

Current State and Perspectives of Criminalization of Violations of Labor Rights in the New Criminal Code of Ukraine

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ABSTRACT

The article is devoted to the problem of criminal liability for violation of labor rights. Based on the analysis of statistical data and examples of case law, it is concluded that it is necessary to leave the norms on criminal liability for violations of labor rights in the national legislation. The aim of the research is to establish the need for the criminalization of violation of labor rights.

The task of the research is to analyze the statistical data on violations in the field of labor relations and develop proposals for criminal liability of employers for violations of the labor rights of employees.

Keywords: Labor Rights, Criminal Offense, Gross Violation Of Labor Legislation, Criminal Liability, Criminal Punishment

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INTRODUCTION

Building a democratic, social, legal state involves the recognition of the priority of universal values. Art. 43 of the Constitution of Ukraine proclaims the right of every citizen to work, which includes the opportunity to earn a living by work, which they freely choose or freely agree to. Labor rights as the most important socio-economic human rights are recognized by the international community and enshrined in major international acts on human rights. The International Labor Organization, founded in 1919, is one of the oldest and most representative international organizations designed to develop and protect labor rights. Ukraine has been a member of the International Labor Organization, which today unites 183 states, since 1954. Nevertheless, over the last 20 years, there has been a significant deterioration and restriction of workers' rights in employment. Non-payment of wages, unlawful dismissals, deterioration of working conditions and lowering of social standards in the field of labor are becoming commonplace in Ukraine. Thus, there are about a thousand initiated criminal cases under Art. 172 of the Criminal Code of Ukraine registered annually. Payment arrears in Ukraine in 2018 amounted to approximately 3 billion UAH [1], and there are 479 criminal proceedings initiated on the facts of non-payment of wages in 2019 alone [2]. According to this, the question of developing effective measures to prevent the development of negative phenomena in labor relations, one of which is the establishment and implementation of criminal liability for violations of labor rights, becomes more and more acute. It should be noted that in 2020 there was a significant rethinking of the concept of criminal responsibility in the state. The law on criminal offenses was adopted and put into effect; the procedure of pre-trial investigation of these categories of proceedings was simplified. A group of scientists developed a project of a new criminal code of Ukraine involving not only forensic experts but also the

public. All this raises legitimate questions about the possibility and necessity of criminalization of labor rights violations in connection with changes in Ukrainian legislation.

MAIN TEXT

The Criminal Code of Ukraine, adopted on April 5, 2001, continued the tendency towards the development of criminal law protection of labor human rights. Articles 170-175 of Section V "Criminal Offenses against Electoral, Labor, and Other Personal Rights and Freedoms of The Human Being and The Citizen" of the Criminal Code of Ukraine provide for liability for human rights violations in the field of labor relations. The main of this group of criminal law norms is the norm on liability for gross violation of labor legislation (Article 172 of the Criminal Code of Ukraine).

Despite the fact that the norms on liability for violations of labor rights have a long history of existence, the research in this regard has been virtually non-existent. Most criminologists who have addressed the issue of liability in the field of labor relations have dealt with theoretical issues of liability for violations of occupational safety rules. The works of such scientists as V.I. Antipov, V.I. Borisov, M.S. Braynin, I.P. Lanovenko, Y.B. Melnikova, O.B. Sakharov concern not only the problems of production safety but are also based on the legislation of the Soviet period. In modern Ukraine, the problems of criminal law protection of labor human rights are addressed in the works of G.E. Andronovych [3], V.O. Navrotsky [4], I.O. Zinchenko [5], S.Y. Lykhova [6], V.I. Pavlykivsky [7], M.V. Fomenko [8], and V.G. Tanadzhi [9]. However, these works, in particular, the works of I.O. Zinchenko and S.Y. Lykhova, concern the problems of liability for violation of labor rights only superficially, within the general consideration of Chapter V of the Special Part of the Criminal Code. The works of

V.I. Pavlyukivsky are directly devoted to the criminal and legal protection of labor human rights, but the research concerns the problem of criminal liability for violation of labor human rights in general, without the detailed consideration of certain criminal law norms, in particular, provided by Art. 172 of the Criminal Code, while the work of V.G. Tanadzhi is limited to the study of Art. 173 of the Criminal Code of Ukraine.

At the same time, the small amount of research in this area cannot be compared with the damage caused by the encroachment on one of the most important socio-economic rights of the human being and the citizen. Labor is the basis of social welfare not only of the individual but also of society as a whole. It is labor that allows a person to realize their abilities, find their place in the state, and get the opportunity for their physical and intellectual development. Job loss is perceived in modern society as the worst evil that any worker tries to avoid.

This is evidenced by statistical data. The tendency to spread criminal encroachments in the field of labor relations continues to exist. Thus, if in 2002 (since the entry into force of the new Criminal Code of Ukraine) only 105 criminal offenses were registered according to Article 172 of the Criminal Code of Ukraine, in 2006 there were 831, and in 2008 there were 1702 [10]. In 2013, the total number of criminal offenses against labor rights amounted to 4077, of which there were 2949 criminal offenses related to the non-payment of wages (Article 175 of the Criminal Code of Ukraine), 1026 criminal offenses related to gross violation of labor legislation (Article 172 of the Criminal Code of Ukraine), and 30 criminal offenses related to gross violation of employment agreements. Negative tendencies continue to be observed today. At least a thousand criminal violations in the field of labor relations are registered annually: 2756 (including 1637 cases of non-payment of wages, 1012 cases of gross violation of labor legislation, and 19 cases of gross violation of employment agreements) in 2014; 1689 (including 901 cases of non-payment of wages, 687 cases of gross violation of labor legislation, and 24 cases of gross violation of employment agreements) in 2015; 1406 (including 677 cases of non-payment of wages, 590 cases of gross violation of labor legislation, and 14 cases of gross violation of employment agreements) in 2016; 1128 (including 464 cases of non-payment of wages, 519 cases of gross violation of labor legislation, and 10 cases of gross violation of employment agreements) in 2017; 1220 (including 554 cases of non-payment of wages, 519 cases of gross violation of labor legislation, and 12 cases of gross violation of employment agreements) in 2018; 1132 (including 479 cases of non-payment of wages, 517 cases of gross violation of labor legislation, and 13 cases of gross violation of employment agreements) in 2019 [2]. And these are only the most dangerous, criminal offenses of labor rights of workers.

At the same time, there is a discrepancy in the number of violations of labor legislation and the number of criminal proceedings against courts against employers who violate the rights of their employees. Thus, in 2017, 13,350 people applied to local courts in cases of violation of labor human rights (of which 1,965 applications for re-employment and 6,885 applications for payment of wages). The total amount of payments amounted to over UAH 205 million [11]. If the officially confirmed wage arrears in 2010 amounted to only 1.7 billion hryvnias, in 2018 the amount was almost 3 billion hryvnias. It should be noted that 56% of the total debt is owed to employees of economically

active enterprises [1]. This means that even in those enterprises where there is a favorable economic situation, employers continue to deliberately ignore labor laws, violating the basic rights of workers.

The unemployment rate in the country is more than 1.7 million people, which exceeds 9% of the economically active population. This means that every tenth able-bodied person in Ukraine does not have a job. Job cuts continue. As of November 2018, the State Employment Service registered 81.2 thousand vacancies, which is a total of 4 unemployed per 1 vacancy, and in 2008 there were almost 195 thousand such vacancies. In addition, the outflow of labor from Ukraine has recently become threatening. Uncompetitive wages, open borders, difficult working conditions, lack of effective protection of workers' rights, and the presence of a visa-free regime with European countries encourage Ukrainians to leave their homeland and seek a better life abroad. Thus, 1 million able-bodied people leave Ukraine every year [12]. The outflow of labor abroad also confirms the annual increase in the amounts transferred by Ukrainian workers to Ukraine. In 2020, even against the backdrop of a pandemic, this amount was about \$8 billion [13].

Thus, the official statistics do not reflect the real state of affairs in the field of labor rights violations in the country. Firstly, it is related to the peculiarities of the criminal law on liability for gross violation of labor legislation (Article 172 of the Criminal Code). The existing criminal law, almost unchanged, was transferred from the Criminal Code of the USSR in 1960 with all the shortcomings that were inherent in it, in particular, the presence of an evaluative feature, which was used to distinguish the criminal offense of labor human rights from administrative misconduct. Art. 41 of the Code of Ukraine on Administrative Offenses provides for liability for violation of the deadlines for payment of pensions, scholarships, wages, and their payment in full, as well as other violations of labor legislation. The main difference between an administrative violation in the field of labor and a criminal offense is the absence of a gross violation of labor human rights. The given feature is evaluative, and therefore the decision on whether or not the crime is entirely the responsibility of law enforcement agencies and depends in many cases on legal awareness and training of specific executors of such decisions. That is why quite often, the courts when resolving the issue of restoring the violated rights of an employee in civil or administrative proceedings, do not even try to consider the possibility of criminal prosecution of the violator. Thus, the decision of the Shevchenkivsky District Court of Lviv denied the claim of citizen K., who was unlawfully fired. As noted in the case, citizen K. is a widow; she is raising a child under the age of 14, and has worked for a long time at OJSC "Lviv Mekhsklozavod". After being on childcare leave, she went to work but was transferred to another place which was contraindicated due to her health condition. She was fired for repeated statements to the manager. Only the decision of the Judicial Chamber on Civil Cases of the Supreme Court of Ukraine satisfied the claimant's complaint, recognizing that according to Part 3 of Art. 184 of the Labor Code, the right to dismiss single mothers with a child under 14 years of age at the initiative of the owner is possible only with the complete liquidation of the enterprise, but with the obligatory arrangement for other work. In this case, the court did not even consider the initiation of a criminal case under Art. 172 of the Criminal Code of Ukraine [7].

Unlawful dismissal also requires the establishment of not only the very fact of illegality but also the personal motive of the guilty person as a basis for criminal liability for this violation. All these features of the legislative technique of the norm provided by Art. 172 of the Criminal Code significantly complicate the decision on criminal liability for violation of labor human rights. It is the imperfection of the criminal law that, in many cases, precludes the possibility of an effective response by law enforcement agencies to the growth of the most dangerous offenses in the field of labor relations.

Secondly, the high latency of these criminal offenses does not allow determining the general picture of offenses in the field of labor relations. Quite often this is preconditioned by the employee's lack of legal knowledge about their rights and responsibilities. Yet in most cases, the lack of appeals for support from government agencies to protect their labor rights is caused by a conscious desire of the employee to keep their job. According to court practice, the majority of employees' appeals for protection of their rights occur in two cases – in case of illegal dismissal or in case of long-term non-payment of wages. The Office of the Prosecutor General of the Kirovograd region sent a criminal case to court under Part 1 of Article 172, Part 1 of Article 175, Part 3 of Article 212-1 of the Criminal Code of Ukraine against the Chairman of the Board of CJSC "Energovugol", who, despite the receipt of about UAH 140 million on the company's accounts over the last two years, unreasonably failed to pay UAH 24.3 million of wages to the company's employees and evaded contributions to the Pension Fund of Ukraine in the amount of UAH 10.3 million. The available funds were used to repay promissory notes, pay bank loans, fuel, and lubricants, etc. At the same time, the head of the company paid themselves the salary on time and in full [14]. That is, the employee applies to law enforcement agencies or the court only in cases where they (the employee) have nothing more to lose. This does not mean that there are no other violations of workers' rights in enterprises, but it means that an employee is willing to give up most of their rights in order to preserve their job [17], [18], [19].

In addition, most violations of labor human rights contained in official statistics are recorded in state-owned enterprises. Yet, this does not mean that there are no violations of labor human rights in the private sector. There are many more violations at these enterprises, although they are more hidden. Private entrepreneurs, considering the company their property, often do not understand why they must comply with the requirements of labor law [20]. Thus, in meetings with employees of legal services and enterprises, the judiciary emphasized the fact that employers in small and medium-sized businesses do not enter into not only collective but also employment contracts with employees. Employees are hired on the basis of oral agreements, no records of work are made in employment records, wages are not accrued and paid not signed in the information, but handed over for the day worked, the amount of which is less than the legal minimum, although they work for 10-12 hours a day [15]. It should be noted that the decision to strengthen the employer's liability for admission of the employee to work without an employment contract (agreement) and payment of wages (remuneration) without accrual and payment of a single contribution to compulsory state social insurance and taxes (Article 265 of the Labor Code) turned out to be more effective than the criminal prohibition. In many cases, according to the employers

themselves, it is a fine of thirty times the minimum wage set by law at the time of the violation, for each employee in respect of whom the violation was committed, that turned out to be a deterrent in contrast to the existing for 19 years criminal law prohibition of such actions provided by Art. 172 of the Criminal Code of Ukraine. At the same time, changes in legislation have not stopped the practice of partial payment of "wages in envelopes", which continues to affect the overall level of observance of labor human rights in the state.

There are still many questions about recent legislative novelties in the field of labor human rights protection. Thus, the addition of Art. 172 of the Criminal Code of Ukraine, with such additional grounds for illegal dismissal as a notification by an employee of another person committing a corruption or corruption-related offense, other violations of the Law of Ukraine "On Prevention of Corruption", does not change the limits of criminal liability for this violation, does not fill legislative gaps, and therefore remains virtually unnecessary for law enforcement [16].

CONCLUSION

The provided information and figures indicate a lack of attention from scientists and practitioners to address the issue of protection of labor human rights. The availability of existing criminal law rules on liability for violations of labor human rights does not guarantee compliance with labor legislation by employers that is why, at present stage of development of the state, it is necessary to strengthen control and use all available means to fight violations in the field of labor relations. Not the last role in these measures belongs to criminal and legal protection of the specified rights which needs updating taking into account modern features of the development of labor relations in the state.

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