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LEGAL REGULATION OF CONCILIATION PROCEDURES: CURRENT STATE AND PROSPECTS FOR DEVELOPMENT

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The article deals with the problematic issues of legal regulation of conciliation procedures as the legal form of social dialogue in the workplace. Peculiarities of conducting conciliation procedures at various levels of social dialogue in the workplace are studied. Lacks of current legislation regulating conciliation procedures are analyzed. The article investigates provisions of the draft Labour Code on conducting conciliation procedures in the process of adoption of local normative acts of employers. Propositions on improving current national labour legislation and the provisions of the draft Labour Code of Ukraine in this area are developed in the article.

Keywords: conciliation procedures, social dialogue, social partnership, legal form of social dialogue, collective labour relations.

Statement of the problem. The ILO Declaration on Social Justice for a Fair Globalization of 2008 enshrines that social dialogue and the practice of tripartism between governments and the representative organizations of workers and employers within and across borders is now more relevant to achieving solutions and to building up social cohesion and the rule of law through, among other means, international labour standards. According to the provisions of the ILO Declaration of 2008, practices of social dialogue and tripartism can be recognized as one the most appropriate methods for making labour law effective [1].

The Report on social dialogue under the ILO Declaration on Social Justice for a Fair Globalization at the 102nd Session of International Labour Conference emphasized that even with the continuing challenges, caused by economic crisis national tripartite social dialogue has offered an opportunity for consensus building and informed economic and social policy-making in the last decade. It has generated cooperation among the social partners, thus avoiding unilateral regulatory action by States, and mitigated the negative impacts of market-driven policies, thereby upholding equity and social cohesion, and establishing consensus-driven policies [2, p. 47].

The rules of labour law become more effective if they are coordinated with representatives of employees and employers. Approval of legal acts on labour and socio-economic issues by social partners allows avoiding labour disputes, as the interests of employers, employees and public authorities and local governments are coordinated before they obtain judicial power.

Law of Ukraine “On Social Dialogue in Ukraine” established the mechanism for participation of employers’ and employees’ representatives in the process of developing labour rules. This mechanism runs through legal form of social dialogue, which according to the provisions of current Ukrainian legislation is called “conciliation procedures”. Conciliation procedures are relatively new form of social dialogue, which has been introduced in Ukrainian legislation by the Law of Ukraine “On Social Dialogue in Ukraine” [3].

Since the adoption of the Law of Ukraine “On Social Dialogue in Ukraine”, the effectiveness of the conciliation procedures remains low. This

problem is caused by the lack of proper regulation mechanism of conciliation procedures and reluctance of lawmaking bodies to engage representatives of employees and employers in the process of development and adoption of legal acts.

Actuality of research on issues of legal regulation of conciliation procedures is also determined by the fact, that the draft Labour Code of Ukraine №1658 [4] adopted by the Verkhovna Rada of Ukraine in the first reading, expands the scope of conciliation procedures. In particular, the Draft establishes mandatory participation of workers’ representatives in the process of adoption of local legal acts of employers. However, the Draft does not contain any provisions that would provide adequate regulation of mentioned mechanism.

Analysis of recent researches and publications. Theoretical and practical issues of legal regulation of social dialogue have been developed in scholarly works of famous domestic and foreign scientists, such as N.B. Bolotyna, I.I. Borodyn, G.I. Chanysheva, R.S. Grynberg, K.N. Gusov, V.V. Lazor, A.M. Lushnikov, M.V. Lushnikova, V.G. Rotan, P.D. Pylypenko, S.M. Prylypko, A.V. Smyrnov, G.A. Trunova, O.A. Triukhan, V.F. Tsytulskyy, S.Y. Chucha, N.M. Khutoryan, O.M. Yaroshenko, V.V. Zhernakov and others. However, legal issues of conciliation procedures haven’t been a subject of special complex research and now are underexplored in domestic labour law science.

Emphasizing the unsettled problem. According to the Information of the Joint Representative Body of Employers at National Level on the implementation of the General Agreement on basic principles of regulation and rules of socio-economic policy and labour relations in Ukraine for 2010-2012, as of July 1, 2011 only 25 from 188 legal acts, supplementing the Tax Code, have been adopted after conciliation procedures [5].

Given example proves non-effectiveness of conciliation procedures in the mechanism of social dialogue at the present time, which is caused by multiple gaps in domestic legislation. Key weak points of domestic labour legislation concerning conciliation procedures are in the areas of trade union rights, mechanism of conducting conciliation procedures at local level of social dialogue.

The aim of the research is to define current status and challenges of the development of domes-

tic legislation on conciliation procedures between parties of social dialogue, to develop propositions on improvement legislation and provisions of the draft Labour Code of Ukraine in this area.

The main material. Current domestic labour legislation doesn't provide a definition for the term "conciliation procedures". Article 8 of the Law of Ukraine "On social dialogue in Ukraine" only enshrines, that conciliation procedures shall be conducted to consider the parties' positions and elaborate compromise concerted solutions in the drafting of legislative and regulatory legal acts. The order of conciliation procedures shall be defined by the bodies of social dialogue of a respective level unless otherwise provided for by legislation or collective agreements. Failure to reach a compromise between the parties based on results of the conciliation procedures may not constitute a ground to prevent the work of the bodies of social dialogue [6].

Analysis of the provisions of the art. 8 of the Law of Ukraine "On social dialogue in Ukraine" makes it possible to come to a conclusion, that conciliation procedures shall be conducted only in purpose of drafting of legislative and regulatory legal acts. As it have mentioned, the order of conciliation procedures shall be defined by the bodies of social dialogue of a respective level unless otherwise provided for by legislation or collective agreements according to the provisions of the art. 8,

Nevertheless, at the present time tripartite bodies of social dialogue haven't adopted any legal acts on the mechanism of conciliation procedures conducting. At the same time, only the General Agreement on basic principles of regulation and rules of socio-economic policy and labour relations in Ukraine for 2010-2012 provides among other collective bargaining agreements appropriate regulation of conciliation procedures. This shows that the chosen by legislator approach to regulation of conciliation procedures came short of expectations.

Conciliation procedures, according to the provisions of the Law of Ukraine "On social dialogue in Ukraine", is one of the legal form of social dialogue. Legal forms of social dialogue are nothing else but methods of collective labour rights realization through mechanism of social dialogue [7, p. 49]. In other words, it is possible to define legal forms of social dialogue as established by law or by social partners' act mechanism of collective labour rights realization.

It follows that every legal form of social dialogue should correspond to certain collective labour right enshrined by law. However, the right to participate in conciliation procedures prescribed by Ukrainian legislation only for employers' organization. According to p. 2 art. 18 of the Law of Ukraine "On Employers' Organizations, their Associations, and the Rights and Guarantees of their Activities", employers' organizations are empowered to examine draft laws and other regulatory acts on issues relating to the rights and interests of their members. Draft laws on the development and implementation of state social and economic relations are submitting by central authorities of executive branch considering proposals of employers' organizations [8].

To the contrary, the Law of Ukraine "On Trade Unions, Their Rights and Guarantees of Activity" doesn't prescribe the right for trade unions and their associations to participate in conciliation procedures [9]. Article 2 of The Labour Code of Ukraine also doesn't mention the right of employees to participate in conciliation procedures among other labour rights of employees [10]. In this case it should be mentioned, that labour legislation of the most states of the former Soviet Union guarantees the right for trade unions and their associations to participate in the process of drafting legal acts. For example, such right is enshrined in art. 11 of the Law of Russian Federation "On Trade Unions, Their Rights and Guarantees of Activity" [11], art. 270 of the Labour Code of Kazakhstan [12], art. 6 of the Law of Belarus "On Trade Unions" [13].

At the same time, current Ukrainian labour legislation contains provisions, which impose the obligation for public authorities to conciliate provision of their acts of social-economic issues with trade unions and employers' organizations. According to the p. 3.11.4 of the Order On Filing of Normative Legal Acts for State Registration to the Ministry of Justice of Ukraine and their State Registration, in the case when for state registration ministries and other central executive authorities submit legal act on the matters relating to social and labour sphere, they also report on a form provided in Appendix 1 to this Order, with the addition of appropriate supporting documents (letters, sheets of external coordination, etc.), on the position of the authorized representative of national trade unions, their associations and authorized representative of the national associations of employers to this Act and on the work under their comments. The need to consider these comments and suggestions is determined by ministries and other central executive authorities that have developed this act [14].

According to the p. 2 of the art. 12 of the Law of Ukraine "On social dialogue in Ukraine", the National Tripartite Social and Economic Council shall perform advisory, consultative and coordinating functions by means of elaborating a common stand and providing recommendations and proposals of the parties to social dialogue concerning: draft legislative and other regulatory legal acts on social and economic policy and labour; basic economic and social indicators of the draft State Budget of Ukraine for a respective year; ratification by Ukraine of the International Labour Organization Conventions, interstate treaties, and the EU regulations on the matters related to the rights of employees and employers.

Analysis of the provisions of art. 12 of the Law of Ukraine "On social dialogue in Ukraine" makes it possible to come to the conclusion, that conciliation procedures at national, sectoral and territorial levels of social dialogue should be mainly conducted through bodies of social dialogue.

Another conclusion arises from the previous one. According to p. 3 art. 4 of the Law of Ukraine "On social dialogue in Ukraine", to participate in collective bargaining on the conclusion of collective agreements, in tripartite or bipartite bodies, and in international activities, a composition of subjects of the trade union party and the employers party shall be determined by representative criteria.

Consequently only trade unions and employers' organizations are recognized as representative in accordance with requirements of art. 6 of the Law of Ukraine "On social dialogue in Ukraine", are empowered to participate in conciliation procedures at national, sectoral and territorial levels of social dialogue.

Provisions of the draft Labour Code of Ukraine are of profound interest for research of conciliation procedures. The rules of draft Labour Code provide employer the right to adopt local normative acts. In modern legal literature, local normative acts are regarded as an independent form (source) of labour law [15, p. 136]. Thereby, local normative acts of employer can be a subject of conciliation procedures.

According to p. 3 art. 12 of the draft Labour Code of Ukraine, if a collective agreement is not concluded, the issues that must be settled by it in accordance with the requirements of this Code, should be regulated by normative act of employer. This act should be approved by an elected body of local trade union organization (trade union representative). In case of the absence of the local trade union organization, a normative act should be approved by freely elected for collective bargaining representatives (representative) of employees.

Approving of legal acts of employer by trade unions and other employees' representatives can be regarded as conciliation procedures. This point of view is also proved out by the fact, that the Draft separates cases of approving local acts and cases of conducting consultation on legal act.

At the same time, provisions of the draft Labour Code do not provide clear mechanism for realization of the right of employees' representatives to approve local acts of employer. In our opinion, it would be appropriate to include into the Draft provisions defining the procedure for submitting the local act to employees' representatives for approval, terms of such approval, legal consequences for violation of this procedure.

Conclusions. Undertaking study allows for the conclusion following conclusions:

- conciliation procedures can be defined as a legal form of social dialogue in the workplace, which is conducted to consider social partners' positions

and elaborate compromise concerted solutions in the drafting of legislative and regulatory legal acts mainly through bodies of social dialogue;

- the subject of conciliation procedures at national, sectoral and territorial level of social dialogue are provisions of legal acts on the matters relating to social and labour sphere; the subject of conciliation procedures at local level of social dialogue are only local normative acts of employers;

- the right to participate in conciliation procedures at national, sectoral and territorial level of social dialogue is guaranteed only for those organizations of employers and employees, which can be recognized as representative in accordance with requirements of art. 6 of the Law of Ukraine "On social dialogue in Ukraine"; this right can be exercised at the present time mainly through participation in activity of social dialogue bodies.

In our opinion, for development of conciliation procedures legal regulation it would be appropriate:

- to supplement the Law of Ukraine "On Trade Unions, Their Rights and Guarantees of Activity" by the provisions similar to those of the Law of Ukraine "On Employers' Organizations, their Associations, and the Rights and Guarantees of their Activities", which guarantees the right to participate in conciliation procedures;

- to amend art. 12 of the draft Labour Code of Ukraine by adding the following: "An employer shall provide a draft local normative act in writing for the consideration to elected bodies of local trade union organizations, freely elected employees' representatives. If there are several local trade union, acting at the enterprise, employer shall provide a draft local normative act to all local trade unions. Trade unions are empowered to create joint commissions to participate in conciliation procedures. Authorized employees' body shall consider a draft local normative act within 3 working days. Violation of conciliation procedure leads to invalidity of local normative acts."

- to amend p. 4 art. 8 of the Law of Ukraine "On social dialogue in Ukraine" by adding the following: "Legal and other acts regulating labour relations shall adopt only after conciliation of their provision with representative parties of social dialogue of certain level".

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ПРАВОВЕ РЕГУЛЮВАННЯ УЗГОДЖУВАЛЬНИХ ПРОЦЕДУР: СУЧАСНИЙ СТАН ТА ПЕРСПЕКТИВИ РОЗВИТКУ

Анотація

У статті досліджено проблемні аспекти правового регулювання узгоджувальних процедур як організаційно-правової форми соціального діалогу у сфері праці. Визначено особливості проведення узгоджувальних процедур на різних рівнях соціального діалогу у сфері праці. Проаналізовано недоліки чинного законодавства, яким здійснюється регулювання узгоджувальних процедур. Досліджено положення проекту Трудового кодексу України, якими передбачено проведення узгоджувальних процедур при прийнятті локальних нормативних актів роботодавці. Розроблено пропозиції щодо вдосконалення чинного вітчизняного трудового законодавства та положень проекту Трудового кодексу України у даній сфері.

Ключові слова: узгоджувальні процедури, соціальний діалог, соціальне партнерство, організаційно-правова форма соціального діалогу, колективні трудові відносини.

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ПРАВОВОЕ РЕГУЛИРОВАНИЕ СОГЛАСИТЕЛЬНЫХ ПРОЦЕДУР: СОВРЕМЕННОЕ СОСТОЯНИЕ И ПЕРСПЕКТИВЫ РАЗВИТИЯ

Аннотация

В статье исследованы проблемные аспекты правового регулирования согласительных процедур как организационно-правовой формы социального диалога в сфере труда. Определены особенности проведения согласительных процедур на разных уровнях социального диалога в сфере труда. Проанализированы недостатки действующего законодательства, которым осуществляется регулирование согласительных процедур. Исследованы положения проекта Трудового кодекса Украины, которыми предусмотрено проведение согласительных процедур при принятии локальных нормативных актов работодателя. Разработаны предложения по совершенствованию действующего отечественного трудового законодательства и положений проекта Трудового кодекса Украины в данной сфере.

Ключевые слова: согласительные процедуры, социальный диалог, социальное партнерство, организационно-правовая форма социального диалога, коллективные трудовые отношения.