The legal nature of the individual employment contract in the spirit of Kosovo's integration in the European Union

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Abstract

As a legal notion, freedom of work and the right to work are respectively the freedom and the right to work or not to work. This thesis is closely related to the action rule of the labour market supply and demand law. Kosovo, on national level, has promulgated a number of laws deriving from labour law, adapting them to international laws and European Union standards. This approach of Kosovo has to do more with its needs and aspirations to join international organizations. The purpose of this paper is the research through statistical data and facts published in the annual reports of state bodies and non-governmental organizations on the practical implementation of the European Union and the International Labour Organization labour legislation and standards in the Republic of Kosovo. Empirical character research findings have concluded that labour rights violations in Kosovo are evident and widespread both in the public and private sector, without exception, and these labour rights violations continue.

Keywords: *employee; employer; labour inspectorate; labour legislation; individual employment contract.*

JEL Classification: K31, K33

1. Introduction

Analysing the democratic legal relations of labour in the current conditions of economic and social development means first and foremost, identifying the essence and the main features of them and the trends of development and perfection of these relations in the future. Kosovo legislation has already given these relations a new modern European profile. Consequently, the dimensions of freedom and rights of employees have been expanded and enriched, thus ensuring the approach of the entering, change and termination of these relations with the acts of international law. By regulating the social relations of labour with the legal norms, the state assigns rights and legal obligations to the labour participants. The legal rights and obligations deriving from these relationships are both for the employee and the employer. The employment contract is one of the basic categories of labour law. It most often represents the legal basis for establishing employment relationships in all countries with a market economy. Although it should be considered that the existence of the constitutional and legal framework is only a prerequisite for the rule of law, equally important is the functioning of various controlling mechanisms of the implementation of constitutional and legal norms, and in particular, the creation of a new mentality of both public officials

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and employees, expressed in a conscious attitude towards the needs to implement these norms and the reaction, by legal means, against violations of such by anyone.

2. Material and methods of work

During the work on the paper, I have used various scientific and professional sources, including university textbooks, papers and scientific articles, analysis, statistical data, public documents, constitutional and domestic legislative acts and international labour law acts.

The study has been worked with various scientific methods, which are typical for scientific research of social and humanitarian sciences.

3. Discussion

3.1 The notion of individual employment contract

The notion *"labour contract"* in French: *Contrat du travail*[2], in English: *Labour contract*, and notion *"employment contract"* in French: *Contrat démploi*; in English: *employment contract*; contract of hire[3] are synonymous and in their content there is no distinct difference, which would be of theoretical importance. In fact, it is known that the notion of labour contract was used when employing so-called manual workers (labourers), while the notion of employment contract was used to establish the employment relationship of so-called intellectual workers[4] In labour legislation, the notion of labour contract originally appears in Belgian law[5], in the 1900 Labour Contract Act, then French law in 1901, Dutch 1907, and so on.

In the foreign legal doctrine, there have been discussions on which person is called "*employed"* and which *"independent"*. In England, in 1978, the Employment Protection Act defines "the employee as an individual who has entered or works under an employment contract", however, in other acts we see different definitions. In developing the contribution for the proper protection of the dignity of employees, in the theory of labour law, purely civil-legal nature of the employment contract was put into question[6], which led to the creation of the concept of contracting theory[7]. This theory considers the contract as the basis of labour relations. Contrary to the contracting theory, the theory of loyalty that took

[2] Pélissier, J., *Droit du travail*, Paris, 1986, p. 321.
[3] Goldman, L.A., *Labour Law and Industrial Relations in the USA*, Kluwer Law International. Alphen aan den Rijn, 1984, p. 43.
[4] Tintić, N., *Radno i socijalno pravo* I, Zagreb, 1969, p. 168.
[5] Humblet, P., Rigaux, M., *Sous la direction de Aperçu du droit du travail belge*, Bruxelles, 2004, p. 41.
[6] Kovačević, Lj., *Pravna subordinacija u radnom odnosu i njene granice*, Beograd, 2011, pp. 49-51; Ghera, E., *Diritto del lavoro*, Bari, 1993, p. 50; Betten, L., *International Labour Law*, Kluwer Law International. Alphen aan den Rij, 1993, p.333; Bercusson, B., *European Labour Law*, Cambridge University Press, 2009, pp. 381-383.
[7] Bajič, S., *Osnovi radnog prava*, Beograd, 1937, p. 9.

place in the 1930s in Germany[8] treated the labour relation as a private legal relationship based not on the contract but on the "working community" from which all rights and obligations arise directly, among which the most important obligation was loyalty to the employer. The employee, according to this theory, carried out a "social function" for the general good.

It should be noted, however, that the legal labour doctrine accepts as a more accurate thesis the theory of those authors who claim that individual employment contract is an autonomous contract, a contract of a particular type[9]. Thus, individual employment contracts do not fall within the scope of local civil law content[10] as the individual employment contract is a contract foreseen by labour legislation.

The individual employment contract has the force of law for the participating parties and cannot be terminated except by agreement of the parties or in the cases provided by the law itself[11] . This contract does not create legal consequences for third parties, but may result in extra-contractual liability to the employer, in the cases expressly provided by the law.

3.2 The content of the individual employment contract

The employer and the employee, as contracting parties to individual employment contracts, take an important role in determining the right to work because they are in a position to determine the content of the individual employment contract as suitable to their needs, taking into account the strict legal standards contained in the collective agreement, in order to improve or extend the contractual standards or the conditions foreseen for the rights of employees[12]. In unilateral legal matters, the expression of the will of one party is sufficient in order to produce certain legal consequences, while in bilateral legal matters, the will for mutual obligations between the two parties takes place[13]. Legal matters are not the same when the quality of one party or both contracting parties is not decisive for their completion and execution[14].

It is clear that the quality of the contracting parties is important in the individual employment contract, which means that the contract belongs to the group of personal contracts, i.e. *intuitu personae*[15]. According to the labour

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[8] Supiot, A., *Critique du droit du travail*, Paris, 2007, p. 18.

[9] Çela, K., *Kontrata individuale e punës*, Tiranë, 2013, pp. 25-30; Deakin, S., Morris, S.G., *Labour Law*, Hart Publishing, Oxford and Portland, 2009, pp. 59-62; 63-64.

[10] Berenstein, A., Mahon, P., *Labour Law in Switzerland*, Kluwer Law International. Alphen aan den Rijn, 2001, p. 53; Weiss, M., Schmidt, M., *Labour Law and Industrial Relations in Germany*, Kluwer Law International. Alphen aan den Rijn, 2008, p. 87.

[11] Çela, K., *E drejtë e punës*, Tiranë, 2013, pp. 195-197.

[12] Holbach, G., *Labor Law in Germany*, Bonn, 1994, p. 25.

[13] Spasić, V., *Uvod u građansko pravo*, Sarajevo, 1950, p. 160.

[14] Kovačević - Kuštrimović, R., Lazić, M., *Uvod u građansko pravo*, Niš, 2008, pp. 244-245.

[15] Brun, A., *Le lien d'entreprise*. Juris-Classeur, Périodique, no.1/1962, p. 1719; Pélissier, J., Supiot, A., Jeammaud, A., *Droit du travail. Paris*, 2000, pp. 52-53.

legislation, the employment contract is concluded in writing and signed by the employer and the employee[16]. Thus, the individual employment contract represents a formal-legal act[17]. The individual employment contract for indefinite period under comparative law represents a consensual contract, where the written form is not a condition for the validity of the contract[18]. If the individual employment contract contains provisions that provide for unfavourable working conditions under the conditions provided for by the provisions of the Labour Law, collective labour contract or labour regulations, such provisions shall be null and void and, in this case the provisions laid down in the general act are applied, since in this case the *infavorem laboratoris* principle applies[19]. However, according to comparative law, the individual employment contract is, as a rule, a consensual contract where a written form is foreseen, i.e. it is sufficient to have an explicit agreement on working conditions, in order to be legally binding on the contracting parties, such as English Labour Law [20]; US Labour Law[21]; Canadian Labour Law [22]; French Labour Law[23]; German Labour Law[24]; Swedish Labour Law[25]; Japanese Labour Law[26], and so on. Also, the European Labour Law defines the employment contract as a consensual contract between the contracting parties[27].

Individual employment contract is always a binding title. It is two-sided, in which it finds the will for mutual obligations between the two parties. In this sense, the individual employment contract belongs to the category of mutual service contracts, namely, the obligations and the rights of the parties are mutual[28]. Among other things, it is worth mentioning that the individual employment contract is a contract, because it is individualized and regulated by law. Hence, the status of public law and status, which also determine the place of the right to work in the legal system, is dominated by the work relationship[29].

As a rule, persons have an employment contract by which they are employed by putting their services under the organization and the employer's orders against a certain payment. The scope of the employment contract may be

[16] Labour Law of Kosovo, 2010: Article 10.
[17] Stojanović, D., *Uvod u građansko pravo*. Beograd, 1981, p. 149; Pélissier, J., Supiot, A., *Droit du travail*, Paris, 2000, pp. 171-172.
[18] Rade, Ch., *Droit du travail et responsabilite civile*, Paris, 1997, p. 78.
[19] Kulić, Ž., *Radno pravo*, Beograd, 2006, p. 109.
[20] Wedderburn, L., *The Worker and the Law*, Pengiun Books. London, 1987, pp. 133-136.
[21] Player, A.M., *Federal Law Employment Discrimination*, Minn, 1992, p. 5.
[22] Opie, Th.A., Bates, L., *Canadian Master Labour Giude*, Ontario, 1996, p. 256.
[23] Rivero, J., Savatier, J., *Droit du travail*, Paris, 1987, pp. 462-464.
[24] Weiss, M., Schmidt, M., *Labour Law and Industrial Relations in Germany*. Kluwer Law International. Alphen aan den Rijn, 2008, p. 87.
[25] Edlund, S., Nystrom, B., *Developments in Swedish Labour Law*. Stockholm, 1988, p. 60.
[26] Hanami, T.A., *Labour Law and Industrial Relations in Japan*. Kluwer Law and Taxation Publishers. Alphen aan den Rijn, 1985, pp. 55-56.
[27] Blanpain, R., *European Labour Law*. Kluwer Law International. Alphen aan den Rijn, 2006, pp. 237-239.
[28] Treu, T., *Labour Law and Industrial Relations in Italy*, Kluwer Law International. Alphen aan den Rijn, 2007, p. 61.
[29] Jovanović, P., *Radno Pravo*, Beograd, 2012, p. 52.

any kind of work for the benefit of the employer, which is not prohibited by law and which is not contrary to the country's legal and public system and contrary to morality[30]. The general principles of the liability law define that the object of the contract must be defined or determinable, whereas the subject matter of the contract must have certain attributes: a) be possible, b) be determined, c) be allowed[31], apply equally to the termination of the employment contract, so that the scope of the employment contract is the job, respectively the tasks and duties stipulated in the employment contract and the employer's rules for systematizing the jobs or any other internal act of the employer. The basic elements of the employment contract are: performing certain jobs under the employer's power against a payment[32].

Newer perspectives on the nature of legal labour relations can be summarized in these main directions: 1) Labour relations are merely contractual relationships governed by the right of obligations; 2) Labour relations are, first of all, contractual (obligatory) but also containing personal legal elements (such as loyalty and subordination to the employer); 3) Relationships are primarily contractual, personal legal relations and, secondly, binding relationships; 4) Labour relations are merely personal legal, not based on any contract, i.e., relationships of factual engagement at work[33].

As it can be seen from the origins, from doctrine and from the jurisprudence of the meaning of dependence, it is now more intertwined with other social and professional aspects of the paid employee. Thus, in fact, the difference between activity and the outcome of work is added. Specifically, wanting to determine the nature of the employment contract of its typical obligation, the doctrine and jurisprudence deepen the review of the position of the employee with the dependence feature, putting in the foreground not so much the activity of the employee as a debtor but more the interest of the employer as a creditor in the final outcome of using the workforce.

However, jurisprudence, in addition to dependent work, also recognizes independent work, which is regulated by special legislation (*lex specialis*), depending on the scope of work. For example, for the exercise of private activity in health, there is a law on private health activity of 2004; for practicing of law, there is Law on Bar of 2009 and 2013; for the exercise of the private enforcement, there is the Law of Enforcement Procedure of 2012, which foresees the powers and authorisations of the private enforcement agents.

All of these activities are considered as independent work under the aforementioned legislation, i.e., they are not considered as employment relationships, even though the employee works and earns from work[34]. In fact, according to jurisprudence, independent work is considered self-employment, self-

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[30] Çela, K., *Kontrata individuale e punës*, Tiranë, 2013, p. 243; Robaj, A., *E drejta e punës*, Pejë, 2017, p. 56.
[31] Dauti, N., *E drejta e detyrimeve*, Prishtinë, 2004, p. 64.
[32] Vannes, V., *Le lien de subortination dans le contract de travail*, Bruxelles, 2005, pp. 16-20.
[33] Scognamigliu, R., *Diritto del lavoro*, Napoli, 1992, p. 202.
[34] Robaj, A., *op. cit.*, 2017, p. 58.

employed, not legal employment relationship. Thus, the Constitution of the Republic of Kosovo defines "advocacy as an independent profession"[35], whereas the Law on Bar expressly states that "bar is a free and independent profession that deals with the provision of professional legal aid to natural and legal persons in protecting their freedom, rights and interests in compliance to the legal order"[36].

4. Factual work

Legal labour relations are created only if two conditions are fulfilled in a compulsory manner: the existence of a legal basis and the commencement of work. If one of the abovementioned conditions is not fulfilled, according to the legal doctrine of labour law and jurisprudence, then it is illegal employment, in fact it is the factual work, namely the factual work relationship, "Factual Work" is not the institute of positive labour law[37]. Factual work is, above all, a work not covered by the jurisprudence of a legal relationship, as it is against the rule of law and against lawfulness[38]. In fact, the factual work is not against the legal order in terms of dignified work and the fundamental principles of labour law, but is considered as a working relationship without a legal basis (without employment contract), illegal and inhumane (unsocial)[39].

As a factual work is considered any kind of legal work concluded verbally between the employer and the employee who lacks the written form, i.e., the employment contract, which creates rights and obligations for the employee and for the employer, and represents legal certainty for the employee, as it guarantees the labour rights in case of arbitrary violation by the employer[40]. Also, the factual work is considered as discriminatory work for the employee, as in the absence of employment contract, the employee cannot realize the rights from the employment relationship, as guaranteed by labour legislation and positive law, and so in some form is treated without dignity and is unequal in society and before the law. For this reason, the rules of law fight against the factual work as they consider it illegal, antisocial and extremely harmful to the employee, as they are denied labour rights guaranteed by the applicable legislation[41].

5. Labour Legislation, in the Spirit of Kosovo's integration in the European Union

Like other states emerging from the former SFRY, Kosovo, together with the political turmoil and its cause for independence, experienced the change of the

[35] Constitution of the Republic of Kosovo, 2008: Article 111.
[36] Kosovo Law on Bar, 2013: Article 3.
[37] Tintić, N., *Radno i socijalno pravo* II, Zagreb, 1972, p. 674.
[38] Weiss, M., Schmidt, M., *Labour Law and Industrial Relations in Germany*, Kluwer Law International. Alphen aan den Rijn, 2008, p. 89.
[39] Baltić, A., Despotović, M., *Ostnovi radnog prava Jugoslavije*, Beograd, 1978, p. 37-38; Robaj, A., *op. cit*., 2017, pp. 59-60.
[40] Humblet, P., Rigaux, *Sous la direction de Aperçu du droit du travail belge*, Bruxelles, 2004, p. 62.
[41] Amon, M.R., *Regulations in European Subcontracting*, „The Journal of International Business and Law", 2010, p. 238.

economic and political system. The change of the political system led to the transformation from centralized to market economy with direct consequence to the labour market and its relations. There was a period of legal vacuum in determining the rights, obligations and responsibilities of the employment relationship, respectively the labour law.

Being aware that without adequate legislation from the scope of employment relations there can be no sustainable stability in society, there is an essential need to act in this regard more seriously and issues related to the process of these relations should take the right shape and solution. Therefore, in function of the concept of functional and democratic state, Kosovo has promulgated laws in this field on national level that are compatible with those envisaged by international legislation. This approach is further strengthened, taking into consideration our needs and aspirations for integration in international organizations, including here the United Nations Organization (UNO), the European Union (EU), the International Labour Organization **(**ILO), etc.

Given that the right to work is classified under the Human Rights and Fundamental Freedoms, then the Constitution also stipulates the right to work and the freedom to choose a profession as a constitutional category[42]. Also, according to the constitution, the application of international law is guaranteed under national law, and moreover International Acts have the supremacy in relation to national law[43].

During this time, Kosovo has made efforts in drafting labour legislation based on the concept of social justice and the rule of law, as well as in cultivating universal values. Thus, Kosovo has rounded up a legal infrastructure in the field of labour law, which is of interest to the rights of citizens, respectively for the whole society.

To substantiate our claims, we present the legal infrastructure of the employment relationship in the Republic of Kosovo, as follows:

- Kosovo Law on Labour, 2001, 2010 (http://www.assembly-kosova.org/common/docs/ligjet/2010-212-eng.pdf).
- Law on Granting Permit for Work and Employment of Foreign Citizens in the Republic of Kosovo, 2009 (http://www.kuvendikosoves.org/ common/docs/ligjet/2009_03-L-136_en.pdf).
- Law on Strikes, 2010, 2012 (http://www.kuvendikosoves.org/ common/docs/ligjet/2010-200-eng.pdf).
- Law on Labour Inspectorate, 2008 (http://www.kuvendikosoves.org/ common/docs/ligjet/2008_03-L017_en.pdf).
- Law on Independent Oversight Board for Civil Service of the Republic of Kosovo, 2010 (http://www.kuvendikosoves.org/common/docs/ligjet/2010-192 eng.pdf).
- Law on the Civil Service of the Republic of Kosovo, 2010 (http://www.kuvendikosoves.org/common/ docs/ligjet/2010-192-eng.pdf).

[42] Constitution of the Republic of Kosovo, Article 49.
[43] Constitution of the Republic of Kosovo, Article 22.

- Law on Private Practices in Health, 2004, 2013 (http://www.assembly-kosova.org/common/docs/ ligjet/2004_4_en.pdf).

- Law on Occupational Safety, Health and the Working Environment, 2007 (http://www.assembly-kosova.org/common/docs/ligjet/2003_19_en.pdf).

- Law on Training, Professional Rehabilitation and Employment of Persons with Disabilities, 2009 (http://www.assembly-kosova.org/common/docs/ ligjet/2008_03-L-019_en.pdf).

- Law on Pension Funds of Kosovo, 2012 (http://www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20Pension%20Funds%20of%20Kosovo.pdf).

- Law on Social Economic Council, 2011 (http://www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20social%20economic%20council.pdf).

- Law on Trade Union Organization in Kosovo, 2011 (https://www.ecoi.net /en/file/local/1137335/1226_1404462977_kosovo-trade-unions-law-2011-en.pdf).

- Law on Insurances, 2015 (https://bqk-kos.org/repository/docs/korniza _ligjore/english/Law%20no.%2005%20L%20045%20on%20Insurance.pdf).

- General Collective Agreement of Kosovo, 2014 (https://gzk.rks-gov.net/ActDetail.aspx?ActID=9534).

6. Violations of employee rights

According to the ILO definition, decent work means dignity, equality, a fair income, and safe working conditions. Decent work puts people at the centre of development, empowering women, men and young people, gives them the right to be protected from exploitation and provides an inclusive and sustainable future[44].

According to the Kosovo Agency of Statistics[45], there were 81,629 people employed in the public sector, while the total number of people employed in Kosovo in 2017 was 331,761 people[46].

Working conditions, poor treatment of employees, contract terminations without prior notice, extension of working hours, work for up to 24 hours with 12 hours of work on the following day, non-payment of pension contributions and taxes, payment in cash, injuries at work, working during holidays, pre-arranged (fixed) vacancies etc. are among the cases of violations of employment relationship rights[47].

According to the official statistics, only 28% of active citizens have a job and the number of those who are able to work or are jobseekers is 686,486 people. The year 2018 has not been a good year in terms of employee rights and safety at work. In 2018, there were 20 deaths registered at the workplace in Kosovo due to the lack of workplace conditions and safety measures especially in the construction

[44] Transparency International Kosova, Report, March 2019, p. 9.
[45] Statistical Yearbook of the Republic of Kosovo, 2016.
[46] Statistical Yearbook of the Republic of Kosovo, 2017, p. 15.
[47] Kosovo Democratic Institute, Report, March 2019, p. 9.

sector[48]. Also during this year, 80 injuries in the workplace were registered in all sectors.

Violations of employee rights are widespread in both public and private sector without exception. The nature of public sector violations is related to public vacancies, namely their use for party-based and nepotism-based employment. In the private sector, most of the violations are related to the non-implementation of the labour legislation and other legal acts.

The findings of the research have ascertained the factual situation as follows:

- the common aspect of the private sector is that violations of employee rights continue;
- it was ascertained by the Kosovo Democratic Institute (KDI) and the Transparency International Kosova (TIK) reports that private sector employees do not report violations to competent institutions due to the fear of losing their jobs despite the fact that they have valid employment contracts;
- many of the employees, especially in the private sector, have no information on institutions responsible for protecting their rights;
- furthermore, according to the public documents of KDI and TIK, it has been proved that, in the private sector, employees have not been paid their salaries regularly and on time (according to individual employment contract); their daily and weekly breaks and annual leaves have not been allowed to them;
- it has been ascertained and proved that a considerable number of private companies that are winners of public tenders are flagrant violators of the rights of their employees;
- despite the legal obligation, some private sector companies manage not to pay the pension contributions for their employees because their salaries are paid in cash;
- private sector employees point out the lack of visits by the Labour Inspectorate or lack of response by the Labour Inspectorate in cases when they report to them anonymously;
- the chronic phenomenon during employment procedures is the fixing of public vacancies to favour persons affiliated with political entities that are in power;
- excessively prolonged employment relationship court proceedings and delays in the execution of judgments.

7. Conclusions and recommendations

Apart from being protected by the Constitution and laws in Kosovo, the employee rights are also protected by various international conventions, but the violation of these rights in Kosovo is continuous. This is also substantiated by our research. Thus, law enforcement authorities should in the future undertake concrete

[48] Transparency International Kosova, Report, March 2019, p. 7.

actions in the implementation of legality, with a view to improving and advancing the rights of employees. This also due to the fact that the European Commission's latest report on Kosovo, published on 29 May 2019, as far as the rule of law is concerned, ranks Kosovo as the last in the Balkans in terms of readiness to join the EU. Therefore, based on the abovementioned statements, law enforcement authorities of Kosovo should urgently take the necessary actions as follows:

- The Labour Inspectorate should visit employers in the field, in particular the private sector;
- The Labour Inspectorate should, in close cooperation and joint inspection with the Tax Administration and the Pension Trust, check whether the taxes and contributions have been paid by these private companies;
- The Labour Inspectorate should, when finding a violation by the companies that have won a public tender, automatically inform the contracting authority about the violations against the employees;
- All contracting authorities in Kosovo should take into account the rights of employee in the contracted company. Careful attention should be paid to employee salaries;
- The Ministry of Labour, through the budget, should foresee a continuous increase in the number of Labour Inspectors;
- The Labour Inspectorate should increase the number of field inspections;
- The Labour Inspectorate should continue with awareness campaigns on employee rights and potential violations for employers and employees;
- The Labour Inspectorate should increase the level of transparency by publishing all rendered decisions on the website;
- The Government of Kosovo, together with the Labour Unions and the private sector, should draft the collective contract and sign it;
- The Ministry of Labour should establish mechanisms that oblige private companies to have trade union bodies;
- The courts should adhere to the legal deadlines and they should treat employment relationship disputes with efficiency and priority.

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