing ones job or having already actually lost it, the employee is unlikely to voluntarily agree to conclude an agreement. Dismissal from work on the initiative of the employee will require an additional agreement on it with the employer. Moreover, the Draft of law No 2708 does not contain the consequences of the employer's refusal to conclude such an agreement in the usual manner, but only recognizes it as a gross violation of labour law. Instead of dismissal by a reduction, the draft proposes to dismiss workers at the initiative of employers without specifying a reason. To do this, it will be

enough to send an electronic or written message within a period from 15 to 90 days, depending on the duration of the employee's work with this employer. The employer will be able to replace the warning period with monetary compensation in the amount of no more than double daily earnings for each day the term is reduced, that is, in fact, employers will receive the right to dismiss the employee even on the day such a decision is made. We are no longer talking about any severance pay. It grossly violates the requirements of Articles 4, 12, 13 and 14 of Convention No. 158.

Despite the fact the Draft of law No 2708 specifies the norm of working hours - 40 hours for 7 days, nevertheless, the norm of undefined working hours, which now amounts to 120 hours a year, is canceled. The approval of the proposal to legalize the rule on the application of overtime work on the terms determined by the collective or labour contract entails the risk of abuse while their usage.

In addition, certain provisions are taking place, the adoption of which will led to a narrowing of the content and scope of the existing constitutional right to rest, provided for by Art. 45 of the Constitution of Ukraine. Thus, the conditions and procedure for providing annual additional vacations for the special nature of work, for working in harmful and hazardous working conditions and for undefined working hours, and additional vacations for certain categories of citizens are not being regulated. The mentioned vacations are now provided for in Articles 8, 151, 161, 162 and 19 of the Law of Ukraine "On Vacations". The number of cases when employees are granted vacation obligatory without payroll is significantly reduced.

Conclusion

Historical analysis of the last three reforms of the Labour code of Belarus revealed negative trends in the development of labour law in Belarus:

- instability of labour legislation (three global reforms of the Labour code of Belarus during 20 years its action);
- decrease in the effectiveness of the rules of the Labour code of Belarus due to an increase in the number of reference rules and a decrease in direct action rules;
- legalizing the contract system of employment under fixed-term employment contracts, not limited to any strict list;
- narrowing the concept of labour function during the third reform of the Labour code.

Among the positive innovations in the reform of the Labour code of Belarus, we pay attention to the expansion of flexibility in the regulation of labour relations, the regulation of such a form of employment as remote work.

In general, taking into account the results of the third reform of the Labour code of Belarus, we conclude that there are no prerequisites for a new codification of the labour legislation of Belarus in the next 5 to 10 years.

In any case, the new codification of the labour legislation of Belarus should be preceded by the development of the Concept of improving legislation in the social and labour sphere. Taking into account analysis of legislative initiatives in Ukraine in 2019, we should mention that the adoption of a new Labour Code of Ukraine or the Law of

Ukraine “On labour” will give an ability to streamline labour relations, to increase their flexibility, and to relieve the employer of economically unjustified expenses. Thus, the opportunities for the development of illegal labour relations will decrease, there will be a real increase in the level of protection of the rights and interests of workers. The purpose of the Code should be to establish the rights and obligations of subjects of labour relations, ensuring both the implementation of the labour rights and guarantees provided for by the Constitution of Ukraine and international documents, and the protection of the rights and interests of employees and employers, and the creation of appropriate working conditions.

The adoption of the law of Ukraine “On labour” has a number of negative consequences: first, it will mean the decodification of labour legislation in Ukraine, the loss of this legislation of complexity in the regulation of labour and related relations; second, it leads to the emergence of many gaps in labour law, which is not always possible to fill through collective agreements and labour contracts; third, the ultra-liberal draft of law is in conflict with the ILO Convention No. 182, ratified by Ukraine, and reduces a number of constitutional social and economic rights of Ukrainian workers.

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