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COMPARATIVE ANALYSIS OF AN EMPLOYMENT CONTRACT IN KAZAKHSTAN AND THE EEU'S STATES

The comprehensive expansion of economic ties, mutually beneficial socio-political and cultural cooperation together with the common historical development allowed the countries of the post-Soviet space to pay serious attention to the possibilities of integration partnership. The formation of the Eurasian Economic Community on the basis of the Commonwealth of Independent States was the first significant step towards the creation of a powerful economic bloc of the Eurasian continent. The subsequent unification of customs borders in the format of the Customs Union and the creation of the Single Economic Space of Russia, Kazakhstan and Belarus have only confirmed the growing prospects for economic and social rapprochement between these countries.

Creation of united labor market on the territory of Eurasian economic Union leads to approximation of the labor laws of the Union's states. That kind of approximation aims to make cooperation and functioning of the newborn union more effective. The problem concerned the development of the directions and approaches of formation of the uniform labor legislation, among which are the institutes of an employment contract. The article deals with the concept of an employment contract in the labor legislation of the countries and reveals its species and generic characteristics. Comparative analysis of terminology of labor contract of the EEU's countries, as well as of individual European Union countries was carried out.

Key words: employment contract, labor relations, Eurasian economic Union, harmonization.

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Қазақстан Республикасындағы және ЕАЭО-ның елдердегі еңбек шарттарын салыстырмалы талдауы

Экономикалық байланыстарының жан-жақты кеңеюі, өзара тиімді саяси-әлеуметтік және мәдени ынтымақтастықтың біртұтастығы тарихи дамуы ортақ посткеңестік елдерге интеграциялық әріптестік мүмкіндіктеріне баса назар аударуға итермелеуде. Тәуелсіз мемлекеттер достастығы негізінде құрылған еуразиялық экономикалық қауымдастық Еуразия құрлығындағы қуатты экономикалық блокты құру жолында жасалған алғаш нық қадам болды. Одан кейінгі Кедендік Одақ форматында кедендік шекаралардың біріктірілуі мен Ресей, Қазақстан және Белоруссияның біртұтас экономикалық кеңістік құруы бұл елдердің болашақтағы әлеуметтік-экономикалық жағынан жақындасуын дәлелдейді.

Еуразиялық экономикалық одақ аумағында біртұтас еңбек нарығының құрылуы жаңа экономикалық одақ қызметін жүргізу және тиімді ынтымақтастасу мақсатында ЕАЭО елдерінің еңбек заңнамаларының жақындасуына әкеліп соғуы сөзсіз. Осыған байланысты бірыңғай еңбек заңнамасын, оның негізгі институттарын және оларға жататын еңбек шарттарын қалыптастырудың бағыттары мен тәсілдерін әзірлеуге байланысты мәселелер туындайды. Мақалада Еуразиялық экономикалық одақ (ЕАЭО) елдері заңнамаларындағы еңбек туралы еңбек шарттары ұғымы жайлы мәселелер және оның түрі мен тектік белгілері қарастырылады. Еуропалық одақтағы жекелеген елдер мен Еуразиялық экономикалық одақ елдерінің еңбек шарты арасында терминологияға қатысты салыстырмалы талдаулар жүргізілген.

Түйін сөздер: еңбек шарты, еңбек қатынастары, Еуразиялық экономикалық одақ, үйлестіру.

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Сравнительный анализ трудового договора в Республике Казахстан и странах ЕАЭС

Всестороннее расширение экономических связей, взаимовыгодное социально-политическое и культурное сотрудничество вкупе с общностью исторического развития позволило странам постсоветского пространства всерьез обратить внимание на возможности интеграционного партнерства. Формирование на базе Содружества независимых государств Евразийского экономического сообщества стало первым весомым шагом на пути создания мощного экономического блока Евразиатского континента. Последующее объединение таможенных границ в формате Таможенного союза и создание Единого экономического пространства России, Казахстана и Беларуси лишь подтвердили возрастающие перспективы экономико-социального сближения этих стран.

Создание единого рынка труда на территории Евразийского экономического союза неизбежно повлечет за собой необходимость в сближении трудовых законодательств стран ЕАЭС в целях наиболее эффективного сотрудничества и функционирования нового экономического союза. В этой связи встает вопрос выработки направлений и подходов формирования единого трудового законодательства, его основных институтов, к одним из которых относится трудовой договор. В статье рассматриваются вопросы понятия трудового договора в законодательствах стран Евразийского экономического союза (ЕАЭС) о труде, раскрываются его видовые и родовые признаки. Проведен сравнительный анализ терминологии трудового договора стран Евразийского экономического союза, а также отдельных стран Европейского союза.

Ключевые слова: трудовой договор, трудовые отношения, Евразийский экономический союз, гармонизация.

Introduction

The Institute of Employment Contract is one of the most important institutions of labour law, as it is the theoretical primary source of the emergence of labour law in general.

It is traditionally believed that labour relations are closest to the modern form of labour relations between the employee and the employer were born in Western countries on the threshold of the industrial revolution, the birth and the emergence of capitalism. The rapid development of capitalism in Europe, the growth of workers and trade unions, the results of research into the relations between employees and the employer forced lawyers to take a new look at the institution of personal employment (Lushnikova M.V., 2006: 194). According to G.F.Scherschenevich personal employment establishes binding relations, the basis for which is an employment contract, which provides for free agreement of the parties to use and provide services. This differs from other forms of other people ‘s services use (Shershenevich G.F., 1999:813).

Some legal academics and jurists refer to the emergence of personal employment relations, as well as employment relations and employment contracts, as part of the history of ancient Rome and the slave-owning system prevailing in that historical era. Thus, according to foreign scientists (J.MacDonell, 200: 253-261), in Roman law, the equivalent dichtomy was the dichtomy between locatio conspectio operarum (employment contract) and locatio conspectio operis (service contract) (Sohm, 1892:311).

L.S.Tal, a distinguished scholar and founding father of labor law science, did not take the view of ancient Rome ‘s experience in the legal regulation of wage labour because he associated the so-called wage relations of the era with slave labor and domination of ideology that is the right to use other’s labor was identical to “the right of deriving benefits from a man” (Tal L.C., 1913:632). In his writings, the scientist explains that “the need for foreign work in practical life is satisfied by contract in a dual way: Either the work is promised by the employee in the form of his own economic activity, separated from the employer ‘s activity (entrepreneurial work), or the employer receives the right for a certain time and within certain limits to dispose of the foreign labor force as an instrument in his economic activity, sending it at his own discretion (official work). In the latter case, the employee, within appropriate

limits, is restricted for a certain period of time in his or her economic self-determination. The activities performed by him under the contract are economically representative of the employer 's activities carried out through him, not his own. The legal form for such application of the labour force of one person to the tasks of another is the employment contract " (Tal L.C., 1916:127).

At the same time, the scientist studied the legal nature of the employment contract and established its distinctive characteristics, which are reflected in the modern interpretation of the employment contract, as the granting by the employee for a certain time of his labour force in favor of the enterprise or economy of a particular person; The subordination of the labour force and, to a certain extent, the personality of the employee of the economic authority; Employee 's non-independence, etc. (Braginsky M.I., 1997:122).

On the basis of such characteristics L.S.Tal will define the employment contract as a contractual type of document, the essence of which is that one person – hired – promises for remuneration the application of his labor force as a non-self-employed employee (Worker, employee or pupil) for a certain or indefinite period in the enterprise or in the farm of another – employer, committing to obey (As far as this follows from the content and purpose of the contract) the owner of the latter – the employer.

This definition of employment contract has fundament of civilistic nature and contains the main characteristics of the contract of civil-legal design of the contract of personal employment.

With the passage of time and the development of labour law, the employment contract acquires the characteristics of modern labour legal realities and almost completely loses its civilistic essence, namely, this is connected with the gradual restriction of freedom of contract. In other words, equality of the parties is not the main characteristic of labour relations, in which autonomy of will is a very relative concept, while property autonomy characterizes only one of the parties to labour relations, usually the employer. In this case, it is possible to agree with Golovina S. Y. that the employment contract is a modified (adapted to the purposes of the labour legislation) legal structure, peddling a certain restriction of the freedom of its parties (Golovina S. Y., 2014:67-77).

This is one of the features of the employment contract. The specifics of the conceptual apparatus of the Institute of Labour Law in the countries of the Eurasian Economic Union and some countries of the European Union are of interest here.

Problem statement

The basis for the emergence of employment legal relations in the EAEU countries is an employment contract, By which is meant an agreement between the employee and the employer, where the employer undertakes to provide the employee with work on a conditional employment function, Ensure the working conditions provided for in labor legislation and other regulations, Containing labor law, collective agreement, agreements, local regulations and this agreement, Pay the employee 's salary in full and on time, and the employee undertakes to perform personally the work function defined by this agreement, to comply with the rules of internal labor regulations. It should be noted that the labor legislation of the Republic of Belarus uses the term "employer" for both legal and natural persons, as opposed to the term "employer" used in the labor legislation of the Republic of Kazakhstan, the Russian Federation, the Republic of Kyrgyzstan and Armenia. Thus, in accordance with article 1 of the Labor Code of the Republic of Belarus, an employment contract means an agreement between an employee and an employer, Under which the employee undertakes to perform work in a particular one or more occupations, Specialties or positions of appropriate qualification according to the staffing table and observe the internal work schedule, And the employer undertakes to provide the employee with work conditional on the employment contract, to ensure working conditions, In accordance with the labor legislation, local regulations and agreement of the parties, pay the employee in a timely manner. The same article gives a legal definition of the employer, who means a legal or natural person, who is granted the right by law to conclude and terminate an employment contract with an employee. In this case, we associate ourselves with S.Y.Golovina's view that the word "employer" has a broader meaning than "employer" because it means someone who provides work, not just hires (http://www.lawbelarus.com/repub2008/sub11/text11395.htm).

According to the Labour Code of the Republic of Kazakhstan, an employment contract means a written agreement between an employee and an employer, according to which the employee undertakes to perform certain work in person (Labour function), observe the work schedule, and

the employer undertakes to provide the employee with work in accordance with the required work function, to ensure the working conditions stipulated by this Code, laws of the Republic of Kazakhstan and other normative legal acts of the Republic of Kazakhstan, collective agreement, employer 's acts, to pay the employee in full and on time (Article 1 of the Labour Code of the Republic of Kazakhstan) (https://online.zakon.kz/document/?doc_id=38910832#sub_id=10000).

Common species characteristics of the employment contract of the EAEU countries include the obligation of the employee to perform work on a certain employment function or provide certain services (Armenian Labor Code) to follow the employment policies and procedures (disciplines) established by the employer, an obligation of employer to provide to workers work according to the employment contract (In the Republic of Kazakhstan written agreement), timely payment of wages, provision of working conditions in accordance with labor and other legislation in the sphere of labor, lkal normative acts or employer 's acts, agreement of the parties.

Thus, the definitions of the "employment contract" in the EAEU countries indicate its generic characteristic and species differences, which make it possible to establish the difference between the employment contract and civil transactions, as well as other agreements on various types of labour activities. This is not the case for EU countries, where, as such, an employment contract does not have a clear structural separation and is often a form of civil contract.

The main act governing the employment contract in Great Britain is the "Employment Contracts Act" 1972 (Contracts of Employment Act 1972), in which the employment contract, in the absence of a clear definition, is two types of employment contract close to civil law. Namely, a contract with an employer-dependent employee, where the employee directly reports to the employer, and a contract with an independent employee. This type of contract is similar to a contract, i.e. a contract for the performance of certain services.

Research methods

In order to carry out a comparative analysis of the conceptual apparatus of the labour contract in the Republic of Kazakhstan, the EAEU countries, as well as other foreign countries, the method of comparative law was used, which includes a number of methods, such as micro-comparison, external comparison, normative comparison, doctrinal comparison. Micro-alignment includes systemic-structural and functional analysis of elements of such micro-objects as legal norms and their parts, articles of normative and legal acts, legal institutions (Malinovsky A.A., 2016:9-24). When using the method of external comparison, objects belonging to the legal systems of different states, such as labor legislation of the EEU countries, etc., were compared. For the purpose of comprehensive study of the concept of employment contract, definition of its definition, the method of doctrinal comparison was used, which consists in comparison of different positions of scientists on the same issues (Fletcher J., Naumov A.V., 1998:275). Normative comparison consists in comparison of requirements of legal norms, legislative definitions of compared normative legal acts in order to identify similarities and differences. In the course of the comparative analysis of labour norms of Kazakhstan and foreign legislation using the method of normative comparison taking into account the terminological self-declaration of definitions in the countries of near and far abroad, it was revealed that there are no normative definitions of the employment contract in the legislation of some foreign countries.

Purpose of the study

Processes of goods, equipment and science production integration and internationalization, the international labor division and, respectively, the world economic exchange development deepening, and also mutual enrichment of cultures don't keep within national legal systems framework: an international legal system gets more law-enforcement practice, i.e. a primacy before the domestic (national) legislation. Thus, value of the international legal system it is so high in the solution of world civilization maintenance questions.

Understanding of indissoluble communication between complete country national legal system, constitutional state in the world community, international relations building on the legal basis, represents important line of modern political thinking. One of the signs of country development as a constitutional state is national legislation legal system improvement – i.e. the state is faces integrated problem of legal reform which includes updating of all its elements and providing conditions for their optimum interaction with standards of the

national legislation and international law, increase of system integrity on what legal regulation efficiency as a whole depends.

In other words, national and international legal systems are "doomed" to be in close interaction (Myullerson R.A., 1982:6-20). In relation to the relations in the work sphere this communication is especially strong. The modern international law is created substantially under the influence of the most successful national labor legislation samples. However in the analysis of any one national labor law system return influence is much more noticeable: influence of the international legal acts on national (Lyutov N.L., 2012:8). The international law should be considered not as legal branch but right system, sometimes for comparison with which can be no one branches of the right (civil, labor, criminal, etc.) and national right as a whole (Marchenko M.N., 2001:185-195). Therefore the international law also includes branches as well as the national law. If labor law and others occur to be the subject of national labor law as branches of international law is not the relations in the sphere, but relations of the states and other subjects of international law concerning these relations (Gusov K.N. Lyutov N.L., 2013:9-10).

According to item 3 of art. 4 of the Republic of Kazakhstan Constitution the international contracts ratified by the Republic, have a priority before its laws and are applied directly, except cases when from the international treaty follows that its application requires the publication of the law (Constitution of the Republic of Kazakhstan). From this constitutional situation follows that: a) the international contracts ratified by the Republic of Kazakhstan, having a priority before its laws, are applied directly, except cases, b) when from the international treaty follows that its application requires law publication .

Eventually, the constitutional methods of international treaties application are reduced to that international contracts, according to the theory of transformation existing in international law, lose their international character, and become a part of national legal system.

From these positions, the international labor law is considered to be not only a relevant branch of international law, but also a direct regulation of the relations in the work sphere beyond national borders of one state. For international law it is typical to integrate diverse law rules that are special for this or that sphere of regulation. The international law integrates not various national law branches, but national and international labor law in the narrow sense of the word i.e. as a branch of international law (Servais J., 2009:13). Therefore the international labor law, as well as the national labor law extend the action to the relations connected with international and national labor migration respectively.

It should be mentioned that problems of migration arose in the world with origin of mankind and the factors promoting migration in the past, remain now (T.J. Matton, J.G. Willaimson, 2002:3). Thus, many foreign countries scientists consider set of the international norms about work as an independent branch of international law (Freidman W., 1964:164).

The research conducted by us in a range of international labor law definition allows us to consider the EEU states' labor legislation harmonization questions, the contract on which creation was signed on May 29, 2014 by Presidents of the Republic of Belarus, the Republic of Kazakhstan, the Russian Federation (Kazakhstan truth. May 30, 2014).

The Euroasian integration has already become the brand which is brings in real income, the President of Kazakhstan N. A. Nazarbayev declared, acting from lectures in Lomonosov Moscow State University. "The Euroasian union is possible, and we already approached to create it. And it has to be constructed on the principles of voluntariness, equality, mutual benefit, accounting of pragmatical interests of each country, in particular. This initiative has become a starting point for the new historical process which now is called the Euroasian integration", – N.A. Nazarbayev told.

It is represented that the Euroasian Economic Union creation principles proclaimed N. A. Nazarbayev, together with fundamental provisions of the EEU states' labor legislation harmonization, will provide creation of the new integration association which concept is based on the principles of general history, economic attraction, close interrelation of cultures.

As russian scientists emphasize, at the same time with formation of new social and economic, political and spiritual prerequisites of Russian constitutional creation the state the maintenance of a standard material is updated also, tendencies of its improvement and development change (Kazakhstan truth. April 30, 2014). It is need of strict ensuring law rule offor all spheres of life of society; specialization, unification, legislation intensification; discrepancy and competitiveness of its structures; increase in the array of

technical and legal instructions, – scientists state (Lawmaking in the Russian Federation, 1996). The tendencies which, as we believe, is entirely possible to extend to Post-Soviet legislations of the EUU countries, and is conditionally possible to divide into three big groups. The first group treat: comprehensive strengthening of a legislative priority, intensification and aspiration to stability. To the second – legislation specialization with its various forms of manifestation: differentiation, specification, specification. The third group includes legal unification and processes accompanying it: integration, generalization, universalization, publication of complex regulations (Matuzov N.I., Malko A.V., 1999: 382-397) .

In the modern legislation development tendencies ahother, called as the Eurasian Economic Community states' labor legislation harmonization, becomes accepted, that is recorded by Recommendations about the EEC states' labor legislation harmonization approved by resolution of Inter-parliamentary Assembly of Eurasian Economic Community from May 13, 2009 No. 10-13 (State and right theory. Course of lectures). We will notice, that the definition "harmonization" is absent in a legal conceptual framework.

According to the act, the Eurasian Economic Community states' labor legislation harmonization can be carried out in several ways:

1) creation of the model Labour code having advisory nature;

2) acceptance of EEC labor legislation Bases having the status of the statutory act of direct action;

3) modification and additions in existing labor codes of the EEC states for the purpose of creating unified conditions of labor use.

The ways of the Eurasian Economic Community states' labor legislation, which in the teory and practical plan will be transferred to the EEC states' legislations, are perceived ambiguously and, naturally, reflected in different researchers' views of this subject.

From our point of view, it is necessary to develop uniform concept of the labor legislation harmonization which, as we believe, it is necessary to understand as rapprochement of national labor legislations, but not their unification reduced only to development of uniform norms, calculated on the similar relations. Certainly, unification process in national legislations is considered as a peculiar science of generalization and a unification of structures of the legal regulation which substantial beginnings are formed at the legislator in the form of need of development of the unified legal models for the labor legislation of a certain state. Further completion of unification can act, as a rule, in the form of the separate regulatory legal act, or the structured contents of certain sections of bases, codes, provisions, charters of various legislations branches, including and labor law.

Conclusion

Comparative analysis of the labour legislation of the countries of the Eurasian Economic Union (Republic of Kazakhstan, Republic of Belarus, Russian Federation, Republic of Kyrgyzstan, Armenia) showed that, in general, the concept of an employment contract, taking into account some differences in these countries, is largely identical, has a common structure and content, historical origins.

The EEC states' labor legislation harmonization needs to be considered from positions of its rapprochement, instead of position of its unification, carried out in any state for its further development. In this sense the EEU states' labor legislation harmonization and standardization in separately taken country, carried out by means of national legal receptions, ways, is necessary to consider as philosophical categories: the general and private. We find an explanation for it that the states of Euroasian Economic Union are sovereign and independent states, and considered to be the subjects of international relations. And the interstate relations of these states are under construction on the standard international principles and norms. Inviolability of the sovereignty of the EEU states is a pledge of future economic union. And from these positions harmonization of the EEU states labor legislation, as we believe, can be built differently, in a view of that unbiased fact that these states are subjects of the international relations and the rights. It is thought that in a case considered by us it is expedient to proceed from particular to general, i.e. from the national, internal law to international law. What standards of the internal law can be used in the transformed look in international law? R. A. Myullerson considers that to such norms of the national right which can be transformed to international law, can relate the norms regulating concrete activity of the states, for example, the conclusion of contracts, a legal status of foreigners, diplomatic and consulates in the country. The standards of the internal law governing the relations between subjects of the national right from the different countries belong to

such "source" of international law also; the norms regulating part of the interstate relations, able to generate the international relations concerning their regulation. With prospect of "occurrence" into international law R. A. Myullerson includes "the certain legal maxims which providing internal coherence of legal systems and have arisen, as a rule, within the national right" in the list of standard elements of the internal law. In the conditions of expansion and deepening of the international cooperation of the states there is a task by means of international law to unify a number of areas of the internal law. This unification is carried out by means of international treaties, agreements.

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