

# The Scope of Labour Law in Ukraine

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**Abstract** Taking into account the general historical past, the paper examines current issues of the scope of application of labour law in Ukraine. The article aims to study the legislation governing the labour activity of special categories of persons, who do not have the status of an employee (civil servants, military, police officers, judges, etc.). The authors also pay attention to bogus self-employed, who perform work personally and are more or less economically dependent on a single principal/employer arguments. Based on analysis, both negative and positive tendencies related to the sphere of application of labour law were identified. It has been established that the scope of labour law in Ukraine is characterized by its constant dynamics. The outdated legal structure of the current Labour Code of Ukraine does not display the situation of legal regulation of work activity that has changed and ignores the existence of new special legal acts. It is concluded that despite the fact that at the beginning of the 21st century the scope of labour law has narrowed, at the moment, the prerequisites for its gradual expansion are being traced. Considering the fact that issue of adopting a new Labor Code in Ukraine is still open, the authors expect that, when developing a new Code, the legislator will focus properly on the scope of application of labour law according to the modern tendencies in this sphere.

**Keywords:** labour law, scope of labour law, employment contract, employment relationships, legislative activity.

**JEL Classification:** K31.

## Introduction

The issue of the scope of labour law has existed since the inception of this branch of law. This fact can be easily traced through the example of existing international standards. For example, the first ILO convention – Hours of Work (Industry) Convention, 1919 (No. 1), defined the scope of its application by means of such a category as “industrial

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enterprises”. Under industrial enterprises, the Convention implies: (a) mines, quarries, and other works for the extraction of minerals from the earth; (b) industries in which articles are manufactured; (c) construction, reconstruction, maintenance, etc.; (d) transport of passengers or goods by road, rail, sea or inland waterway. In turn, the latest ILO convention – Violence and Harassment Convention, 2019 (No. 190) already uses the broader term – “world of work”. This term covers employees, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer. As we can see, the last ILO convention treats the scope of labour law much broader.

If we trace the history of the scope of application of labour legislation in Ukraine, we can see that it is unstable in nature. All Labour Codes of the 20th century (Codes of 1918, 1922 and 1971) contained a fairly broad scope of application of labour law. However, at the beginning of the 21st century, the situation began to change towards narrowing the scope of labour law norms.

The problem is complicated by the fact that since 2017 the Grand Chamber of the Supreme Court has made a number of legal positions on the jurisdictional nature of disputes over the dismissal of certain entities. In the absence of special labour courts in Ukraine, labour disputes in general are subject to review by the general courts in accordance with the rules of civil jurisdiction. At the same time, disputes concerning the dismissal of civil servants are subject to review by the administrative courts. The dismissal from the position of CEO can be challenged in the economic court in accordance with the rules of economic jurisdiction.

The paper will analyze the current issues of the scope of application of labour law in Ukraine, taking into account the labour activity of special categories of persons – civil servants, police officers, judges, prosecutors, CEOs etc.

## **1. The historical background of application of labour law in Ukraine**

As we noted earlier, Labour Codes of the 20th century broadly interpreted the scope of labour law in Ukraine. If we look into the Labour Code of Russian Soviet Federative Socialist Republic of 1918<sup>1</sup>, we can see that in spite of the fact that it proclaimed labour duty for all citizens, the Code also established that its provisions apply to all persons working for remuneration and are obligatory for all enterprises, institutions and establishments, as well as for all individuals who use other people’s labour for remuneration<sup>2</sup>.

The first codified act which formally regulated the employment relations on the territory of modern Ukraine was the Labour Code of Ukrainian Soviet Socialist Republic of 1922. According to the Article 1 of the Code, its provisions apply to all employed persons, including home-based workers, and are mandatory for all enterprises, institutions

<sup>1</sup> Formally, this Code did not apply to the territory of modern Ukraine, but on the whole it had initial significance for the development of Ukrainian labour legislation.

<sup>2</sup> Code of Labour Laws of Russian SFSR of 1918 // Collection of legalizations and orders of the Workers and Peasants Government of RSFSR. 1918. No. 87-88. Art. 905.

and holdings (state, including military, public and private, including those who distribute work to perform at home), as well as for all persons using hired labour for remuneration<sup>3</sup>.

Despite a fairly clear definition of the scope of the Labour Code of 1922, the subsequent implementation of its provisions still left some room for scientific discussions. This mentioned the possibility of extending the labour law to collective farmers, whose activities also contained features inherent in the employment relationship. A Soviet researcher Nikolay Aleksandrov in 1948 wrote that the production-cooperative labour relationships, in contrast to the work-service relationships, are not an independent legal relationships, but are an integral part of a complex legal relationships, that are memberships especially in a collective farm<sup>4</sup>.

On July 15, 1970, the USSR Law “On the Approval of the Fundamentals of Legislation of the USSR and the Union Republics on Labour” was adopted<sup>5</sup>. The Articles 1 and 3 of the Fundamentals stipulated that Soviet labour legislation regulates the employment relations of all manual and office workers, the work of members of collective farms and other cooperative organizations is regulated by their charters adopted on the basis and in accordance with the Model Collective Farm Charter, the Model Cooperative Charter, as well as the legislation of the USSR and the union republics. Further these provisions were reflected in the Labour Code of Ukrainian Soviet Socialist Republic of 1971<sup>6</sup>, which is still in force in Ukraine with a significant number of amendments made to it.

The Labour Code of 1971 did not solve the problem of applying labour legislation to collective farmers, which disappeared only with the abolition of collective farms after the collapse of the USSR. But an interesting feature of this act was that it introduced the concept of manual and office workers, that allowed the Code to interpret the scope of its application broadly enough (e.g. the term “office workers” also covers the judges, prosecutors, police officers, etc.). Later, in 1991, the general term “employee” and a special form of employment contract that applied to certain categories of professions replaced the concept “manual and office workers”.

This special form of employment contract made it possible to cover by labour law many branches of professional activity that began to appear in Ukraine after its independence. These branches include civil service, National Guard, rescue service, senior staff of private companies, etc. For instance, under the letter of the Ministry of Labour and Social Policy of Ukraine No. 06/2-4/66, of 06.05.2000<sup>7</sup>, this form of employment contract was provided for work activities governed by 35 laws (e.g. Law on Police, Law on Civil Defense, Law on Notaries). The situation with the application of this special form of employment contract has existed since the beginning of the 21st century and was replaced

<sup>3</sup> Code of Labour Laws of Ukrainian SSR of 1922 // Collection of legislations of Ukrainian SSR. 1922. No. 52. Art. 751. Appendix.

<sup>4</sup> Aleksandrov N.G. (2009) The Labour Relationship. Monografy. Prospekt, Moskow. Pp. 243-244. (In Russian)

<sup>5</sup> Law of USSR “On approval of the Fundamentals of Legislation of the USSR and the Union Republics on Labour” No. 2-VIII, of 15.07.1970. Gazette of the Supreme Soviet of the USSR. 1970. 29. Art. 265.

<sup>6</sup> Law of Ukrainian SSR “On approval of the Code of Labour Laws of the Ukrainian RSR” No. 322-VIII, of 10.12.1971. <https://zakon.rada.gov.ua/laws/show/322%D0%B0-08?lang=en>.

<sup>7</sup> Letter of the Ministry of Labour and Social Policy of Ukraine No. 06/2-4/66, of 06.05.2000. [https://zakon.rada.gov.ua/rada/show/v4\\_66203-00](https://zakon.rada.gov.ua/rada/show/v4_66203-00).

by a new rule-making policy in Ukraine. In accordance with this policy, a significant part of the laws providing for the application of a special form of employment contract was canceled, and in the new ones that came to replace them, a completely different, not labour law direction of regulation relations of work was enshrined.

## 2. The modern trends of application of labour law in Ukraine

According to the most recent edition of the Article 3 of the Labour Code, the labour legislation regulates employment relationships of employees of all enterprises, institutions, organizations, regardless of ownership, type of activity and industry affiliation, as well as persons working under an employment contract with individuals. The peculiarities of the work of members of cooperatives and their associations, collective agricultural enterprises, farms, employees of enterprises with foreign investments are determined by legislation and their charters. At the same time, guarantees of employment, safety and health protection, labour protection for women, youth, persons with disabilities are provided in the manner prescribed by labour legislation.

As we can see the Labour Code does not fully answer the question of the scope of application of labour law norms. The situation is complicated by the fact that it does not give definitions of employee, employer and employment relationships. The Labour Code, in the Article 21, contains only a definition of an employment contract, according to which we can interpret these categories. In accordance with this Article, employment contract is an agreement between the employee and *the owner of the enterprise, institution, organization or its authorized body or individual (employer)*, under which the employee performs the work specified in this agreement, and the employer undertakes to pay the employee wages and provide working conditions necessary for the performance of work provided by labour legislation, collective agreement and agreement of the parties.

Therefore, from the analysis of the Code, we can conclude that the provisions of labour law apply to employment relationships, i.e. relationships based on an employment contract. In turn, there are other relationships, the basis of which is labour activity, but which may not arise on the basis of an employment contract. Unfortunately, the Code 'keeps silence' about these relationships.

The closest to the employment relationships are relationships associated with the *civil service*. This can be explained by two factors: a) according to the Article 5 (3) of the Law on Civil Service, the norms of labour legislation apply to civil servants in terms of relations not regulated by this Law; b) the Article 31-1 (14) of the Law on Civil Service provides two grounds for the creation of civil service relationships – the act of appointment and the contract.

It should be noted that in practice it is difficult to find a sphere of relations in the regulation of which it is possible to use the Article 5 (3) of the Law on Civil Service. After all, if we turn to the content of the provisions of this Law, we can see that it covers almost all aspects related to the service, namely: appointments, transfers, trips, wages, working hours, time of rest, disciplinary and financial liability, dismissal, etc. At the same time, the norms of the Law in regulating the relations of civil service are not always identical to the labour legislation. For example, according to the Article 42 (6) of the Law

on Civil Service is not allowed to send pregnant women on trips without their consent, although the Article 176 of the Labour Code in this case contains an absolute prohibition. However, the priority in regulating the legal relations of civil servants in the field of labour is given to the norms of special law, and norms of labour legislation are applied only in cases when the rules of special law do not regulate the disputed relationship, and when the possibility of such application directly specified in a special law. Nonetheless, a bit paradoxical is the fact of trade unions' activities and the collective agreements in the field of civil service, because due to the imperative regulation of special laws there is too little room for collective bargaining left.

Another controversial issue is the consolidation in the Law on Civil Service of the possibility of using two grounds for the emergence of civil service relationships – the act of appointment to the position and the contract on the passage of civil service. It should be noted that these two legal facts are quite different by their nature. The first is a striking example of the application of administrative law. The legal nature of the second is not clear. On the one hand, the law defines a civil service contract as a fixed-term employment contract, on the other hand, pointing out that the relations of the parties under this contract are subject to legal acts regulating only the relations concerning civil service<sup>8</sup>.

An interesting feature of the Law on Civil Service is that it regulates the legal status of *patronage service*, which does not apply to civil service. Under the Article 92 of the Law on Civil Service, the positions of patronage service include the positions of advisers, assistants, commissioners and press secretaries of the President of Ukraine, employees of the secretariats of the Chairman of the Parliament of Ukraine, employees of the secretariats of parliamentary factions, employees of the patronage services of the Prime Minister of Ukraine and other members of the Cabinet of Ministers of Ukraine, etc. The employee of the patronage service is hired to the position for the term of appointment of the person for whom he will perform patronage services. Employees of the patronage service are subject to labour legislation with the exception of: the possibility of extending a fixed-term employment contract for an indefinite period (if, after the expiration of the term of the employment contract, the employment relationship actually continues and neither of the parties requires their termination); preferential right to remain a job position in the case of redundancy; obtaining the prior consent of the trade union at the termination of the employment contract by the employer; etc.

Taking into account the above, it can be stated that there is no legal certainty in the issue of legal status of employees of the patronage service. This is also confirmed by the lack of a unified approach of the judiciary to the issue of jurisdiction of disputes involving such employees. In particular, in 2019, disputes on the dismissal of assistant judges (this position belongs to the patronage service) were considered in civil jurisdiction, which, according to the procedural legislation of Ukraine, is intended for labour disputes. At the same time, some similar disputes were also considered in administrative courts as disputes related to public service. Examining the issues of legal regulation of the labour in the public sector, we would like to pay special attention to

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<sup>8</sup> The Procedure for Concluding Contracts for Civil Service, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 494, of 17.06.2020. <https://zakon.rada.gov.ua/laws/show/494-2020-n#Text>.

the *civil service of a special nature*, which in most cases is allocated by the militarized component of its passage. This type of service includes service in the national police, national guard, military, civil defense, etc. If we turn to the national legislation, we can see that it does not contain clear provisions on the application of labour law to the civil service of a special nature relationships.

For example, clauses 8 and 11 of the Final and Transitional Provisions of the Law on National Police establish that from the date of publication of this Law all police officers, as well as other employees of the Ministry of Internal Affairs of Ukraine are warned in due course of a possible future dismissal due to redundancies. The temporary disability of police officers or the use of leave is not an obstacle to their dismissal from the service in the internal affairs bodies. These rules completely contradict the guarantees reflected in Article 40 (3) of the Labour Code, according to which the dismissal of an employee at the initiative of the owner or his authorized body during his temporary incapacity for work, as well as during the leave, is prohibited.

Current legislation also separately regulates the *political positions*, which include the positions of members of the government of Ukraine (Article 6 (3) of the Law on the Cabinet of Ministers of Ukraine), as well as positions of First Deputy Minister and Deputy Ministers (Article 9 (5) of the Law on Central Executive Bodies). Despite the fact that work in such positions corresponds to all the features of employment relationships, provided, for example, ILO Employment Relationship Recommendation, 2006 (No. 198), labour law still does not apply to them, as explicitly stated in the above legislation. For instance, under the Article 6 (3) of the Law on the Cabinet of Ministers of Ukraine, labour legislation and civil service legislation do not apply to the positions of members of the government of Ukraine.

If we turn to *semi-political positions*, it should be noted that such a definition is not provided in the current legislation of Ukraine. However, in our opinion, the given term should cover the positions of government commissioners and commissioners of the President of Ukraine. These positions include: Commissioner of the President of Ukraine for Children's Rights, Government Commissioner for the European Court of Human Rights, Commissioner of the President for the Rights of Persons with Disabilities, Government Commissioner for the Rights of Persons with Disabilities, Government Commissioner for Gender Policy, Commissioner of the President of Ukraine for the Rehabilitation of Combatants, etc.

As a separate example in this case, we can consider the position of the Government Commissioner for Gender Policy, which approved by the Resolution of the Cabinet of Ministers of Ukraine No. 390, of 07.06.2017. Despite the fact that norms of Resolution indicate the special, in fact political, nature of the professional activity of the Government Commissioner, this position belongs to the sphere of regulation by labour law. This is due to the fact that the Government Commissioner works on the basis of an employment contract and included in the staff of the Secretariat of the Cabinet of Ministers of Ukraine. However, due to the fact that the peculiarities of the legal status of the Government Commissioner are fixed at the level of a special legislative act that does not sufficiently detail the labour rights and responsibilities of the person holding the position, in practice

there may be some issues related to with the need to develop job descriptions, determine the vertical of subordination, the procedure for termination of employment, etc.

By the way, the problem of lack of clear labour regulation is typical not only for semi-political, but also for political positions. Thus, the peculiarities of the professional activity of the members of the Government of Ukraine are disclosed in only five articles of the Law on the Cabinet of Ministers of Ukraine. It is clear that these articles will not be able to cover the full range of relationships that may arise in the performance of official duties by these persons (for example, they do not regulate working hours and time off work, social leaves, etc.).

The possibility of regulating the work of *judges* and *prosecutors* by labour law is fractionally traced in the Labour Code. The Code in some cases separately indicates the specifics of regulating the work of such persons. For example, in accordance with Article 222 of the Code, the peculiarities of consideration of labour disputes of judges and prosecutors shall be established by special law. According to the Article 32 (5) of the Labour Code, when transferring prosecutors, the peculiarities determined by the special law regulating their status are taken into account. Thus, based on the analysis of the above rules, which in fact establish exceptions for judges and prosecutors from the general legal regulation of the Labour Code, it is possible to extend all other provisions of the Code to the employment of these categories of persons. In turn, the Law on the Prosecutor's Office and the Law on the Judiciary and the Status of Judges do not enshrine in their norms the possibility of extending labour legislation to these categories of persons. In addition, these laws regulate in detail in their provisions issues related to appointment and dismissal, seniority, leave, pay, disciplinary action, etc. At the same time, if we analyze the above provisions, we can see that they are endowed with a completely different from the Labour Code the legal content.

It should be noted, that since the emergence of labour law, the question of its co-relation with civil law has always been the subject of lively scientific debate. And the grounds for such debate are added every year by national legislation and judicial practice. For instance, the decision of the Constitutional Court of Ukraine No. 1-rp/2010, of 12.01.2010, states that the corporate rights of the company's members to participate in its management, making decisions on the election (appointment), removal, recall of members of the executive body of this company also apply to the granting or deprivation of their authority to manage the company. Such decisions of the authorized body should be considered not within the framework of labour, but corporate relations that arise between the company and the persons entrusted with the authority to manage it<sup>9</sup>. Based on this decision, the current case law has followed a path that the relations arising when the founder (member) of the company performs the functions of its director, are corporate, and therefore there is no obligation to conclude an employment contract and pay wages<sup>10</sup>.

<sup>9</sup> Decision of the Constitutional Court of Ukraine No. 1-rp/2010, of 12.01.2010. URL: <https://zakon.rada.gov.ua/laws/show/v001p710-10#Text>.

<sup>10</sup> Resolution of the Eighth Administrative Court of Appeal No. 857/1476/19, of 14.03.2019. URL: <http://reyestr.court.gov.ua/Review/80455482>.

Another situation occurs when the hired head of the company (*CEO*) is a person who is not associated with the company by corporate rights. As an example we should cite the issue of legal regulation of CEOs of joint stock companies, as well as limited and additional liability companies. The provisions of the Law on Joint Stock Companies, which came into force in 2009, were the basis for the emergence of this issue. Under the Article 62 (4) of the Law, CEOs of the bodies of the joint-stock company are paid remuneration only on the conditions stipulated by both the civil law contract and employment contract concluded with them. Also, in 2018, the Law on Limited and Additional Liability Companies was adopted. The provisions of the Article 39 (7) of the Law provide for the possibility of concluding civil law contacts with CEOs of these companies instead of an employment contracts.

Thus, it can be seen that the provisions of the Law on Joint Stock Companies and the Law on Limited and Additional Liability Companies actually allow for the possibility of the occurrence of civil law relationships in those areas where labour law has always been applied. And despite the fact that these two legislative acts avoid specifics in procedural issues of application of civil law contracts to the regulation of labour of relevant CEOs, their ambiguity in the delimitation of the scope of civil and labour law may further “pave the way” for law enforcement practice, not in favor of the labour law. The current case law already confirms this statement. For instance, the Grand Chamber of the Supreme Court in its resolution, of 30.01.2019, concluded that the removal of CEOs of the company by its legal nature, subject of regulation and legal consequences differs from the suspension from work on the basis of the Article 46 of the Labour Code. The possibility of the authorized body of the company to remove a CEO from the performance of his duties is not contained in the provisions of the Labour Code, but in Article 99 of the Civil Code, therefore it is not a scope of regulation of labour law. Although such decisions of the authorized body may have consequences within the employment relationships, but determining in such circumstances, according to the judges of the Supreme Court, are corporate relationships.<sup>11</sup>

It should be emphasized that in some cases, we can observe the scope of the expansion of labour law in those areas where this is not expected. This primarily concerns the work of prisoners, the regulation of which has undergone significant changes in recent years. It should be noted that the work of these categories of persons for a long time was not associated with labour law, due to the nature of the relationships, the participants of which are convicts. After all, such relationships are characterized primarily by punitive and educational nature. In turn, the existence of labour law cannot be imagined without the principle of freedom of employment contract, which is guaranteed by the Article 43 (1) of the Constitution of Ukraine. Under the provisions of this Article, everyone has the right to work, which includes the opportunity to earn a living by work, which he/she freely chooses or freely agrees. In turn, in 2018, the Article 118 (1) of the Criminal Executive Code was amended to provide that condemned to imprisonment have the right to work. Under this Article, the work is carried out on a voluntary basis by virtue

<sup>11</sup> Resolution of the Grand Chamber of the Supreme Court of Ukraine No. 145/1885/15-c, of 30.01.2019. URL: <http://www.reyestr.court.gov.ua/Review/79684982>.



of a civil law contract or employment contract concluded between convict and private entrepreneur or legal entity for which the convicts perform work or provide services. Such contracts are approved by the administration of the colony and must contain the procedure for their implementation. The administration is obliged to create conditions for the work of convicts under civil law contracts and employment contracts. At the same time, convicts who have debts under executive documents are obliged to work in places and at work determined by the administration of the colony, until such debts are repaid. It should be noted that the Article 118 of the Criminal Executive Code does not contain clear rules for distinguishing between the application of the civil law and employment contracts, which in practice may lead to a narrowing of the scope of the labour law.

If we talk about the scope of labour law, we should also pay attention to the *bogus self-employment*. This phenomenon has existed in the world for a long time. The costs associated with workers and self-employed highly differ. Hiring a self-employed person instead of an employee is cheaper. The price of hiring self-employed is unrelated to minimum wage or other wage-setting methods such as collective agreements. In the extreme cases, they receive remuneration less than the minimum wage. In addition to that, no social security contributions have to be paid when hiring self-employed. Also, the law obliges employers to live up to many expensive standards for employees such a compensation in case of dismissal, holiday payments etc.

The current labour law of Ukraine, unfortunately, does not say anything about this, which makes it possible to refer the work of self-employed person to the sphere of regulation by other branches of law, primarily civil law. Due to the fact that the bogus self-employment is often formalized – a person can register as a private entrepreneur or individual entrepreneur and pay due taxes, the practice of classifying this type of activity as employment relationships in Ukraine is not effective. Despite this, to the mentioned above persons do not apply guarantees provided by the labour law. These issues have given rise to a debate about the need for redefining the personal scope of labour law. In the wake of the increased importance of self-employment there are more and more arguments that the scope of labour law should be extended also to self-employed workers, who perform work personally and are more or less economically dependent on a single principal/employer.

## Conclusions

If we look from a historical point of view at the scope of labour law in Ukraine, we will see that it has always been characterized by instability and dynamics. This circumstance cannot be considered negative. After all, the law should always serve social relations, and they always tend to change. This is very well illustrated by the labour law of Ukraine. If the greater half of the 20th century was characterized by the total coverage by the labour law of all relationships with the use of hired labour for remuneration, then in the 21st century the situation changed due to the emergence of new types of work activity, which are regulated by special, not labour, legislative acts. In turn, the outdated legal structure of the current Labour Code of Ukraine does not see that the situation of legal regulation of work activity has changed a long time ago. The

Code continues to live in the old way, ignoring the existence of new special legal acts. At the same time, despite the fact that at the beginning of the 21st century the scope of labour law norms has narrowed, at the moment, the prerequisites for its gradual expansion are being traced (e.g. this is observed in relation to convicts). This happened not because labour legislation was improved, but because the special, far from labour, legislation was amended.

If we talk about the prospects for reforming labour legislation, it should be noted that the issue of replacement of current Labour Code, which has been operating in Ukraine for almost 50 years, has been raised a large number of times. The drafts of the new Labour Code were registered in the Ukrainian Parliament in 2003, 2009, 2011, 2015 and 2019. It should be noted that these drafts were similar in terms of defining the scope of labour law, unfortunately leaving this issue unattended. At the moment, the issue of adopting the new Labour Code remains open, and we hope that in the future, when developing a new Code, the legislator will focus on the scope of application of labour law taking into account current trends in labour activity in Ukraine.

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