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ANTI-DEMOCRATIC DRAFT LAW OF UKRAINE «ON LABOUR» DURING MARTIAL LAW

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Abstract. Nowadays Ukraine is experiencing an extremely difficult wartime in the strengthening democratic European values of social life. With the help of the critical analysis method the historical and legal evaluation of objective norms in labour sphere which are discriminatory was done. The comparative-legal method has helped to study the draft's norms on conformity of their current legislation of Ukraine on labour. In the context of the armed struggle for Democracy, part of which is recognition of human rights and strengthening the Rule of Law, legislative initiative to reform the legal regulation of social relations, the object of which is the labour and employment, has signs of an anti-democratic state-political regime. The most dangerous trend of the Draft Law of Ukraine «On Labour» is that its content gives priority to the economic system rather than to the human, the fatal consequence of which in the World History were genocide of Nations.

Key words: labour, signs of labour relations, labour agreement, safeguard, discrimination, economic, genocide.

Introduction. The Labour Code of Ukraine, dated December 10, 1971, No. 322-VIII (The Labour Code of Ukraine, 1987) is today the only normative legal act that is really able to protect human rights in Ukraine, in particular, the employee, along with the Constitution of Ukraine. At the same time, certain institutions and sub-institutions of labour law need to be developed as a result of the dynamics of social relations related to labour. Instead, the Draft Law of Ukraine «On Labour» on the legislative initiative of the Cabinet of Ministers of Ukraine represented by D. Shmygal, submitted for discussion by the Directorate of Labour Market Development and Remuneration of the Ministry of Economy of Ukraine on September 23, 2022 at 8: 12 a. m. (hereinafter referred to as the Project), does not represent any development of the already established foundations and principles of legal regulation of labour relations, but on the contrary, proposes to cancel them all, which has the characteristics of an anti-democratic state-political regime and discrimination of a person on the basis of work.

Some elements of the subject of the study have become the object of repeated scientific interest, in particular regarding the form of the state: R. Martyniuk, I. Protsiuka, Yu. Matsyevsoy, O. Yevtushenko, M. Karmazina, T. Bevz, N. Rotar, V. Lemaka, G. Kuts, V. Kopeichikova, Yu. Shemshuchenko, etc.; regarding the principles of labour law and its institutions: V. Prokopenko, P. Pylypenko, M. Boiko, S. Prylipko, O. Yaroshenko, S. Sinchuk, N. Bolotina, O. Protsevskyi, etc.

The purpose of the work is to study the Project for compliance with its current legislation of Ukraine during the period of the legal regime of martial law.

Main part. Research objectives:

– to analyze the Project in terms of the definition of the concept of «labour relations»;

– to determine the non-compliance of the current labour legislation of Ukraine with the project norms on the signs of labour relations;

– to compare the project definition of the employee's legal status with the current labour legislation of Ukraine.

– to provide examples of signs of anti-democratic character of the Project.

Material and research methods. The current Labour Code of Ukraine certainly needs to be improved, but any reforms of legal regulation cannot cancel the already developed legal institutions on the basis of the principle of the rule of law. Unfortunately, the Project is not of an evolutionary nature of the institutions of the right to work, it simply escapes them, which contradicts the existing regulatory framework of Ukraine, and can lead to an irreparable social situation, examples of which have repeatedly occurred in the historical and legal development of the nations of the world. The methods of our doctrinal research are the method of critical analysis and description, the comparative legal method, etc.

Results and their discussion. We will focus on the analysis of only some project regulations on changes in labour legislation, in particular, on Section II of the Project «Labour Relations and Employment Contract». From the very title of this section, it can be argued that the subject of the legislative initiative has a wrong idea of the difference/separation of labour relations from the employment contract, since labour relations cannot exist without the final legal registration in the form of an employment contract. At the same time, it is necessary to emphasize the problem of not including any labour-related relations in the subject of legal regulation of labour law.

Article 12. Labour (Employment) Relations

1. Labour relations are relations between the employee and the employer, which provide for the performance on behalf, under the direction and control of the employer personally by the employee for the remuneration of the work determined by the employer. Such a definition does not comply with the current legislation of Ukraine. Labour relations are social relations regarding the use and application of live hired labour, in which not only the employee and the employer participate, but the whole system of subjects of labour relations:

1) labour collective on the basis of:

– the International Covenant on Economic, Social and Cultural Rights;

– the European Social Charter (revised);

– ILO Convention No. 98;

– ILO Convention No. 154;

– ILO Recommendation No. 91;

– art. 36 of the Constitution of Ukraine;

– The Law of Ukraine «On Collective Agreements and Contracts»;

– the Law «On labour collectives and increasing their role in the management of enterprises, institutions, organizations»;

– Part 2 of Article 91, Part 3, Art. 52, Art. 152, Chapters III, XVI-A, XV of the Labour Code of Ukraine, etc.;

2) a trade union (professional union) or other bodies authorized to represent the labour collective on the basis of:

– the International Covenant on Economic, Social and Cultural Rights;

– ILO Convention No. 145;

– chapter XVI of the Labour Code of Ukraine;

– Art. 36 of the Constitution of Ukraine;

– Law of Ukraine «On Trade Unions, Their Rights and Guarantees of Activity», etc.;

3) the parties to the social dialogue are the social partners at the appropriate level of concluding a collective agreement on the basis of:

– chapter II of the Labour Code of Ukraine;

– The Law of Ukraine «On Collective Agreements and Contracts» («On Collective Treaties and Agreements»);

– the Law of Ukraine «On Social Dialogue in Ukraine»;

4) subjects resolving collective labour disputes: an independent mediator, a conciliation commission, labour arbitration, the National Service of Mediation and Conciliation, on the basis of the Law of Ukraine «On the Procedure for Settlement of Collective Labour Disputes (Conflicts)» and other regulatory legal acts and agreements.

5) state (government) authorities;

6) local self-government bodies;

7) other subjects, the list of which cannot be exhaustive.

Thus, Article 12 of the Project specifies that labour relations are only individual labour relations, discriminating against subjects of collective legal personality in the field of labour relations, together with public authorities and local governments, by excluding them from the circle of participants in labour relations, which is contrary to the national legislation of Ukraine.

In addition, in part 1 of Art. 12 of the Project applies the concept of «commission» («order»), which is part of the regulation of civil-law relations (Civil Code of Ukraine, 2003) or some branches of public law in the form of a management decision or written authority with the participation of public authorities (On government service, 2015). If we are talking about the performance of work by an employee, then it can be carried out only under the terms of the employment agreement, and not on «commission» («order») – some non-legal «instructions» of employer. This interpretation of Art. 12 of the Project causes harm to the employee, depriving him of legislative guarantees in the field of labour, since such «commission» («order», «instructions») can be issued at the discretion of the employer, and not in accordance with the labour agreement, collective agreement, collective treaties or labour legislation. Such abolition of legislative guarantees of employees' (workers') rights is traced throughout the text of the Project, which contradicts the Constitution of Ukraine, the Labour Code of Ukraine, the laws of Ukraine and international treaties and agreements. It should also be added that in the current legislation of Ukraine there is a terminological concept of «employer's assignments (commission, order)», which is simultaneously included in the subject of civil and labour law and means a written task issued to the employee, which is directly related to the specifics of the enterprise or the employer's activity and can lead to the creation of an invention (utility model), but the Project does not contain this.

The clause is also subject to the Projected design «under the control of the employer» in Part 1 of Art. 12. The employer does not exercise «control», such powers fall within the competence of state authorities and trade union organization or other bodies authorized to represent the labour collective, that is, state and public control provided for in Chapter XVIII of the Labour Code of Ukraine. Instead, the employer is entrusted with the duties to «properly organize the work of employees, create conditions for the growth of labour productivity, ensure labour and production discipline, strictly comply with labour legislation and labour protection rules, carefully treat the needs and requests of employees, improve their working and living conditions» (Art. 141 of the Labour Code of Ukraine). In other words, the employer has the right only to ensure the fulfillment of labour duties under the terms of the employment contract by the employee, and not to control such fulfillment with the creation of the necessary organizational and economic conditions for normal highly productive work, conscious attitude to work, methods of persuasion, education, as well as encouragement for conscientious work (Art. 140 of the Labour Code of Ukraine). Such clauses are contained in the current Labour Code of Ukraine, in Chapter X «Labour discipline», which is not in the Project at all.

The principle of freedom of work lies not only in the freedom to choose the type of activity and type of occupation, but also in the freedom at the discretion of the employee to perform his/her labour duties in the best possible way, choosing the forms and methods of performing labour duties that cannot be controlled, but only provided. In view of the proposals for amendments to the labour legislation and the existing illegal practice of using, for example, video surveillance of employees, including without their consent, as well as the illegitimate abolition of the principles of labour law,

the employee will turn into a powerless subject, who will be obliged to carry out the commands and whims of the pseudo-employer in a systemic and mechanical manner. This state of affairs falls under the recognition of the economic indicator above the human being that is present in anti-democratic communist China. Thus, according to some economic characteristics, a person turns into an object of economic exploitation, which contradicts all the principles of law, common sense, and if such an anti-democratic mechanism is used, it will lead to an irreparable catastrophe, which has already occurred more than once in the historical and legal development of both the Ukrainian people and other nations of the world in the form of inhumane, criminal events and phenomena called «slavery», «serfdom», «feudalism», «landing», «war communism», «communism», «NEP», «collectivization», «Holodomor (1921–1923, 1932–1933, 1946–1947)», «Apartheid», «Holocaust», etc. – the subject of the crime of genocide or the whole complex of the crime of genocide – the most important crime against humanity.

Consequently, Part 1 of Art. 12 of the Project, as well as the entire content of the Project, provides the employer with discretionary powers contrary to the Constitution of Ukraine, the Labour Code of Ukraine, the laws of Ukraine and international treaties and agreements, which cancels the current rights of employees and cannot be adopted on the basis of Articles 1, 3, 8, 22, etc. the Constitution of Ukraine.

The following inconsistency of Part 1 of Art. 12 of the Project, the current national legislation of Ukraine is that the remuneration, as well as the performance of work, is determined by the employer independently – this is a violation of the principle of the contractual nature of labour relations (Melnychuk, 2009: 152), defined in the entire system of regulatory legal acts of Ukraine, in particular, the legal institution of labour law «employment contract», which is an agreement (Part 1, Art. 43 of the Constitution of Ukraine, Part 1 of Art. 21 of the Labour Code of Ukraine) and is concluded on the basis of voluntary will, except as provided for in Part 3 of Art. 43 of the Constitution of Ukraine – military or alternative (non-military) service, work or service performed by a person under a sentence or other court decision or in accordance with the laws on martial law and state of emergency. To this it should be added that in Ukraine there is also established an appropriate regulatory regulation of the systems and amounts of remuneration (On the remuneration of employees based on the Unified tariff grid of grades and coefficients for the remuneration of employees of institutions, establishments and organizations of certain branches of the budget sphere, 2002), which exclude the possibility for the employer to determine at his own discretion the amount of wages, which is established in compliance with the established coefficients, categories, categories, qualifications, complexity of work, etc.

2. Part 2, Art. 12 of the Project notes that «the parties to the employment relationship are the employee and the employer». Such wording is erroneous, since the employee and the employer are parties to the employment contract and the main participants (subjects) of the employment relationship, but not the only ones.

3. The basis for the emergence of labour relations is not only the labour contract, although it is a personal legal fact of the emergence of labour relations and, when there are other legal facts that are the basis for the emergence of labour relations, then in the end they will be formalized by the labour contract in the case of individual labour relations.

In paragraph 2 of Part 3 of Art. 12 of the Project is indicated «in cases stipulated by the constituent documents». Constituent documents are constituent acts of subjects of civil and economic relations, acts of a legal entity. On the basis of the current labour legislation of Ukraine, in the presence of a legal entity-employer, there is necessarily a subject of labour relations «labour collective», the legal status of which is not determined by the Project at all, but is only mentioned in two words in paragraph 2, Part 1 of Art. 16 of the Project. Moreover, according to modern realities, the concept of «labour collective» as a subject can exist with the participation of an individual employer in labour relations.

In the items of paragraph 2 of Part 3 of Art. 12 of the Project, not all possible cases of legal facts are listed, which are the grounds for the emergence of labour relations, in particular membership in cooperatives (Condominiums), peasant (farm) farms, collective agricultural enterprises, organizations (Yeromenko, 2017). On the basis of Part 1 of Article Labour legislation regulates the labour relations of employees of all enterprises, institutions, organizations, regardless of ownership form, type of activity and sectoral affiliation, as well as people who work under an employment contract with individuals. Thus, any hired labour must be regulated by the norms of labour legislation. Instead, the Project generally excludes from the concept of labour relations the object of labour relations – labour and further does not regulate labour in cooperatives (Condominiums), peasant (farm) farms, collective agricultural enterprises, organizations, which needs to be properly regulated from the moment of restoration of independence of Ukraine within the framework of labour legislation. Such project exclusion is a violation of the principles of democracy and the rule of law and discriminates against the citizens of Ukraine in the field of labour on the basis of professional grounds, field of activity. Again, discretionary rights are granted to economic entities, which may determine the grounds for the emergence of labour relations in their charters, and not on the basis of the legislation of Ukraine.

Further absence of legal regulation of labour under the norms of labour legislation in cooperatives (Condominiums), peasant (farm) farms, collective agricultural enterprises, organizations continues the long-term operation of the participants in these relations.

Any work must be regulated by the norms of labour legislation with a distinction from civil law agreements and with the additional application of separate legislation depending on the peculiarities of the performance of labour function (civil service, public service, military service, law enforcement, justice, activities in positions in higher authorities (People's Deputy of Ukraine, President of Ukraine, composition of the Cabinet of Ministers of Ukraine), advocacy, notary, etc.). At the same time, economic activity cannot absorb the regulatory and legal regulation of labour subjects (labour relations). Taking into account the text of the Project, the entire institutions of labour law (employment, collective agreement, employment contract, labour discipline, working time, rest time, etc.) fall under such economic absorption – this is the removal from the labour legislation of the subject of legal regulation of labour law, the object of which is labour, which has the features of an anti-democratic regime of the state form.

In paragraph 2 of Part 3 of Art. 12 of the Draft Law states that the employment contract is amended on the basis of: 1) appointment to a position; 2) election to a position; 3) results of the competition; 4) court decision. Such a provision of the Project also contradicts the principle of the contractual nature of the employment relationship (Zhyhalkin, 2015; Kozak, 1999), which consists in the mutual agreement of the parties to the employment contract, which can be changed only with the mutual consent of the employee and the employer.

In Part 4 of Art. 12 of the Project, it is proposed that the parties, i.e. also the employee, are obliged to inform about any circumstances that may affect the conclusion, execution, termination of the employment contract. Such a provision contradicts Parts 2, 3 of Art. 24 of the Labour Code of Ukraine, which determines the list of information submitted when concluding an employment contract, and also contradicts Art. 25 of the Labour Code of Ukraine, which prohibits the submission of information (documents), the submission of which is not provided for by law. Design norm Part 4 of Art. 12, on the contrary, wrongly names any circumstances about which the employer must necessarily be informed on the part of the employee. This will give the employer discretion to impose penalties on the employee up to and including termination of employment in the event of failure to provide any information that the employer believes should have been known. This position contradicts the current legislation of Ukraine.

Also Part 4 of Art. 12 of the Project uses the erroneous wording of the legal terminology «performance of the employment contract». The Employment Contract may be entered into, amended,

extended or terminated but not performed. Only the duties specified in the terms of the employment contract may be performed.

Part 5. 12 of the Project notes that the norms of labour legislation apply to the relations under which the work was performed without the conclusion of an employment contract and which are recognized as labour in accordance with the procedure established by the Law. However, the Project does not establish such a procedure for the recognition of labour relations in the case of performance of work without the conclusion of an employment contract, but only specified, in the opinion of the subject of the legislative initiative, which are signs of labour relations (Art. 13 of the Project), and it is not clear at all what the «Law» is talking about.

Article 13 Signs of Employment Relationship.

1. Part one suggests that the work «may be recognized» as being performed within the scope of the employment relationship. This wording deprives of legislative guarantees for employees, since the imperative of recognizing labour relations is lost if there are three or more signs of labour relations. It is not clear by whom such work «can be recognized», in addition, there is no obligation to draw up an employment contract (guarantees such an employee protection in the field of labour) from the employer in the presence of signs of labour relations. There is also no legal justification why three or more signs are an «opportunity» to recognize labour relations.

Paragraph 1 of Part 1 of Art. 13 of the Project does not fully apply the concept of «labour function», which includes: profession, specialty and specialization, qualifications, position and workplace (Lavrinenko, 2009; Dihtiarenko, 2018), instead it is mentioned only about qualifications, profession and position. In addition, it can be concluded from the design of this paragraph that the sign of labour relations is self-employment, which is included in the subject of legal regulation of economic legislation, and not labour, namely in the words that «a person performs work in the interests of a person».

It also violates the «principle of stability of labour relations» (Shvets, 2020) and the «principle of material interest (interest) in the results of work» (Fartushok, 2015), which are mutually beneficial activities of the parties to the employment contract, the performance of work (labour duties) is also carried out in the interests of the employee himself, since any work is socially useful and cannot be satisfied only in the interests of the employer, abolishing the rights of employees. Employees should have confidence in the future – a guarantee of employment and payment for their work, the employer – a stable, qualified employee or a team of employees who are interested in the ultimate positive result of their work.

Labour activity is a way of meeting material and moral needs, which is largely carried out on the availability of funds. The totality of all the interests of the employee, namely, to organize their workplace as best as possible, to improve their skills, etc., is to receive for their work as much money as possible (remuneration for work), and thereby more fully meet their needs, - a material interest in the consequences of their work.

There is no clarity in the understanding of the term «person», why it is not specified specifically – «natural person», if it is an employee, and a natural or legal person, if it is an employer.

Paragraph 2 of Part 1 of Art. 13 of the Project uses the phrase «permanent nature», which is not specified in the calendar period, which does not improve and does not develop labour legislation, and further contains gaps in the time during which an individual (employee) works in a relationship that has signs of an employment relationship. In addition, instead of «permanent», «systematic» (Prohoniuk, 2011) should be used, which has the specification of the legal fact in time – two or more times.

Paragraph 3 of Part 1 of Art. 13 of the Project excludes from legal regulation distance and home work provided for in Articles 60-1, 60-2 of the Labour Code of Ukraine, the Regulations on the Working Conditions of Domestic Workers (1981) and ILO Convention No. 177 (Home Work Convention, 1996).

Paragraph 4 of Part 1 of Art. 13 of the Project mistakenly covers the workplace as a means of production and does not differentiate the means of production from the tools of production (Inshyn, Shcherbyna, 2016: 210; Bilodid, 1971: 141).

Paragraph 5 of Part 1 of Art. 13 of the Project proposes to pay remuneration only in kind, which is contrary to Art. 23 of the Law of Ukraine On Salary. It is also not clear what the reward is, since there is no binding as a reward for work, but only tendentiously emphasizes the work that is performed in the interests of some person.

Paragraph 6 of Part 1 of Art. 13 of the Project does not contain a guarantee for the employee in the event that the employer does not establish the duration of working time or rest time signs of an employment relationship, in addition, from the wording of this paragraph it is seen that if no rest time is established, then such work will not have a sign of an employment relationship.

Paragraph 7 of Part 1 of Art. 13 of the Project proposes to consider it a norm to impose «other financial expenses» on the employee, which is contrary to the current labour legislation of Ukraine. In addition, in the presence, for example, of the features provided for in paragraphs 1, 4, 7 of Part 1 of Art. 13 is not sufficient to recognize the employment relationship, which does not develop, but, on the contrary, complicates the legal definition of the employment relationship under the Project.

Part 2 of Art.13 of the Design is meaningless.

Article 14. Employee

1. Part one does not give a proper definition of the legal status of the employee, since it omits the main institution of labour law and the main basis for the emergence of labour relations – an employment treaty (agreement) that contradicts paragraph Part 1 of Article of the Law of Ukraine «On Trade Unions, Their Rights and Guarantees of Activity», Thus, today an employee is an individual who works on the basis of an employment agreement at an enterprise, institution, organization or an individual who uses hired labour. The performance of paid work by one's own work for the benefit of another person does not confer the status of an employee. We also have to note that «employment treaty (agreement)» is not the same «employment contract (agreement)» in the Ukrainian labour legislation.

Therefore, it is clear only from the analysis of incomplete three articles of the Design that it cannot be acceptable, as it contradicts the national legislation of Ukraine. It should be added that the Project also cancels the legal institution of rest time, in particular, its longest type – vacations, an inexhaustible list of which is provided by Art. 4 of the Law of Ukraine «On Vacations».

Conclusion. The content of the Draft Law of Ukraine on Labour is useless, since:

1) abolishes human rights in the field of labour in comparison with the current labour legislation;

2) contradicts the general and sectoral principles of law;

3) does not comply with the Constitution of Ukraine;

4) gives priority to the employer, rather than to the employee, which contradicts the essence of the right to work itself and the entire labour law, which should be directed only to the priority of recognizing the rights of the employee who, for remuneration, hires his own human labour;

5) abolishes the institutions of labour law regulated by the current labour legislation;

6) does not develop or improve anything, which is really required by the realities of today, but, on the contrary, contains even more gaps in the legal regulation of labour;

7) provides the employer with the right at his own discretion to organize the labour process without complying with the legal requirements, which are not in the Project at all, which, contrary to the Constitution of Ukraine and all national legislation of Ukraine, will allow the exploitation of labour of individuals, first of all, citizens of Ukraine without providing any guarantees in the field of labour;

8) has the features of an anti-democratic state-political regime;

9) is a Ukrainian translation of the Labour Code of the Russian Federation;

10) the norms of Ukrainian spelling were not observed.

11) duplicates the Draft Labour Law No. 2708 dated 28. 12. 2019

12) constitutes a dangerous anti-legal trend;

13) can be a prerequisite or a means of irreparable consequences that took place in the world during «slavery», «serfdom», «feudalism», «landlordship», «military communism», «communism», «NEPu», «collectivization», «Holodomor (1921–1923, 1932–1933, 1946–1947)», «Apartheid», «Holocaust» and other inhumane events and phenomena.

Thus, it should be noted that labour law inherently combines the features of private and public law today through planned Eurocentric development, as it distinguished itself from civil law in an independent branch of law after the Second World War, and also as a result of the fact that after the restoration of Ukraine's independence in 1991 and the democratization of public life, the state monopoly on the mandatory application and use of labour with elements of administrative command management as a totalitarian system of exploitation of society was abolished. In this way, labour law is a balanced regularity of the settlement of public interests at different levels during the social dialogue of social partnership subjects. Contrary to the national traditions of the state formation of the Ukrainian people with the recognition of human life, health, honour, dignity, inviolability and security with the highest social value and the right to work, the Project recognizes the priority of the interests of the quasi-employer with discretionary rights and the priority of economic interests, in which the person – employee is transformed into an object of the economic system and loses its legal personality, guaranteed today by the national legislation of Ukraine.

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