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ПРОФСПІЛКОВИЙ ЗАХИСТ ТРУДОВИХ ПРАВ В ОКРЕМИХ ПОСТРАДЯНСЬКИХ КРАЇНАХ

Анотація. Профспілки відіграють усе більшу роль у захисті працівників кожної держави. Ця стаття має на меті встановлення проблем у правовому регулюванні профспілкового захисту в пострадянських країнах. Дослідження ґрунтуються на низці загальнофілософських методів (діалектичний метод), загальнонаукових методів, як от: методи синтезу та аналізу, індукції та дедукції і спеціальних методів, включаючи порівняльно-правовий метод та метод моделювання. Вибір згаданих методів визначається метою наукової розвідки. Правове регулювання профспілкового захисту трудових прав в пострадянських країнах здійснюється низкою міжнародних конвенцій, конституцій таких країн (оскільки це є особливим конституційним правом, що перебуває під особливим захистом держави) та їх національним законодавством. Наразі деякі пострадянські держави є членами ЄС (Литва, Латвія, Естонія) і на них поширюються регіональні норми ЄС. Кожна пострадянська держава має особливу доктрину, юридичну практику та традиції захисту трудових прав, а отже, має свої національні особливості цього захисту, представництва працівників та архітектури трудового законодавства. Аналіз, проведений авторами, свідчить, що національні законодавці не завжди дотримуються міжнародних стандартів, встановлених Міжнародною організацією праці, і не забезпечують у повній мірі свободу права на об'єднання в асоціації. Деяким країнам було рекомендовано або внести зміни до певних законодавчих актів, або здійснювати контроль за поданими законопроектами, щоб вони відповідали вимогам, встановленим низкою міжнародних конвенцій. Автори також дійшли висновку, що діяльність профспілок в пострадянських країнах не завжди є ефективною.

Ключові слова: профспілки, право на профспілковий захист, пострадянські країни, трудові права, Комітет з питань свободи об'єднань

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PROTECTION OF LABOUR RIGHTS BY TRADE UNIONS IN SEPARATE POST-SOVIET COUNTRIES

Abstract. *Trade unions play an increasingly more critical role in protection of the employees of every state. This article aims to outline the problems with regard to the legal regulation of labour rights protection by trade unions in post-Soviet countries. The research is based on a system of various general philosophical methods (dialectical method), general scientific methods, such as methods of synthesis and analysis, induction and deduction, and special legal methods, including comparative legal method and the method of modelling. The choice of the mentioned methods was determined by the purpose of this study. The legal rules on protection of labour rights by trade unions in post-Soviet countries are set up by a number of international conventions, Constitutions of such countries (as this is a special constitutional right, being under a special protection of the state) and their national legislative acts. Some of the post-Soviet states are now members of the EU (Lithuania, Latvia, Estonia) and are subject to regional EU regulations. Every post-Soviet State has its own jurisprudence, legal practice and traditions of labour rights' protection and hence has its own national peculiarities with regard to this protection, the representation of employees and the architecture of labour legislation. The analysis conducted by the authors shows that the national legislators were not fully following the international standards established by the International Labour Organization and did not fully secure the freedom of association. All the mentioned countries were recommended either to change some pieces of legislation or to supervise the existing draft of laws to make them meet the rules set in a number of international conventions. The authors have also stated that trade unions in post-Soviet countries are not always effective*

Keywords: *trade unions, right to protection by trade unions, post-Soviet countries, labour rights, the Committee on Freedom of Association*

INTRODUCTION

It seems impossible to deny that, due to the globalisation of economic life, protection of labour rights by trade union is becoming more and more significant for employees of every state. History has shown cases where big employers were trying to minimize social expenses whilst limiting or infringing the labour rights of their employees. The trade unions' protective activities include resisting such limitations, and establishing preventive defence and protection of employees' labour rights along with their legitimate labour interests. This serves to protect the balance of rights between the employer and the employee. The efficiency of this protective mechanism is reflected by the trade unions' establishment and functioning.

Trade unions form an important element in the structure of any modern civil society, they tend to be "par excellence form or workers' organisation" [1]. A right to form trade union is now understood as one of the main components of the international human rights system [2]. A progressive civil society should pursue the freedom of association of people, who are connected by common professional, social, economic interests that were developed while they fulfilled their labour activity (e.g., powerful trade unions were created in France, Germany, United Kingdom, Ukraine, Poland). As V. Lambropoulos notes, "the legislative history reveals how the concept of freedom of association was reframed over the last century" [3], it

is necessary to add that trade unions can be very effective even in times of economic and political crisis [4], they can narrow or broaden their agenda to respond to challenges (e.g., a migration challenge) [5], they can even influence a climate-change policies [6]. A trade union may become the main actor of the workplace democracy [7], no surprise the workers can even use hybrid forms of organising [8].

The trade unions' activities are an illustration of each society's social and economic life. The analysis of special literature shows that while perceiving the nature-labour relationship different models can be formed: "the container model, nature as a mediator of survival, and the nature-labour alliance" [9]. The sphere of protection of labour rights by trade unions in post-Soviet countries has its own peculiarities. Common problems and tendencies can be outlined in the Republics of Kazakhstan, Uzbekistan, Tadzhikistan, Moldova, Belarus, Ukraine, Lithuania, Latvia, Estonia and other post-Soviet countries.

This article aims to outline the problems with regard to the legal regulation of labour rights protection by trade unions in post-Soviet countries, based on international, regional legislation, Constitutions as well as on jurisprudence.

1. LITERATURE REVIEW

The protection of labour rights by trade unions was studied by a number of Soviet and modern authors, such as: N. Aleksandrov, V. Chibisov, M. Chos, V. Dogadov, G. Goncharova, N. Iefremova, M. Inshyn, Ie. Ivanov, N. Lyutov, B. Nurasheva, V. Prokopenko, O. Protsevskiy, Yu. Schotova, I. Snigiriova, F. Tsesarskiy, V. Tsyv, S. Vavzhenchuk and others.

The protection of labour rights by trade unions was also studied in a number of dissertation theses, defended during Soviet and post-Soviet times. In 1975 Valeriy Chibisov devoted his dissertation to the protective function of Soviet trade unions [10]. In 1988 Irina Snigiriova defended her dissertation thesis called "Trade Unions as Subjects of Soviet Labour Law" [11]. Mykhail Zelenov defended his thesis "Legal Problems of Participation of Trade Unions in Solving Collective Labour Disputes" in 1999 [12]. In 2004, the problem of protection of social-labour rights of employees in a market-driven economy by trade unions was analysed by Veniamin Nikiforov [13]. This very year Feliks Tsesarskiy devoted his dissertation thesis to the protective function of the trade unions and its peculiarity [14]. In 2013, Yulia Schotova studied the realisation of trade unions' function on the level of individual and collective legal relations in her dissertation for Dr. Habil, named "Legal Mechanism of Realisation of Trade Unions' Function as Subjects of Labour Law" [15]. In 2015 Bibigiul Nurashva devoted a separate chapter in her dissertation to trade unions as the main element of protection of labour rights, in which she outlined perspectives on the development of a mechanism

for legal protection of labour rights by the trade unions in Republic of Kazakhstan [16].

A significant number of studies devoted to the legal status of trade unions was written *during Soviet times*: Vasilyy Dogadov (studied legal status of trade unions in the Soviet Union and was the first to mention Trade Union Law) [17], Volodymyr Prokopenko (researched the peculiarities of subjects in relations between the trade unions and administration of the company) [18], Ievgeniy Ivanov analysed trade unions in the socialist system [19]. In *post-Soviet times*, problems concerning the protection of labour rights by trade unions continued to be a popular field of research: Volodymyr Tsyv examined trade unions in civil society [20] and Nikita Lyutov researched the peculiarities of protection of rights by trade unions in the United Kingdom [21]. Some separate questions of trade union activity were raised by the authors in a manual "Theoretical foundation of Labour Law of Ukraine" [22]. Serhii Vavzhenchuk, in his monograph called "Protection and Defence of Labour Rights of Employees" [23], considered the mechanism of protection labour rights by the trade unions.

Scientific articles were also devoted to the problems concerning the legal regulation of trade unions' activity. During the *Soviet period*, the following scholars were dedicating their papers to the protection of rights by trade unions and their activities: Nikolai Aleksandrov described the notion of protection of employees' rights in his article [24]; Nadezhda Iefremova studied the role of trade unions in the period of communism building [25]; and Boris Shelomov devoted his research to the representation of trade unions [26]. During the post-Soviet period the authors also chose the protective function of trade unions as the object for scientific research. Anatoliy Appakov studied the problems concerning the protective function of trade unions [27]. Galina Goncharova described trade unions and labour relations through the application of Ukrainian legislation [28]. Mykola Chos analysed the Law of Ukraine, regulating the activity of trade unions [29]. Olga Zadorozhna considered the issue on the development of collective contract relations though the activity of trade unions [30]. Bahodyr Ergashev researched the problems that trade unions in Central Asia and the Caucasus encountered [31]. Oleksandr Protsevskiy studied the consent of the trade union to the termination of contract [32]. Zinaida Bilous has highlighted the role of trade unions in the sphere of control upon meeting the rules of the labour legislation [33]. Pavlo Lukianchuk has studies the role of trade union's control in developed countries of the world [34].

2. MATERIALS AND METHODS

The article is based on international universal and regional European legal instruments, such as: Right to Organise and Collective Bargaining Convention¹, Workers' Representatives

1. Right to Organise and Collective Bargaining Convention No. 98. (1949, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NRMLXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312243.

Convention¹, Freedom of Association and Protection of the Right to Organise Convention², International Covenant on Economic, Social and Cultural Rights³, International Covenant on Civil and Political Rights⁴, Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community⁵, EU Directives No. 94/95/EC (no longer in force)⁶, 97/74/EC (no longer in force)⁷, 2006/109/EC (no longer in force)⁸ and 2009/38/EC⁹, Constitutions of the post-Soviet Countries, the case law of the Committee on Freedom of Association and a number of scientific works.

The research is grounded on a system of various general philosophical methods (dialectical method), general scientific methods, such as methods of synthesis and analysis, induction and deduction, and special legal methods, including comparative legal method and the method of modelling. The choice of the mentioned methods was determined by the aims of this research. The dialectical method gave the possibility to review the interrelation between the international and regional European legal instruments regulating protection of labour rights by the trade unions and national legal framework of post-Soviet Countries and helped to identify that in general the national legislation of post-Soviet Countries does not always provide for direct implementation the international standards.

Such general methods as induction and deduction, were used to evaluate the exercising of the right to protection by trade unions in post-Soviet Countries and formulate the conclusion that the efficiency of the traditional model of labour rights' protection by labour unions is still insufficient in post-Soviet countries. The methods of synthesis and analysis were used to assess the existing Constitutional norms in the post-Soviet countries on trade unions and formulation and formulate the conclusion that in most post-Soviet Countries the right to establish and join a trade union is either directly or indirectly foreseen in

their Constitutions and also that the mentioned right is a peculiar right: a so-called constitutional labour right. The constitutional labour rights of employees are natural human rights, envisaged in the Constitution as opportunities for the person to apply his/her capability to certain labour, which is a minimal necessity for decent living, development and the securing of quality of life, all of which are realised within the labour legal relations.

Comparative legal method was used when accessing the international legal instruments, regulating the freedom of association and the trade unions' legal status and when examining the case law of the Committee on Freedom of Association, being an international body authorised to decide cases in violation of freedom of association, brought by the trade unions against the member states. The empirical base of the relevant case-law is broad, as the Committee on Freedom of Association has already examined more than 3 300 cases, including the cases brought against some post-Soviet countries. The method of modelling was used while formulating conclusion that the traditional models of labour rights' protection by labour unions needs revision and renovation of the legal framework.

3. RESULTS AND DISCUSSION

3.1 *The Constitutions of post-Soviet Countries and Protection by Trade Unions*

In most post-Soviet countries, the right to establish and join a trade union is either directly or indirectly foreseen in their Constitutions. This is a special constitutional right, being under a special protection of the state, just as much as other human rights (including such basic rights as the right to life, reproduction rights, rights to healthcare etc.).

In the *Constitution of the Republic of Kazakhstan* this right is not directly mentioned. Rather, the right to establish and enter a union is envisaged, as follows from the analysis, Article 32 of the Constitution of the Republic of Kazakhstan. In accordance with Part 1, Article 23 of the

1. Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/?p=NORMLEX_PUB:12100:0::NO::P12100_ILO_CODE:C135.

2. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087.

3. International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

4. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

5. Directive No. 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. (2002, March). Retrieved from <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32002L0014>.

6. EU Directive No. 94/95/EC. (1995, October). Retrieved from <https://www.epchungary.hu/>.

7. Council Directive No. 97/74/EC. (1997, December). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31997L0074>.

8. Council Directive No. 2006/109/EC. (2006, November). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0109>.

9. Directive No. 2009/38/EC of the European Parliament and of the Council on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (2009, May). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0038>.

Constitution of the Republic of Kazakhstan, citizens of the Republic of Kazakhstan have freedom of association¹. Such a broad definition allows the citizens to form and enter any types of associations, including the trade unions. The text of *Constitution of the Republic of Latvia* also does not provide a direct indication to trade unions and the right to form and enter them, however as derived from Article 102 of the Constitution of the Republic of Latvia, everyone has the right to enter companies, political parties and other non-governmental organisations². Trade unions are one of the types of non-governmental organisations and, therefore, this article entails the right to establish and enter trade unions. A very similar approach was used by the lawmaker of the Republic of Estonia. Pursuant to Article 48 of the *Constitution of the Republic of Estonia*, everyone has the right to join non-commercial associations and unions³. Therefore, unlike the Constitution of the Republic of Kazakhstan, under the Constitutions of the Republic of Latvia and the Republic of Estonia, the mentioned right is vested not only in the citizens of the relevant state, meaning that under the Constitutions of the Republic of Latvia and the Republic of Estonia, the right to enter trade unions is granted not only to citizens of these states, but also to the foreign citizens and stateless persons. This shows that the focus, Article 48 of the Constitution of the Republic of Estonia and Article 102 of the Constitution of the Republic of Latvia are much wider than the range of Part 1, Article 23 of the Constitution of the Republic of Kazakhstan. Moreover, the Constitution of the Republic of Estonia provides for the principle of voluntariness of employees in the trade unions. The mentioned principle is directly listed in Article 29 of the Constitution of the Republic of Estonia, due to which the participation of the employee and employer in the associations and unions is voluntary⁴.

A number of constitutions of post-Soviet countries directly list the right to enter trade unions. The mentioned right is a peculiar right: a so-called constitutional labour right. The constitutional labour rights of employees are natural human rights, envisaged in the Constitution as opportunities for the person to apply his/her capability to certain labour, which is a minimal necessity for decent living, development and the securement of quality of life, all of which are realised within the labour legal relations [22]. In particular, Article 36 of the *Constitution of Ukraine*

precludes that Ukrainian citizens are entitled to freedom of association in political parties and non-governmental organisations for realisation and protection of one's rights and freedoms and serving political, economic, social, cultural and other interests, excluding the limitations foreseen by the law in the interests of national security and public order, health care of the population or protection of rights and freedoms of other people⁵. Part 3, Article 36 of the Constitution of Ukraine stipulates that citizens have the right to participate in trade unions with the aim to protect one's labour and social economic rights and interests. The *Constitution of the Republic of Uzbekistan* directly stipulates the right to enter trade unions. Pursuant to Article 23 of the Constitution of the Republic of Uzbekistan, the citizens of Uzbekistan are entitled to join trade unions, political parties and other non-commercial organisations, taking part in public events⁶. Moreover, the mentioned right is recognised as a political right, because the lawmaker included it in Chapter 8 of the Constitution of the Republic of Uzbekistan, titled "Political rights". The right to freely create trade unions is foreseen in the *Constitution of the Republic of Moldova*, in accordance with Part 1, Article 42, in which it is listed that anyone is entitled to create trade unions and join them for the protection of one's interests⁷. The *Constitution of the Republic of Lithuania* also stipulates the right to free creation and activity of trade unions. Therefore, according to Article 50 of the Constitution of the Republic of Lithuania, trade unions are established and function independently. Apart from that, the Lithuanian lawmaker also listed the aim of trade unions' establishment, namely: protection of professional interests and social-economic rights and interests of the employees⁸. Article 41 of the *Constitution of the Republic of Belarus* also stipulates the right to enter trade unions. However, the mentioned right is defined by the Belarus lawmaker as one of the competences of the right to protection of economic and social interests, despite the fact that the right to protect one's economic and social interests and the right to enter unions have a different legal nature. The mentioned thesis is derived from the analysis, Article 41 of the Constitution of the Republic of Belarus, in accordance with which the citizens have the right to protect their economic and social interests, including the right to enter trade unions⁹. If we have a look at the *Constitution of the Republic of Poland*, we may find not only

1. Constitution of the Republic of Kazakhstan. (1995, August). Retrieved from https://www.akorda.kz/ru/official_documents/constitution.

2. Constitution of the Republic of Latvia. (1922, February). Retrieved from <https://likumi.lv/ta/en/en/id/57980>.

3. Constitution of the Republic of Estonia. (1922, June). Retrieved from https://www.concourt.am/armenian/legal_resources/world_constitutions/constit/estonia/estoni-r.htm.

4. *Ibidem*, 1922.

5. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254k/96-вп#Text>.

6. Freedom of Association and Protection of the Right to Organise Convention No. 87, op. cit.

7. Constitution of the Republic of Moldova. (1994, August). Retrieved from <http://www.presedinte.md/rus/constitution>.

8. Constitution of the Republic of Lithuania. (1992, October). Retrieved from https://www.lrs.lt/home/Konstitucija/Konstitucija_RU.htm.

9. Constitution of the Republic of Belarus. (1994, March). Retrieved from <http://pravo.by/pravovaya-informatsiya/normativnye-dokumenty/konstitutsiya-respubliki-belarus/>.

the principle of voluntariness of entering trade unions, but also a duty of the Republic of Poland to guarantee the realisation of this principle, as foreseen by Article 59 of the Constitution of the Republic of Poland, pursuant to which the freedom of association in trade unions, socio-occupational organisations of farmers, and employers' organisations shall be ensured¹.

3.2 Protection by Trade Unions as Defined by the International Legal Framework

The right to protection by trade unions is prescribed by a number of international acts. The international standards of the relevant right are set forth by the *Freedom of Association and Protection of the Right to Organise Convention (No. 87)* (hereinafter – Convention No. 87). As envisaged by the Article 2 of the Convention No. 87, workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation². Article 2 of the Convention No. 87 is formulated very broadly, focusing on recognition of human social and labour rights and freedoms. Part 3, Article 36 of the Constitution of Ukraine³, Article 23 of the Constitution of the Republic of Uzbekistan⁴, Article 41 of the Constitution of the Republic of Belarus⁵, Article 2 of the Convention No. 87 do not mention citizenship as necessary pre-condition of establishing or joining trade unions, unlike Part 1, Article 23 of the Constitution of the Republic of Kazakhstan. Therefore, in accordance with Article 3 of Convention No. 87, no person is restricted in his/her right to establish trade unions and enter them. It is important that the mentioned right is not just granted to people, but is also recognised by the Convention.

Bearing in mind the aforesaid, it is worth noting that Convention No. 87 establishes the rules on balance of norms of national legislation in the sphere of freedom of association and guarantees protection of labour rights by trade unions with the rules specified in Convention No. 87. In accordance with Article 8 of Convention No. 87, in exercising the rights provided for in this Convention, workers and employers and their respective organisations, like other persons or organised groups, will respect the law of the land. The law of the land will not be such as to impair, nor will it be so applied as to impair, the guarantees provided

for in this Convention⁶. Thus, the guarantees and rights recognised by Convention No. 87 have priority over the national legislation and the national law-maker cannot limit the international guarantees in the pieces of national legislation.

Also, it is noteworthy to mention that, due to the imperative rule, Article 4 of the Convention No. 87, workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority⁷. The norms of Convention No. 87 contain the guarantee of non-interference of the state, under the jurisdiction of which the trade union was established, into the activity of such trade union (Article 3)⁸. Convention No. 87 also envisages the right of workers' and employers' organisations to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. Thus, trade unions have the rights to organize their activity based on their action plans, forming additional guarantees to realisation of protection of employees' rights by trade unions.

Another fundamental international instrument, establishing standards for activity of trade unions, is the *Right to Organise and Collective Bargaining Convention (No. 98)* (hereinafter – Convention No. 98)⁹. Convention No. 98 lays down the principle of non-interference in the activities of trade unions either “by each other or each other's agents or members in their establishment, functioning or administration” and provides a definition of the act of interference, being the act which is “designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations” (Article 2 of Convention No. 98). Moreover, in order to ensure the freedom of association, machinery appropriate to national conditions shall be established (Article 3 of the Convention No. 98)¹⁰. Some additional guarantees, protecting activity of trade unions, are laid down by the *Workers' Representatives Convention (No. 135)*¹¹ (hereinafter – Convention No. 135). In accordance with the Articles 1,3 of the Convention No. 135, trade union's representatives, namely representatives designated or elected by trade unions or by members of such

1. Constitution of the Republic of Poland. (1997, April). Retrieved from <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

2. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

3. Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.

4. Constitution of the Republic of Uzbekistan. (1992, December). Retrieved from <https://lex.uz/acts/35869>.

5. Constitution of the Republic of Belarus. (1994, March). Retrieved from <http://pravo.by/pravovaya-informatsiya/normativnyedokumenty/konstitutsiya-respubliki-belarus/>.

6. Freedom of Association and Protection of the Right to Organise Convention No. 87, op. cit.

7. *Ibidem*, 1948.

8. *Ibidem*, 1948.

9. Right to Organise and Collective Bargaining Convention No. 98. (1949, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C098,%2FDocument.

10. *Ibidem*, 1949.

11. Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280.

unions, shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements¹.

Analysing the normative fundamentals of the trade union's protection and the guarantees of its realisation, it is necessary to mention the *International Covenant on Economic, Social and Cultural Rights (hereinafter – the Covenant)*². As established in Part 1, Article 8 of the Covenant, the State Parties to the present Covenant undertake to ensure: (a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations; (c) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country³.

Having analysed these rules provided by the Covenant, one can come to conclusion that the norms of Part 1, Article 8 of the Covenant complement the provisions of Convention No. 87. The norm of Part 1, point a), Article 8 of the Covenant further develops the contents, Article 2 of the Convention No. 87 regarding the right to establish trade unions and freely join them. Part 1, point b), Article 8 of the Covenant correlates to Article 5 of the Convention No. 87, as the latter provides that workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers⁴. Part 1, point c), Article 8 of the Covenant meets the norms, Article 3 and Article 4 of the Convention No. 87 with

regard to the unrestricted functioning of trade unions. *The International Covenant on Civil and Political Rights*⁵ also lays down the basics of protection of labour rights by trade union. Because of Part 1, Article 22 of the International Covenant on Civil and Political Rights, everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of one's own interests⁶. It is very positive that two capabilities that form the right to freedom of association are outlined in this article. The first capability is the right to form trade unions. Its recognition as the separate element shows a very special attitude from the side of international law-makers. The second capability will be the right to join trade unions with the defined aim – protection of interests.

As commanded by Part 2, Article 2 of the International Covenant on Civil and Political Rights, no restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others⁷. This rule contains limitations on everyone's right to freedom of association. Such limitations are appropriate when prescribed by law and should meet special requirements, i.e., to be necessary: 1) in a democratic society; 2) in the interests of national security; 3) in the interests of public safety; 4) in the interests of public order; 5) in the interests of the protection of public health; 6) in the interests of morals; 7) in the interests of protection of the rights and freedoms of others.

Special attention should be paid to criterion No. 6 (in the interests of morals) and criterion No. 7 (in the interests of protection of the rights and freedoms of others). The term "moral" has 12 meanings as defined by the Oxford English dictionary [32], with the first meaning being as follows: of or pertaining to character or disposition, considered as good or bad, virtuous or vicious; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings; ethical (e.g., Aristotle distinguished the moral from intellectual virtue) [32]. Thus, the term "moral" is not a legal term, because it is based on moral norms but not on legal rules, and should therefore not be regulated by legal acts. It must also be mentioned that morality is subjective and not legal category, meaning it has very broad frames of

1. Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280.

2. International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

3. *Ibidem*, 1966.

4. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

5. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

6. *Ibidem*, 1966.

7. *Ibidem*, 1966.

understanding within society. Thus, there is no established rule for a qualification that should regulate the limitation of right to freedom of association as such a criterion as morality cannot serve as grounds for limitation or termination of the human right to association.

Regarding criteria No. 7 (in the interests of protection of the rights and freedoms of others), it should be noted that the conflict between the right of one person and the interest of the other person is a questionable one: on the one hand we have the freedom of association and on the other hand – the protection of the rights and freedoms of others. Moreover, under such a formula it may occur that the right to freedom of association contradicts the interest of the employer to minimize the importance and capability of trade union, limit its independence etc. In the light of this argument, it seems impossible to talk about a grounded and possible conflict between the right of one person and the interest of another one.

Apart from the mentioned exceptions, Article 22 of the International Covenant on Civil and Political Rights¹ correlates with Article 4 of the Convention No. 87² and is specified in Part 1, point c), Article 8 of the Covenant.

3.3 Evaluation of Exercising the Right to Protection by Trade Unions in post-Soviet Countries

It is not a secret that not all trade unions in post-Soviet countries are fully working towards the aim of protecting the labour rights and interests of the employees, despite the existence of legally established guarantees. This is causing tension in society and is leading to a number of employee strikes, who are attempting to protect those labour rights.

A lot of trade unions created in post-Soviet countries have the distinctive features of hostage institutions, as they are either dependent from the employer or have lost their independence under pressure of the employer. In this context it is very interesting to read the outcome of the research on exercise of labour rights, conducted by the Solidarity Centre in cooperation with the Uzbek-German Forum for human rights. In accordance to the report of the Solidarity Centre “*There is No Work We Haven't Done*”, published in 2019, trade unions in Uzbekistan are weak and dependent from the state or employer and are incapable to represent the interests of the employees and protect them from forced labour. The employees who were interviewed acknowledge that their trade unions were ineffective and sometimes even helped to organize and manage forced labour [33]. The conclusions of the Report of the Solidarity Centre contain a number of interesting observations. First of all, it is mentioned that the central government “has recently taken a stand against the forced labour of public-sector employees that has begun to influence regional and local officials, including some to stop using forced labour or take steps to

try to hide it” [33]. Secondly, the dependence of the trade unions is underlined. The report stresses that the trade unions “are weak and subordinate to influence from both government and management... This undermines the perceived effectiveness of union-led mechanisms for grievance and remedy” [33].

The final report of *international research project “Trade unions in post-socialist society: overcoming the state-socialist legacy”* mentions that in the Republic of Belarus, the federation of trade unions was built into the state system of power and was turned from a non-governmental organisation into the “Labour Ministry with Employees”. The organisation is now called “Federation of Trade Unions of Belarus” and this very fact is extremely demonstrative: under the legislation of Belarus, the official name of the state can only be used in the titles of the state structures. Therefore, the “Federation of Trade Unions of Belarus” became a state instrument by its title and by its substance [34].

In the Republic of Moldova, the establishment of the trade unions’ protection of labour rights is considered to be a geopolitical process. In legal literature it is mentioned that forcing the establishment of “alternative” trade unions in October-December 2000, completed by the Establishing Conference of the Confederation of Free Trade Unions of the Republic of Moldova “Solidarite”, was a part of a unified geopolitical process in the country. Therefore, stating that this process is a renaissance of the communist trade unions is justified as a consequence of close cooperation of the mentioned trade unions with the state governing party [35].

One of the problems of development of trade unions’ activity in Estonia, Poland, Lithuania is that the employees are not very active in the trade unions’ movement with regard to the protection of labour rights. In the report, published in the framework of the project “*Europe 2020 and the Baltic Region*”, titled “*Employee participation in Poland, Lithuania, Latvia, Estonia and Great Britain*”, it is underlined that very limited participation in the trade unions (5% in Estonia, 12% in Poland, 15% in Lithuania) directly affects the restricted possibilities of influencing the employer and the decisions taken by the employer [36]. In the meantime, the legal model of the protective function of the trade union is recognised by a number of scholars as an effective one, because it allows for the development of a mechanism of protection of labour rights and balances the interests of the employers and the employees. E.g., the experts from Poland, Lithuania, Latvia, Estonia and Great Britain have outlined trade unions as the most effective model of support and representation of the employees in their reports, elaborated in 2016 [36].

In EU countries, under *Directive 2002/14/EC of the*

1. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

2. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

*European Parliament and the Council of 11 March 2002*¹, work councils had to be set up. By their nature, they are new forms of alternative representation in labour law. However, setting up such work councils on the level of EU Directive 2002/14/EC appeared to be not very effective from the point of view of protection of the employees' labour rights. I.e., in the Report "Employee participation in Poland, Lithuania, Latvia, Estonia and Great Britain", it is underlined that such councils haven't been used in Estonia, except by international corporations, and in Latvia there are no such councils at all. In Lithuania they are called councils and are functioning only within the enterprises where trade unions have been established [36].

European Work Councils (EWC) is an alternative form of employees' representation in the countries of the EU, foreseen by the *EU Directives No. 94/95/EC (no longer in force)*², *97/74/EC (no longer in force)*³, *2006/109/EC (no longer in force)*⁴ and *2009/38/EC*⁵. The preventive protection of labour rights is realised by EWC by conducting representational, consultative and informative functions. EWC is an intermediate between the representatives of the employees and the employer in questions concerning organisational and management changes in the enterprise, and in the establishment, change and closure of the subdivisions of the enterprise. A number of functions which are conducted by the EWC are overlapping with the functions of the trade unions (representational, informative, consultative). Additionally, representatives of the trade unions are usually the first to enter the EWC created within the enterprise, due to their knowledge on representation and protection of labour rights. This situation has caused

differences in the application of the EWC mechanism in different states, notwithstanding the stimulation of application of EWC by the EU through its directives etc. In a number of states, EWCs are integrated only partly in transnational corporations (Latvia, Lithuania). The Report "Employee participation in Poland, Lithuania, Latvia, Estonia and Great Britain" stresses that, in Latvia, EWCs are not widespread and there is little knowledge on its functioning and advantages [36]. EWCs are also not widely used in Estonia, because the national legislation on EWC has not been adopted and the EU Directives are not a legal basis for their functioning [36].

The International Labour Organisation established the *Committee on Freedom of Association* (hereinafter – CFA), which is an international body authorised to decide cases in violation of freedom of association, brought by the trade unions against the member states. The CFA has already examined more than 3 300 cases, including the cases brought against some post-Soviet countries. E.g., during the last 10 years, CFA has heard:

- 4 cases against Poland and issued recommendations for the Polish government concerning the collective bargaining procedure and safeguarding the right to protests⁶; to review the situation of the trade unions activists that were allegedly fired due to their organisation of industrial action⁷ and even to amend the Act on Trade Unions so as to ensure that home-based workers can establish and join organisations of their own choosing⁸;

- 3 cases against Ukraine, with the following recommendations for the Ukrainian government: to ensure independent inquiries in the cases on interference in trade

1. Directive 2002/14/EC of the European Parliament and the Council establishing a general framework for informing and consulting employees in the European Community. (2002, March). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0014>.

2. Council Directive 1994/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (1994, September). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31994L0045>.

3. Council Directive 1997/74/EC extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (1997, December). Retrieved from <https://www.legislation.gov.uk/eudr/1997/74/contents/adopted>.

4. Council Directive 2006/109/EC adapting Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, by reason of the accession of Bulgaria and Romania. (1996, November). Retrieved from <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:363:0416:0417:EN:PDF>.

5. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (2009, May). Retrieved from <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0038>.

6. Case No. 3111 (Poland): Definitive report of the Committee on Freedom of Association No. 378. (2016, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3282128.

7. Case No. 2972 (Poland): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 368. (2013, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3128190.

8. Case No. 2888 (Poland): Definitive report of the Committee on Freedom of Association No. 363. (2012, March). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057194.

union's affairs¹; to amend the Civil Code of Ukraine to fully guarantee the right of workers to establish their organisations without previous authorisation²;

- *1 case against Kazakhstan*, where the FCA requested entering amendments into the Law on Trade Unions so as to ensure the right of workers to freely decide whether they wish to associate with or become members of a higher-level trade union structure and to lower thresholds requirements to establish higher-level organisations³;

- *2 cases against Lithuania* and asked the government to inform the CFA on developments relating to the draft law on police activities insofar as it has an impact on organisations and bargaining rights⁴; to review the relevant provisions governing collective bargaining⁵.

This analysis shows that the national legislators were not fully following the international standards established by the International Labour Organization and did not fully secure the freedom of association. All the mentioned countries were recommended either to change some pieces of legislation or to supervise the existing draft of laws to make them meet the rules set in a number of international conventions.

CONCLUSIONS

Trade unions form an important element in every civil society, because one of their main functions is the protection of labour rights with the aim to establish a fair balance between employers and employees. A number of legal guarantees to ensure a smooth fulfilment of the protective function of the trade unions is foreseen by international legal instruments: Freedom of Association and Protection

of the Right to Organise Convention (No. 87)⁶, Right to Organise and Collective Bargaining Convention (No. 98) (hereinafter – Convention No. 98)⁷, Workers' Representatives Convention (No. 135)⁸, International Covenant on Economic, Social and Cultural Rights⁹ and the International Covenant on Civil and Political Rights¹⁰. The international standards, set forth by these conventions, are not always directly implemented in the legislation of post-Soviet Countries, despite the fact that trade unions' activities are directly or indirectly mentioned in the Constitutions of the mentioned countries.

Some of the post-Soviet states are now members of the EU (Lithuania, Latvia, Estonia) and are subject to regional EU regulations. The EU legislator provides special additional representational instruments of the rights of employees, which duplicate the functions of trade unions – such as European work councils. However, these instruments are only used in big transnational corporations and aren't popular in Lithuania, Latvia, and Estonia.

Every post-Soviet State has its own jurisprudence, legal practice and traditions of labour rights' protection and hence has its own national peculiarities with regard to this protection, the representation of employees and the architecture of labour legislation. All of this should be taken into account when implementing or unifying international or European labour legislation. When studying the cases heard by the Committee on Freedom of Association, established by the International Labour Organization, one notices that in post-Soviet countries there had been a number of norms, provided by national laws, which were not meeting the international standards. Moreover, as the international

1. Case No. 2890 (Ukraine): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 367. (2013, March). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3112068.

2. Case No. 2843 (Ukraine): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 362 (2011, November). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2912587.

3. Case No. 3283 (Kazakhstan): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 386 (2018, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3950243.

4. Case No. 3073 (Lithuania): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 374. (2015, March). Retrieved from http://ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3237748.

5. Case No. 2907 (Lithuania): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 367 (2013, March). Retrieved from http://ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3112089.

6. Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

7. Right to Organise and Collective Bargaining Convention No. 98. (1949, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C098,%2FDocument.

8. Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280.

9. International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

10. International Covenant on Civil and Political Rights. (1966, December). Retrieved from <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

independent reports show, trade unions in post-Soviet countries are not always effective, despite the fact that national legislation duly meets the standard of international practices. Notwithstanding mistakes of certain trade unions, the efficiency and popularity of the traditional model of labour

rights' protection by labour unions is still insufficient in post-Soviet countries. These models need revision and renovation of the legal framework, which will allow the rebooting of the protective mechanism of the trade unions, aligned with the modern needs of post-Soviet societies.

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