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Comparative analysis in collective labor disputes resolution

The author made an attempt to study the system for settling labor disputes abroad (as of collective and individual). The mechanisms for their resolution, and the possibility of borrowing-data systems in order to maximize the experience of foreign countries to improve the legislation of Kazakhstan. Determined that a comparative analysis of the legal regulation of labor dispute settlement in these countries are not so much comparison of the activity of an organ, the presence or absence of authority for employees, employers and the state as how to reflect the tradition and historical context of these countries on the process formation of the modern dispute resolution mechanism.

Key words: labor disputes, the resolution of labor disputes, the analysis of labor law, employee, employer.

Various legal actions and conflicting views in the political, economic, social and international spheres are very painful for the society and the state. Increasing tensions in social relations — is dangerous. Therefore there is a need in «translation» of their solution in the legal channel to give collision and conflict of a legal nature. What does it give? Order stability in its analysis and resolution is achieved.

To provide transparency and publicity. The rights of the parties in disputed relationship are guaranteed by using pre-defined ways and the acceptance of the grounded decisions on the controversial cases.

Difficulties and disputes accompany any activity and its various stages. Originating due to objective reasons and subjective factors, they reflect the different interests of the subjects of law and the differential law, the resulting of its legal position.

At first disputes gain meaning of differences and refer to the understanding of a situation. The typology of disputes is determined by its' nature and status of the participants, and, accordingly by a set of legal rules from different areas of law.

Perhaps combined application of different standards, because complex and continuing disputes involve many participants and increase the field of contentious relations.

The concept of «dispute», «controversial situation», «peaceful resolution of disputes» as is the concept of «dispute», according to international law experts, contains constructive grain — a well-defined requirements and requirements of the parties to each other, that sets them to resolve the existing contradictions [1]. Highlighting the concept of dispute can explain the meaning of a labor dispute — is disagreement between the employee and the employer in the application of labor legislation, that the conditions of the employment and collective agreement, not previously settled between the employer and employee, which stated in a specially created to resolve a labor dispute body or the court [2; 379]. N.N.Nurgaliyeva gives his definition of a collective labor dispute: «Collective labor dispute — are unresolved differences between employees (or their representatives) the employer (employers and their representatives) on the establishment and change of working conditions (including payment), conclusion, amendment and implementation of collective agreements, agreements and the refusal of the employer to take into account the opinion of the representative body of election workers in making local normative legal acts» [3]. In clause 3, Article 24 of the Constitution of the Republic of Kazakhstan- recognized the right of individual and collective employment disputes with the use law for their resolution, including the right to strike. Most national labor law was formed as a result of the settlement of collective labor disputes. The need for social stability caused society to establish certain rules of interaction between workers, employers and the state, which are more or less take the edge off conflicts in the workplace. Collective bargaining is a means of regulating relations between management and employees and for settling disputes between them. It is based upon the realization that employers enjoy greater social and economic power than individual workers. The contract of employment is by nature imbalanced due to the fact that its content is largely determined by the employer by virtue of him owning the means of production and this places him/her in a stronger bargaining position. As employees need work more than the employer needs the services of a particular employee, they tend to accept any terms and conditions offered to them, even if they turn out to be exploitative Labor disputes, usually preceded by a labor violation. Labor can be considered guilty of the offense, any failure to perform its obligation to the subject of work. In some cases, it may be a labor dispute. It can occur when the action of the subject were legal, but the

other person thinks its unlawful, that is, when labor is virtually no offense. The establishment or the lack of labor violations is the prerogative of the competent authority, considering the employment dispute. Such a body has jurisdiction to resolve the dispute.

It should be noted that the labor offense is not a trade dispute. Disagreement subjects of labor law can evolve to an labor dispute, if it is not settled by the parties themselves, and therefore brought to the jurisdictional body.

Consequently, the dynamics of the labor dispute in stages would be as follows:

- Labor law relation (effective or only according to the authorized agent);
- different estimation of it by legal entities (disputes);
- an attempt to resolve these disputes between the parties in direct negotiations, that is, self-regulation of disputes;
- to appeal in order to resolve the employment dispute to the jurisdictional body [4; 8].

Labor dispute resolution system in the West, as a rule, differs in kinds — a dispute about the rights or interests.

As for the foreign experts, the system of industrial relations in the world differ in the way of the classification of labor disputes, if any, once classified. However, the intrinsic nature of a labor dispute is that, intentionally or not, and regardless of the procedures and mechanisms for its resolution, the dispute falls within the specific category. Accordingly, in many systems of industrial relations allocation of labor disputes to a category dictates the use of a specific mechanism for its' resolution.

Disputes about the interests — it is always disputes about establishing or changing conditions, if this is not about violating the law, other legal acts, acts of social partnership and individual employment contracts. A classic example of a dispute of interests — a dispute initiated by the employee on the salary increase, if the obligation of the employer is to raise the salary is not provided in a regulatory legal act or agreement (if such obligation is provided, then we are talking about violating workers' rights, not conflicts of interest; such dispute shall be classified as a dispute about rights, i.e. legal). The role of collective bargaining as an effective tool for industrial democracy and social justice has been recognized for many years. It is against this background that collective bargaining forms one of the most important gradients of the ILO Strategic Objective on promoting and strengthening social dialogue. Collective bargaining has the potential of reducing conflict through the resolution of labor disputes, and can promote workplace democracy and ensure the recognition and protection of the worker's rights. International legal instruments on employment law, providing for arbitration of disputes under collective bargaining's, appeared only after the Second World War. So, in 1949, the International Labor Organization (hereinafter — ILO) adopted the Convention # 98 on the Right to Organize and the right to make collective bargains, which provides the freedom and the right to collective bargaining's. In 1951, the ILO adopted a special act on the resolution of collective labor disputes — Recommendation # 92 on the Voluntary Conciliation and Arbitration. ILO Convention № 154 and Recommendation № 163, 1981 on collective bargaining's provided a procedure for resolving disputes (disputes) in collective bargaining's. These international instruments on collective labor disputes are the basis for the development and adoption of national legislation.

People abroad follow the traditional classification of Kazakhstan of labor disputes on individual and collective, although this classification is given less importance than the classification of the controversy about the rights and the interests. Note that the law holds the opposite approach, dividing labor disputes is on the individual and collective disputes, but no where a distinction between disputes over rights and disputes of interest, which, in our opinion, is not quite correct, because it is the intrinsic nature of the dispute in greater than its subject structure shall determine the manner of its resolution.

Authorities which work on labor disputes over rights abroad can be classified into four groups. Specifically:

- the courts of general jurisdiction;
- courts on labor disputes;
- quasi-judicial administrative bodies;
- arbitration.

In many countries there are no specific judicial or quasi-judicial bodies, which could be addressed in the event of a labor dispute of rights. Such conflicts are treated exactly the same and is the same courts as any other civil dispute. Supporters of the status quo argue that disputes under the contract are not different, whether it is a contract of employment, collective agreements, business, etc. As a rule, a qualified judge in

the state of competence applies the law — the statutory or common law — whatever the facts. Undoubtedly, this statement contradicts the very idea on which the system of labor courts.

Labor courts exist in many countries, but only a few are endowed with the broadest jurisdiction. We are talking about countries where the ordinary courts practically engaged to resolve labor disputes. Labor courts in developed countries where they are established, they differ in many ways:

- in terms of competence, that is, the type of cases under their jurisdiction;
- by composition (tripartite, double-sided or single);
- selection and role of lay judges in the courts of constituents;
- degree of pre-trial procedures (mediation procedures of any kind);
- procedural powers and a number of other characteristics.

The countries where the ordinary courts play a major (and often exclusive) role in the resolution of labor disputes on the rights include the Netherlands and Italy.

All countries in the European Union allow for individual worker disputes concerning alleged breaches of employment law to be heard in an appropriate court of justice — whether a specialist labour court or a civil court. The issue addressed by this comparative analytical report is the use of means seeking to resolve the problem before a full hearing takes place, that is, through alternative disputes resolution (alternative dispute resolution — ADR) procedures. A narrow definition of ADR is the use of third parties engaging in conciliation, mediation and arbitration prior to a court hearing. This can be action by a legal authority, often the court judge, immediately prior to a hearing in an effort to resolve the dispute. Alternatively, or in addition, it can involve the appointment of publicly-funded specialists, or private experts — either once an application has been made but before a court hearing is fixed, or before the claim has been made. These types of ADR linked to the judicial process are referred to as ‘judicial ADR’. In addition, some countries emphasise the role of the social partners in the workplace, or sometimes in the region or sector, in providing an avenue for a worker to resolve a dispute at the level of the works council or similar institutions aligned to collective bargaining.

Collective labor disputes are closely connected with the history of the labor movement for sake of the improvement of working and living conditions of workers. However, the legislation anywhere in the world up to 50-th in the XX century didn't regulate the settlement of collective labor disputes. In present, both in England and in the United States it remained mostly collective-contractual negotiation its regulation.

Conciliatory procedure for settlement of collective labor disputes in many developed countries is all developing.

The term «collective bargaining» was first used in the UK in 1891. The country which first experienced the formation of trade unions.

The collective bargaining process here was to develop even in those times when almost nothing was known in other countries. Nevertheless, these negotiations have become a common practice for skilled workers. Suffice it to mention only the world's first factory law in favor of workers, adopted in the UK in 1802. Against child labor for more than 12 hours daily. This law was passed due to the fact that among the children working in unsanitary conditions, spread dangerous infectious diseases. The history of regulation in the sphere of labor everywhere demonstrated the feasibility of combining two opposing inequalities parties to the employment contract: government regulation, as well as workers' and their resources to jointly defend their requirements, in particular through the equitable settlement of collective labor disputes. And still the main feature of collective labor disputes in the UK can be called a tradition of non-interference of the state in managing their permission. This distinguishes the British labor law, not only from the relevant institutions of the continental system, but also the U.S.A.

In the United States relating to compulsory collective bargaining has always been the opposite British. Collective agreement from the beginning was seen as a mandatory document, equal in force to any other contracts between the entities. The Italian legislation provides the possibility of using an individual labor dispute by the parties of a certain form of Arbitration (whose decisions are not binding), however, noted that this possibility is almost never used. As already mentioned, as such, labor courts in Italy did not exist. However, labor disputes over rights generally become objects faster procedure than with other things, and they can be seen judges with special training in labor law, so-called «praetors» (pretore). Thus, in the Italian system still contains some aspects of the labor courts.

In Italy, recourse to the judicial authorities for the resolution of a labour dispute must be preceded by a mandatory attempt at conciliation — referred to as «administrative conciliation». This takes place before a special board instituted by the relevant Provincial Labour Directorate. If the judge ascertains at the beginning

of the court procedure that no attempt has been made to use conciliation, the proceedings may be suspended and the parties ordered to use the procedure. The administrative difficulty in setting up a conciliation hearing, especially in the public sector where different rules apply, can lead to lengthy delays. Alternatively, a worker may give written permission to a trade union to attempt «trade union conciliation» in the workplace. If the outcome is registered with the labour directorate, it is deemed valid. In non-union organisations, the equivalent process available is called a «transaction», ending in a written agreement or decision. Issues relating to the payment of wages can be dealt with by 'monocratic conciliation' at the Provincial Labour Directorate prior to a formal intervention of the labour inspector at the behest of the worker. A recent development, introduced in 2004, is a form of non-judicial ADR where the management and trade union can request a certification of the working relationship, presumably showing the quality of procedures for handling grievances and disciplinary matters.

An important feature of judicial review labor cases in Germany — focus on reaching a compromise on the conclusion of a settlement agreement. In Germany, collective agreements may be reached at company level between a trade union and an employer, or—as is most common—at a more general level between a trade union and an employers' organization. Inconsistencies can sometimes arise between collective agreements, for example, if an employer signs a collective agreement at company level at the same time as the employer through membership in an employers' organization is bound by a more general collective agreement. In such situations the company-level agreement applies. In Germany, the right to strike does not permit strikers to prevent non-strikers from entering the workplace. Neither is it permitted to stop goods deliveries to from the company, nor to refuse customers access to the company. The labour courts have exclusive jurisdiction over virtually all legal conflicts between the employer and employee arising from the employment relationship. Labour court proceedings aim to be simple, speedy and inexpensive. Every case brought before the labour court begins with a conciliation hearing heard by the chairperson acting alone. The purpose of this approach is to achieve an amicable settlement, usually a compromise between the parties, before recourse to a formal hearing. In Germany, all employees have the right to have their grievances heard by the works council. It is then possible for a company-level arbitration committee to be established. In practice, in most cases where a works council exists, an employee might first address the council; the works council would then seek to resolve the matter with management, sometimes using informal mediation. Where there is no works council, the trade union would seek an out-of-court agreement with the employer. In cases of individual dismissals, the works council must be consulted. Recent evidence shows that only 12 % of forced dismissals resulted in court cases.

As in France, the court first attempts to reconcile the parties. It makes one chair at the preliminary hearing. In case of impossibility of reconciliation is going to court in full force, and regards this matter, but, as a rule, in a few months. Procedure before the court the labor dispute is somewhat simpler than in the ordinary courts, and everything possible to complete the works in a single sitting. Solutions labor courts of first instance are subject to immediate execution. In accordance with the principle of immediate execution, solutions announced immediately after the court hearing.

In conclusion, let us summarize: each model has several varieties. In addition, the basic model of dispute resolution for the interests are used simultaneously or sequentially. If, for example, the legislature defines a mechanism for resolving disputes between the parties, based on the collective judgment of its objective and fair due to the competing interests of the parties, the dispute may be settled by the simultaneous application of models of arbitration and state regulations. In turn, finding out what is hidden behind the term «fair», the legislature may have the effect of incentive on the part of the instructions or recommendations of the ILO Report of the Special Committee appointed by the president or the prime minister. An example of consistent use of dispute resolution models can serve the interests of the situation in which to reach an agreement, the representatives of the parties are using the talks, but the achievement of this agreement depends on the approval of the members of these parties by voting. Comparative analysis of the legal regulation of the labor dispute settlement in these countries are not so much a comparison of the activities of a body, the presence or absence of authority for employees, employers and the state as how to reflect the tradition and historical context of these countries, the formation of the modern dispute resolution. The main goal we studied the system for settling the labor disputes abroad both collective and individual labor disputes and make an attempt to analyze the mechanisms in resolving the labor disputes, as well as the possibility of borrowing these systems.

In the Republic of Kazakhstan in the formation of civilized labor relations in the market plays an important role Labor Code (the LC RC), adopted on the 15 of May 2007. The emergency of the Labor Code of a chapter on collective labor disputes in general should be viewed as a positive decision of the legislator as it facilitates systematic labor law regulating collective labor disputes, codified in a single act. Of the above systems, the settlement of collective labor disputes can reveal that the current procedure for settlement of labor disputes in the interest of workers, because disputes are resolved at the workplace, in the workplace, by the same workers who can most accurately judge the validity of any claims.

The legal framework of the parties' collective labor disputes in the negotiation process outlined inclusion LC RK procedural rules. Full explanation of rules dedicated to the prevention of illegal strikes, the revised institution of «labor dispute», which have been refined: the beginning of a labor dispute, the procedure of registration, a quorum meeting, conference representatives, terms of labor disputes. Over the years, is improving the labor law, examines the experience of foreign countries to ratify international conventions on labor, which is a big step towards a stable legislative regulation. Poor knowledge of the subjects of labor law and social and labor relations, and the weakness of the trade unions and the protection of the interests of employees, one conclusion is based on the state of the law in labor law field. Analysis of violations of labor law shows that often the violations by employers may be due to ignorance of labor laws or improper use, negligence, heads to his official duties, inefficient organization of work [5].

In its report, a prominent scholar of labor law professor, LLD Nurgaliyeva E.N defects noted labor law, namely, the objective and subjective reasons for their occurrence. The objective causes include socio-economic factors, the lack of the necessary material conditions for the implementation labor law standards. Subjective factors include socio-cultural reasons, when adopting regulations on labor rulemaking authority takes into account the awareness of the society, the level of cultural development, including the culture of labor relations [6]. All the above mentioned defects of labor law unfortunately, present in Kazakhstan labor law. Particularly prevalent such subjective reasons for their appearance as ignoring the legal awareness level, the cultural level of employment. So try to settle the collective agreement at the level of the most important issues of labor and wages instead of their laws and regulations has led to numerous collective labor disputes.

Thus, a comparative analysis can give a legal response to the settlement of collective labor disputes, and compare their fundamental differences, take the positive aspects of the peaceful settlement of disputes arising from the employment relationship. Learning and using the experience of foreign countries is the main objective of improving the rules of domestic law.

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М.М.Есіркепова

Ұжымдық еңбек дауларды салыстырмалы түрде шешу

Мақала авторы шетелдегі еңбек дауы бойынша (ұжымдық және жеке) заңды жетілдіру жүйесінің негізгі сұрақтарын зерттеуге талпыныс жасаған. Батыс елдерінің еңбек дауын шешудегі механизмдері және тәжірибесі жете талданып, біздің заңнамаға енгізу мәселелері қарастырылған. Бұл елдердің еңбек дауларын шешудегі құқықтық реттеулерінің салыстырмалы талдауына жүгінсек, осы елдердің дауларды шешудің қазіргі заманғы механизмдерін құру процесінде олардың осы салада айналысатын органдардың іс-әрекеттерін салыстыруда қызметкерлердің, жұмыс берушілердің және мемлекеттің өкілеттік деңгейіндегі кемшіліктері ғана емес, сонымен қатар тарихи және мәдени жағдайлар орын алғанын байқаймыз.

М.М.Есіркепова

Сравнительный анализ разрешения коллективных трудовых споров

Автором сделана попытка изучить систему разрешения трудовых споров за рубежом (как коллективных, так и индивидуальных). Проанализированы механизмы их разрешения, а также возможности заимствования данных систем с тем, чтобы в максимальной степени использовать опыт зарубежных стран для совершенствования законодательства РК. Определено, что сравнительный анализ правового регулирования разрешения трудовых споров в рассматриваемых странах интересен не столько сопоставлением деятельности того или иного органа, наличием или отсутствием полномочий у работников, работодателей или государств, сколько тем, как отразились традиции и исторические условия в этих странах на процесс формирования современного механизма разрешения споров.

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*Карагандинский государственный университет им. Е.А.Букетова (E-mail: rizvan_84@mail.ru)***Правовые основы конституционного строя Республики Казахстан и Республики Польша**

Показано, что данная статья представляет часть большой научной работы, проводимой автором в целях изучения и сравнения опыта построения современных Конституций двух государств — Республики Казахстан и Республики Польша. Отмечено, что у обоих государств последние десятилетия наблюдаются схожие условия для развития, но пути реализации разные. Автором проведен сравнительный анализ правовых основ конституционного строя Республики Казахстан и Республики Польша.

Ключевые слова: Конституция; нормативно-правовой акт; закон; конституционный строй; Республика Казахстан; Республика Польша.

Тема «Источники права» уже давно и фундаментально освоена в отечественной юридической науке. Общегеоретические и специально-конституционные вопросы источников права глубоко исследованы в трудах Г.С.Сапарғалиева, С.К.Амандыковой, А.Т.Ащеуловым, А.Тусуповой и других. Данную тему также рассматривают и российские ученые С.А.Авакьян, С.С.Алексеева, А.А.Белкина, Ю.П.Еременко, С.Л.Зивс, Е.В.Колесникова, Е.А.Лукьянова и ряд других авторов.

И все же надо констатировать, что с позиции нынешнего времени тема источников конституционного права получает новое звучание, а ее изучение стимулируется новыми факторами.

Во-первых, сегодня во многом изменились, хотя и не достигли консенсуса, взгляды на право, а от этих взглядов зависит и подход к определению источников права, их системе.

Во-вторых, предлагаются новые взгляды на понимание закона как источника права.