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THE SERBIAN LABOR LAW BETWEEN THE ESTABLISHED LEGAL ORDER AND CHAOTIC SOCIAL REALITY

The author tries to determine most important transitional peculiarities of Serbian Labor Law. It isn't an exhaustive analysis of the entire legal text; the focus is only on basic concepts of Labor Law. Especially discussed are the definitions of employer and employee as main actors having to implement its provisions. Since the article has been written mainly for foreign readers, the extra-legal circumstances decisively influencing the form and content of rules contained in Labor Law are shortly described in its introductory part. An analysis of the fundamental rights and duties of parties to work contract is also carried out. The practical importance and transitional character of legal provisions relating to the surplus of employees are singled out in the text. Rules prohibiting discrimination at work or relating the work are analyzed in more details suggesting their modernization potential. In conclusion, the author shows that there is a need for more radical revision of the analyzed legal solutions that have to be made conformant with basic postulates of market economy and socially responsible State.

Keywords: Labor Law, employer, employee, discrimination.

The Extra-legal Introduction into Serbian Labor Law

Any study of Serbian Labor Law (if it is worth being called a legal analysis) has to take into account the distinction between the normative order and everyday life in the social and political community. This distinction is incorporated into the concept of legal rule itself: if a distance of legal order from the facts of empirical social life is non-existent, any rule becomes superfluous; if it is too great, legal provisions become ineffective and unworkable. But in Serbian case the gap separating the language of Labor Law from trends in the

labor market became wider in the last decade of 20th century's to the extent that it had been fathomless. Now, nine years after democratic changes and the inauguration of real transformation in economy and society, the gap referred to has remained as one of the most important and unsolvable problems facing the labor legislation in Serbia.

There are many and rather disparate reasons for such state of things. First of all, this is affected by the factors common to all Eastern European countries experiencing transition into open, market economy. At the legal level, transition means a massive deregulation of labor market, less restriction for employers and less protection for employed. It is not a geographically localized process; it rather includes even the most advanced Western countries, those in which the social partnership and welfare state have had a long tradition. But in the former Communist-led societies deregulation of labor market had gone far more and had more serious and harmful effects for the entire position of the employees than in the West. The break-up of Communist system is accompanied by demise of leftist ideology in general and far-reaching weakening of all working-class organizations. The trade unions had to wage an in advance lost struggle against a hostile public opinion; the workers themselves had assaulted headlong into a promised land of free market, not asking for price. And the price was by no means a little one: the newly-acquired freedom was bought by the increased insecurity of wages and jobs. There is more to win into the open labor market, but there is more to lose also. The joining of these countries to EU has simultaneously sharpened and mitigated the trends referred above. Competition into a pan-European market requires an increasingly higher productivity and rigorous reduction of all production costs. It led to the massive dismissal of employees' surplus, i.e. of those whose jobs had no economic justification. The Serbian Labor Law has acknowledged this category of employees by term of "technological surplus", although this phenomenon has nothing to do with technology, instead reflecting the changed economic conditions. In the period of steady economic growth these disadvantages were compensated by the rise of real wages and the decrease of unemployment rate after the initial transition shock. However, with current global financial crisis, the entire economic climate is worsened: the unfavorable aspects of deregulation come into a fore plane, and their stimulating effects vanish away. Serbia shares the mentioned features of her labor market with all other Eastern European countries.

Another set of factors affecting the Serbian Labor Law concerns the distinctiveness of Yugoslav Communist past; it stands in a direct relation to the

theory and practice of workers' self-management. Whatever we think on its economic effectiveness and/or ideological nature of its justification, there was a relatively high degree of the employees' participation in the decision-making processes, at least at the level of basic working units. The employees of course had never been collective owners of enterprise employing them; Communist state had always found a way to frustrate the free working of market forces, to suppress the independence of employees' bodies making formal decisions on company's business policy, and particularly to retain an absolute monopoly of the Communist Party at all levels of decision-making, either on purely political or business-related topics. Nevertheless, there was a widespread feeling – lacking in other Communist countries – that the workers indeed had their factories, that every employee had a share not only in profit but also in property of company employing him/her. This belief did not arise from a mere ideological trick, although the ideology had a prevalent part in its forming and maintaining. It had some support in daily workers' experiences, in their awareness that they could lose their jobs as a result of bad business moves taken by managers chosen by workers themselves. The economic system of socialist Yugoslavia, especially in last two decades of its existence, may therefore be termed as half-market economy. The natural path from thence to the normal market economy led through the workers' share-holding. This was a way of privatization preferred by Ante Marković, the last Prime Minister of SFRY. The history, for good or wrong, went on in other direction.

The self-management background equally affected all former Yugoslav republics; it stood behind one of the most successful (Slovenia) as well as the most troublesome transition processes in Eastern Europe (Serbia). The divergence of post-Communist development in spite of a common and largely unique past reminds that the interplay of causes and effects in transition into economic and social normality must be estimated and studied more carefully, with a more sensible insight into details of recent economic and social history of every newly-formed state in the region. The topic goes definitely beyond a scope of this article and it is mentioned here only to suggest a possible field of a promising research. This is true in an increased measure for Serbia, country in which the simple, logical, consistent, unambiguous and probable hypotheses explain nothing. Citizens of Serbia – employees not less than their employers, the supporters of an authoritarian regime not less than their opponents – turned resolutely a back to their Yugoslav legacy in everything save the repressive nature of political power. At the very beginning of

her real or feigned transition Serbia carried out a reform that can be termed as the second nationalization: so called social property – a form of public ownership in which the powers arising from property were divided between the state and employees – was transformed into a classical state ownership. Accordingly, a real-socialist curtain was inserted between Serbia's recent past and her then yet distant and enigmatic democratic future. The negative consequences of this reactionary act have been felt in Serbian Labor Law until now.

Finally, third set of factors influencing the labor market and shaping Serbian Labor Law have appeared and worked only in Serbia. At the very moment in which the state, and it means a central government in an over-centralized state, had become the only and exclusive possessor of everything, the state itself was beginning to disintegrate, to lose the most essential properties of statehood. It abandoned its fundamental task, the only serious reason for its existence - a care for general good as an irreplaceable foundation of modern state's concept. After 2000 democratic half-revolution it was said that other countries may have their own mafias, but in Serbia a mafia had its own state. A war environment and UN economic sanctions had only restricted and subordinated bearing on the labor market and Labor Law in comparison with this unprecedented implosion of the most important state functions. Serbia had become a realm of legal, as well as political, economic and social fictions. It was not only possible but usual to have a job without work or wage. Many state companies have had merely apparent, "paper" life, while the private firms in the real economy were doing their business activities with no legal control or regulations. There was at work not only an "economy of destruction"[1] but also a self-destructing legal order representing a complete negation of the idea of justice. Western exponents of a wholesale deregulation of labor market may in Serbia from nineties find the obvious evidence of the absurdity of their conceptions.

Somebody will say: that's history – a recent, it is true, but past and concluded series of occurrences with no real effect in contemporary legal order. But this briefly sketched chaos, untranslatable into language of any jurisprudence, casts a long shadow onto the present Serbia. As the pre-2000 regime was neither a dictatorship nor a defective democracy (a distinctive term *democrature* has been coined to describe it), the democratic takeover from that October was neither mere election victory nor a real revolution. Participants in these happenings and experts in political analysis have subsequently had widely divergent, sometimes wholly opposite accounts on extent, causes, effects and meaning of

[1] This is title of a book written by Mlađan Dinkić, published first in 1995.

the changes already effected and – more importantly – on nature, direction and speed of reforms needed in the future. A massive enthusiasm for changes and possible revolutionary momentum waned away having left only symbolic changes (a flag, an anthem, the national holidays). The prevalent opinion in Serbia was and yet is against the burning of all bridges with the past; rather, it favors the continuity of certain aims seen as vital interests of the nation, as well as joining the European Union. Whoever interprets the election results from 2000 onwards differently, he fails to understand the post-2000 politics in Serbia mistaking his own desires and hopes for hard facts of life.

One of the main deficiencies of entire contemporary Serbian legal order remains a significant weakness of distinct rule of law mechanisms and procedures. The Serbian legislature has adopted a number of more modern legal texts formed according to the model of EU legislative measures, but these laws were only implemented with more or less selection, discrimination and favoring various individual or group interests. In the field of Labor Law this situation is well illustrated by a persistent maintaining of a black labor market, massive breaches of legal and contractual obligations by employers, a partial and selective fulfillment of privatization conditions by new owners of privatized companies and a general disinterest and indifference of government (even if it is called a socially responsible one) regarding the actual unfavorable trends at the labor market. A few months ago the Ministry for Economy and Regional Development sent a recommendation to the courts of law asking them to postpone decision-making in current labor disputes in order to alleviate the employers' difficulties caused by recession. The move has indicated not only the modest place taken by the independence of judiciary and rule of law in a list of the Serbian governing coalition's priorities, but a systematic and purposeful neglect of the employees' needs in favor of the big business interests. On the other hand, the attempts to take positive measures to enhance the entire condition of Serbia's poorest citizens has led to an increasingly wide gap between the budget's expenditures and incomes, a policy contrary to the IMF demands and recommendations. It is characteristic of the degree of the Labor Law provisions' implementation that the strikers' demands in Serbia are mainly concerned with paying wages and contributions to the Social Insurance Fund at arrears, and not with the normal trade unions' demands for higher wages and better work conditions. Also present is the long-term inability of trade unions to be an active factor at labor market and an efficient participant in the collective bargaining processes provided by Labor Law, so that the prevailing majority of strikes are rather the spontaneous outbursts of workers' discontent and despair than the results of a well-

conceived and organized trade union action. All so far stated suggests that the provisions of Serbian Labor Law have to be seen from the perspective of far-reaching deficiencies in Serbia's rule of law. A neo-liberal ideological atmosphere in the post-Communist Europe lays a decisive stress at the essential lack of balance between the work and the capital at labor market, both at national and global level, but a neo-liberalism is neither only nor main cause of the workers' troubles in Serbia.

The Labor Law was adopted and amended by Republic of Serbia's National Assembly (Parliament), but these changes had never been encroached into its basic solutions. The positive cleared text of the Law is published in Republic of Serbia's Official Currier (RSOC), Nos. 24/2005, 61/2005 and 54/2009. The scope of this contribution allows no detailed account of all particular provisions contained in it; accordingly I shall consider only the basic legal institutes determining the nature of Labor Law as a special and specialized form of the Law of Contract and Torts (obligations law), as well as the legal tool for regulating the labor market.

The sources of Serbian Labor Law

The sources of Serbian Labor Law are defined in the Serbian Labor Law's Art. 1 as including:

a) international conventions on Work and Working relations ratified by Serbia:
b) the Labor Law regulating rights, duties and responsibilities from work and founded on work;
c) special laws adopted in accordance with provisions of the Labor Law:
d) collective agreements (contracts) concluded by empowered representatives of employers and employees;
e) individual work contracts concluded by an employer and an employee,
f) rules regulating the work adopted by an employer.

Collective agreements, individual work contracts and an employer's regulatory rules of work are legal sources only where expressly provided for by the Labor Law. So the State ensures a general legal framework for the rights and liabilities of employers and employees, the particulars of which are regulated by mutual agreement of contracting parties – represented either individually or collectively. But the Labor Law contains an important exception from this principle – regulatory rules of work are enacted only by an employer with no participation of employees. Indeed, this is only an accessory source of rights and liabilities founded on work and the Labor Law provides its application under

clearly specified and narrowly restricted conditions. These conditions are formulated in Art. 3 as follows:

1) if there is no trade union organization in the employer's company, or if no trade union organization complies with requirements for representative status of trade unions contained in the Labor Law, or if no agreement on combining of trade union organizations is concluded in accordance with the Labor Law;
2) if no party in a collective bargaining process takes an initiative for beginning the bargain for conclusion a collective agreement;
3) if the bargaining parties arrive at no agreement after 60 days from the beginning of bargaining process;
4) if the trade union fails to accept the employer's appeal for beginning of collective bargain after lapse of 15 days from receiving the appeal.

These provisions reflect a formally unequal position of employer and employees in the Serbian Labor Law. Employer can impose his will in certain degree, in certain circumstances and under certain conditions, while employee is never able to do the same. This deviation from the perfect symmetry of mutual rights and liabilities is unnecessary: employer would lose no essential right if his position is absolutely, geometrically equal to that of employee. Just stated deficiency concerns not the material content of a disputed legal rule, but a defective form the rule takes. The same effects are produced by a provision in the individual work contract stating that the employee will observe the regulatory rules issued by the employer. In this case the formal equality of contracting parties is maintained, since the foundation of the employee's liability lies in his/her own will, and not in the external coercion of the legal order.

The mutual relationships of this legal branch's various sources are determined by their own hierarchy. The succession of sources cited in Art. 1 displays a series established just on the hierarchical principle: the members of series contain the increasingly precise and concrete rules regulating work, but their scope of application and legal strength decrease. So the international conventions relating to the work at the upper end of series have the widest territorial validity and the utmost legal strength, but they contain the most abstract and general rules of behavior for employers and employees as well as for states adhering to them, the immediate application of which is in most cases impossible. The individual work contract at the lower end has the most precise and definite rights and liabilities of employer and employee signing it, but this contract concerns only them and nobody else. Its content depends on all other sources and must not be in contradiction with them; it has the least legal strength at all. Even

in this hierarchical succession of legal sources the place of regulatory rules of work issued by employer is a problematic one. The Serbian Labor Law puts it behind the individual work contract; following the logic of just described legal sources' hierarchical order, it would mean the individual contract has a greater legal strength than these rules – an obvious absurdity that cannot be the legislator's intention. But the legislator could not give a more legal weight to the unilateral statement of will by one of the contracting parties - and the regulatory rules of work issued by employer are just that – than to the contract as an agreed statement of both parties' will. Hence, the employer's rules play only a supplementary and accessory role in the legal sources' system of Serbian Labor Law – but not a less controversial one.

Some articles of the Serbian Labor law expressly treat the relations between various sources of law. Most attention is given to the collective agreements – a relatively novel institute in Serbian law, unknown to Communist Yugoslavia – and their relations to the legislative acts. So Art. 4 states that the General and Special collective agreements must be in harmony with laws. Acts by an individual employer – a collective agreement the employer concludes with empowered representatives of employees in his company, employer's general rules of work and individual work contracts, called in Labor Law by a common name of general acts - have also to be in accordance with the legislative acts as well as with the general and special collective agreements under conditions provided by Arts. 256 and 257 of the Labor Law. The general acts can contain no provision granting less rights to the employees or establishing the less favorable work conditions than the rights and conditions defined by legislative acts. If a general act provides the work conditions less favorable for employees than ones defined by law, the provisions contained in law will automatically be applied. Unfortunately, as already noted, the legislative acts are even more remote from real social life than the general employer's acts usually are; their bearing in social reality is the less, the more are ambitions of those adopting them. But same acts can always provide more rights for employees or work conditions more favorable for them than the ones defined by law. Particular provisions of an individual work contract giving less rights for employee or establishing the less favorable work conditions than ones defined by law are void. The competent court of law establishes and declares by its decision that the general act's particular provisions are void and null. The right to demand this decision never becomes an obsolete one (Art. 11). The same is true with provisions founded at misinforming of an employee on his rights by employer. So the state establishes a minimal level of the employees' protection leaving to social partners (trade

unions and the employers' associations) to define the real extent of rights and liabilities in accordance with the labor market condition. Also the special collective agreement cannot establish less favorable legal regime or work conditions than the general collective agreement does.

Basic subjects of the Serbian Labor Law

The Serbian Labor Law contains the formal definitions of an employee, employer as well as their respective empowered representatives in the so-called social dialogue. It is worth to retain one's attention onto these definitions for a while, since there is a perceptible background of a socialist legacy in their wording.

Labor Law defines an employee before an employer, although the logic of a free labor market demands a contrary approach. It is an employer who seeks to invest his/her funds, to organize a business and to offer a job to employees. It is possible to do business without any employee, but it is not possible to be employed without an employer. Examples of the liberal professions prove nothing, because a physician with his own practice, a barrister, a writer or an artist of any kind is rather an employer with no employees than an employer with no employer inasmuch his market position is identical with that of an employer and very different from the stance of an employee. We are not wrong if we see this preference of an employee to his/her employer as a residue of Marxist ideological viewpoint insisting on an advance guard role working class plays in the entire social development.

So an employee, in terms of Labor Law, is any natural person being in a working relation with an employer (Art. 5). On the other hand, an employer is any native or foreign person or corporation employing or engaging in work one or more persons. While the definition of an employer is in a large measure a tautological one (an employer employs an employee), the definition of an employee lacks any definite meaning because a working relation as its key constituent part remains yet unexplained. Besides, the term *working relation* effectively conceals the crucial fact that an employee sells his/her own working force in the labor market and an employer buys it on the same market. Speaking in a paradox, if the arrangement of the basic subjects' definitions reflects a thoroughly Marxist standpoint since the definitions themselves are couched in the insufficiently Marxist terms. This is a fair example of the conceptual and ideological confusion of a nation better knowing what it doesn't want than indeed desires.

The employees and employers may act in the labor market either individually, in their own name and account, or through their associations empowered to represent their interests as sellers and buyers of labor force. The Serbian Labor Law only rather imperfectly expresses this essential and determining feature of trade unions and their antagonists and partners from employers' ranks. Thus, Labor Law in Art. 6 provides that a trade union is an autonomous, democratic and independent organization of employees voluntarily joining it, in order to represent, advocate, promote and protect their own professional, working (relating a work), economic, social, cultural and other individual or collective interests. This cumbersome definition is too large to offer any sensible explanation of the defining term. It veils much more than it discloses. In its first part the superfluous adjectives with same or similar meaning are cast one upon another without contributing anything to the content of the concept to be defined. Even in the English translation the terms *autonomous* and *independent* are experienced as near-synonyms; in Serbian original this is even more pronounced shortcoming. But the main defects lie in the second part of definition leveling out all conceivable interests a human being can have. On such a jungle of the most various interests the trade union's distinctive role in the labor market in representing the working force's sellers is irretrievably lost. The definition includes a trade union and a factory sport team alike. The specific difference of the defined concept is non-existent.

The definition of an employers' association is a more adequate one. By this it is also meant an autonomous, democratic and independent organization of employers voluntarily joining it, in order to represent, advocate, promote and protect their own business interests in accordance with law (Art. 7). This statement is somewhat better from the preceding definition inasmuch as the term *business interests* has no such a limitless content as possible aims of trade union organizations provided by Labor Law. But the provision is yet an insufficiently precise one, since the business interests may or may not include the employers' interests in labor market. They may concern the questions unrelated to labor market, like various forms of technical cooperation or coordinated activities in the market of goods and services. The business chambers may deal with a wide range of matters relating the general economic policy, but they remain beyond a scope of Labor Law until they usher labor market and enter into the bargaining process with trade unions and state. And when they enter into such arrangements, they cease to be associations of a general business type, having become the bearers and representatives of the distinctively job-giving "class" interests on labor market. They are naturally antagonistic and supplementary

to the trade unions; the state task is to arrange this antagonism, not to suspend it. The same is true for trade unions; they may do everything (in Communism they sell pork-halves to their members), but the Labor Law's provisions may be applied to them only when they represent the employees' interests in labor market. The professional, working (relating a work), economic, social, cultural and other individual or collective interests, save just mentioned ones antagonistic and supplementary to the employers' demands, have nothing to do with Labor Law.

Basic employees' rights

Labor Law guarantees to an employee the following rights arising from his/her status of employed person:

a) right to an adequate wage;
b) general security, life and health protection in a job;
c) personal integrity protection;
d) other rights enjoyed during a disease, loss or lessening of work capability;
e) material support during a temporary unemployment and
f) other forms of protection in accordance with law and the general act (Art. 12).

These rights constitute a general legal regime applicable to all employees. Beside these, there are three added special levels of employees' protection:

1) special protection of employed woman during pregnancy and childbirth;
2) special protection of both parents for a childcare, and
3) special protection of employees under 18 years of age as well as of employees with disabilities.

Consequently, this system of rights and protective measures for employees has remained a dead letter for too many workers in Serbia. When an employee receives no wage at all for many months, all other rights arising from his/her employment must seem illusory.

In addition to the right to an adequate wage in accordance with work contract, Labor Law has constituted a right to a minimal wage as another level of employees' protection and an important instrument of government's economic and social policy. So an employee has a right to a minimal wage for standard work effect and full working hours or working hours equated with them (Art. 111). The amount of minimal wage is established by Social-economic Council formed for Serbia's territory. If this Council fails to take a decision establishing

a minimal wage within 10 days after negotiations' beginning, the Government of Serbia will establish this amount. Body establishing the amount of minimal wage has to take into account the living costs, the average amount of wages paid in Serbia, the existential and social needs of an employee and members of his/her family, the unemployment rate, the employment trends in labor market as well as the general level of Serbia's economic development. The factors influencing the amount of minimal wage are too numerous, disparate and unsuitable for mathematical modeling to be used as definite, exact and uncontestable parameters for its establishing. This legal provision leaves practically a free hand to Government in reconciling opposing demands of trade unions and employers' associations. This is only one of numerous examples illustrating the shameless verbalism of Serbian Labor Law and utter inapplicability a good deal of its provisions.

The following set of employees' rights is closely tied with the freedom of trade unions' organizing and activities. In that respect employees, immediately or through their representatives, have the right to:

- organize themselves;
- take part in bargaining for concluding collective agreements;
- participate in extra-judicial procedures for solving the individual and collective labor disputes;
- express their views on essential topics concerning the work, and
- to be informed and consulted on these topics (Art. 13).

The same Article also provides that an employee engaging in trade union activities cannot be called to account or put into a less favorable position regarding work conditions for these activities if he/she does them in accordance with law and collective agreement. The application of this provision in most cases depends on the empirical balance of power in particular companies because the state is not able or interested to implement its own courts of law's decisions. The rights guaranteed by this Article constitute classical trade union liberties gained by the organized workers in 19th and early 20th centuries, codified by ILO in a number of Conventions signed by Serbia and her legal predecessors, and most universally accepted in international community. In them there are no traces of Yugoslav socialism's self-management ideology. The weakness and disunity of the Serbian trade union movement are serious obstacles to their full implementation. Both are more permanent features of Serbian labor market, and not the circumstantial outcome of an unfavorable economic conjunction.

Finally, a work contract or an unilateral employer's decision may provide a share of employees into distribution of company's profit at the end of the business year. It is a mere possibility, by no means a liability on the part of an employer to accept the employees' demands relating it. In the troubled times of transition and the current economic depression there is a very few socially responsible employers voluntarily incurring this added expenditure to their business.

Duties of employees

Work contract gives to both parties their respective rights and imposes corresponding liabilities; the rights of one party are simultaneously the liabilities of the other one and *vice versa.* Nevertheless, the Serbian Labor Law prefers to provide the employer's rights in terms of employees' duties, having once again disrupted the ideal symmetry of the contractual relation. It seems as if that the legislator has shied of expressly recognizing the subjective rights of employer, rather formulating them as the employees' duties, their liabilities to an unnamed holder of property powers in economy. The result is that the employer's rights are strangely absent from Labor Law's texts; they have to be logically deduced from the legal provisions dealing with the employees' duties. This inconsistence reflects the official ideology of the former governing Serbia's Socialist Party when Labor Law had been firstly adopted by Parliament. This ideology had postulated the "property pluralism" in economic sphere including a substantial share of a "social", in fact a state property in the key economic branches, as a counterpart of "party-less pluralism" in the political sphere. Both ideological projects were soon renounced even by socialists themselves, but the property pluralism left a deep and hardly removable trace in Labor Law. This peculiarity has nothing to do with the real condition of employees: there is no difference if they are submitted to the arbitrary power of a private or state employer. Moreover, the state employer is far more dangerous for workers' rights, since it is the state employer that embodies a merge of economic and political might endangering implementation of fundamental human rights, and workers' ones among them.

So an employee has the following duties:

1) to do his/her job conscientiously and with responsibility:
2) to observe the working organization introduced by his/her employer, as well as the employer's conditions and rules relating to the implementation of contractual and other liabilities arising from work;

3) to inform his/her employer on the essential circumstances influencing the jobs, or on circumstances that may influence them and
4) to inform his/her employer on any potential danger for life and health of employees, and for the occurrence of the material damage (Art. 15).

The three last duties are couched in such terms that they clearly point to employer as their only user. The first duty, however, has no definite user. A formal interpretation of this provision without its legal and economic context leads to conclusion that an employee owes the conscientious and responsible doing of his/her jobs to the legislator, in other words to the state. This interpretation, although formally possible, has nothing to do with the economic realities behind work contract, but has with just mentioned ideological premises of Socialist Party from the early nineties. The work is due not only to a particular employer but also to a Nation, social community represented and replaced by the state.

If an employer has no rights, at least at the level of Labor Law's headings, he/she has a set of expressly formulated obligations. So he/she is due to:

1) pay a wage to an employee for a job done, in accordance with law, general act and work contract;
2) ensure adequate work conditions for an employee and to organize work in the manner by no means endangering the life and health of an employee, in accordance with law and other binding rules;
3) give an information to employee on work conditions and work organization, rules specified in the preceding point of this Article, and also on the rights and liabilities arising out of work rules and legal acts regulating the protection of workers' life and health;
4) secure for an employee the doing of jobs determined by work contract, as well as to
5) demand the opinion of trade union in cases determined by law. If there is no trade union organization in the company, the employer has to demand the opinion from a representative chosen by employees (Art. 16).

The employer's duties may be classified into three groups. His/her first and foremost liability is to pay the wage to an employee. Paying a wage is a legal foundation for the employer's right to demand a conscientious and responsible doing of jobs by an employee. It is already noted that employers may successfully escape this obligation for months due to the ineffectiveness of judicial decisions' implementing procedure. The employees too often have to secure themselves the implementation of enforceable judicial decisions with a passive bear-

ing of state officials in which jurisdiction an implementing procedure is, so that a strike is the only way to enforce the pay of wages at arrears. This is the most fundamental weakness of the Serbian Labor Law; it concerns not the relevant legal provisions, but an incompetent and corrupt state administration. Current economic depression offers an added justification, real or apparent, for continuance of this practice disruptive for a rule of law. Second set of the employer's duties belongs to the protection of an employee's life and health at a work. Measures necessary to be taken by employer are contained in special laws dealing with this matter, as well as in the directions, instructions and other sub-statutory acts. Implementing of these disparate rules is effected by Inspection of Work, incorporated in the Ministry of Work and Social Security Matters. The number of these inspectors is still insufficient and – what is more important – they lack the genuine support of other state administration bodies for a perceptible improving of work security. Third group of employer's duties is coextensive with the trade union rights and make the implementation and observance of these rights possible, probable and even peremptory. Degree of their enforceability depends on the entire strength of trade union movement, especially on its capability to impose itself as an essential and irreplaceable factor in labor market. Level of trade unions' unity in action and their effective power to exert a pressure on employers and government are yet not promising a successful struggle for workers' rights. The condition is evidenced by an absence or relative rarity of large-scale strikes and/or workers' street demonstrations. It is characteristic that a possible exception to this rule concerns the state employees, for example in education and health services. In Serbian economy's private sector the trade union movement is still underdeveloped and effectively suppressed by a continually high unemployment rate. Under these conditions employers may easily evade their legal obligations towards trade unions.

Surplus of employees

One of the typically transitional institutes of Serbian Labor Law is a set of provisions regulating various modes of solutions for an enormous number of unproductive and economically unjustifiable jobs inherited from the socialist economy. This is an economic problem having to be solved by structural transformation of an obsolete economy into a viable one conformed on a normal market pattern. It's a long-term process requiring a number of years. In the meantime, mass dismissal of employees, absolutely necessary for bringing about the economic transformation, is likely to produce a rate of unemployment unwanted on economic, unbearable on social and hardly acceptable on

political grounds. The task of this new legal institute, unknown both to a socialist and to a normal market economy, is to bridge a time gap between vanishing the state-run or at least state-controlled enterprises and arrival of a normal market economic structure. It must not be an end for its own sake; it is only to be a temporary means lessening negative economic and social effects of transition to market economy without slowing down the pace of economic transformation. This is a necessary but not a sufficient means; it has to be accompanied by more positive, stimulating measures enabling creation of new jobs for dismissed army of industrial workers forming the backbone of an over-industrialized, but insufficiently productive and competitive economy. It is hard to overestimate the importance of having as great a part of compensation received the dismissed employees as possible, invested into profitable and job-making small and medium-sized companies, instead into a personal consumption. All this stresses a secondary, accessory and palliative nature of provisions regulating the handling of a surplus of employees found in Serbian Labor Law. Nevertheless, they are too often seen as main, if not even exclusive item in collective bargaining processes engaging so-called social partners under the state's auspices. An importance accrued by Labor Law to this ephemeral legal institute is well illustrated by having it singled out into a Law's special chapter under its own title.

Approach to solving the problems arising out of surplus of employees, and to duties of employers in facing them in Serbian Labor Law is largely a formal and formalistic one. According to Art. 153, an employer has to adopt a program for solving a surplus of employees' problem if he/she establishes that the need for work of:

1) 10 employees if he/she employs for an indefinite time more than 20 but less than 100 employees;
2) 10% of employees if he/she employs for an indefinite time more than 100 but less than 300 employees;
3) 30 employees if he/she employs for an indefinite time more than 100 employees irrespective of the total number of employees

is to cease in the period of 30 days for cases under 1) and 2) or in the period of 90 days for cases under 3), due to the technological, economic or organizational changes. This provision offers an implicit and very broad surplus of employees' definition. The employer cannot arbitrarily determine whether the surplus of employees does exist in his/her enterprise, but the restrictions Labor Law has imposed to him/her are so few and broadly outlined that they are practically imperceptible. The technological, economic or organizational changes required by the cited provisions of Labor Law are so indefinite that it is hard to see what

occurrences relating company do not belong to them. In contrast to this limitless scope of terms used, the legislator is more than commonly definite and precise when he circumscribes the dismissed employees granting favorable status of being surplus. But Law's terms are only quantitative ones; if dismissed workers are too few to pose a serious threat to the established social order and election prospects of governing party or coalition, they are of no interest for legislative body, political elite and artificially induced public opinion – real or supposed engineers of Serbian transition. An employer, it is true, is obliged to take adequate measures in order to again employ the employees dismissed as a surplus; these measures have to be taken in cooperation with a trade union representative in employer's company and state body having the labor market in its competence.

Labor Law provides the following essential elements having to be included in a program for solving the surplus of employees' problem:

1) grounds for ceasing the need for employees' work;
2) total number of people employed by employer;
3) number of employees being a surplus, their respective professional qualifications and age, length of a period during which they have social insurance and jobs they have done;
4) criteria for determining the surplus of employees;
5) measures for new employment: removal of employees to new jobs; acquiring a new professional qualification; working shorter working hours but not shorter than half of full working hours; and other measures tending to help new employment;
6) means for improving the socio-economic condition of employees declared to be a surplus, as well as
7) the term work contracts are to be renounced.

An employer has to send a project of this program to the representative trade union in his/her company and organization competent for employment affairs at latest 8 days after the project has been determined. Final text of the program is adopted by managing board of employer's company after receiving an opinion of trade union and organization for employment affairs; if there is no such board, the program will be adopted by employer himself/herself. Trade union is bound to express its own opinion and suggestions on the projected program to the employer at latest 15 days after the project has been received. The organization competent for employment affairs is liable to send the projected measures to be taken in order to prevent the employees' dismissal or to reduce as far as possible the number of renounced work contracts to employer

at the same term. An employer cannot dismiss the surplus of employees without receiving the mentioned opinions and suggestions, but neither trade union nor organization competent for employment affairs can block this dismissal. The result is an increased amount of bureaucratic formalities with no real protection of employees. Namely, an employer is obliged to consider and take into account said opinions and suggestions (Art. 156), but not to comply with them. In contrast to this looseness of Labor Law's wording, the following article expressly states that the length of employees' absence from work for temporary prevention to work, pregnancy, childbirth, child care and special child care (if a child with developmental difficulties is in question) must not be taken as a criterion for determining the employees' surplus. This is an effective protection of certain specially endangered employees' categories, but only of them.

An employee being a surplus in Labor Law's sense is entitled to receive the compensation conformed to general act and work contract before the latter is renounced (Art. 157). This right has had a greater practical importance for employees than all measures the Serbian state takes to retard a rise of unemployment. This is so because it is accepted both by employees and employers as a kind of just price employer has to pay for a free disposal of labor force in his/her company. Main class conflicts in transitional Serbia are taking place over the amount of this generally accepted compensation rather than over uncertain and unprotected wage. This is recognized even by Labor Law determining its minimum amount: it cannot be lower than a sum of yearly wages' thirds for the first 10 years of employee's work plus the sum of yearly wages' quarters for all years over that. Preciseness and sophistication of this recently adopted legal provision is due to legislator's attempt to eliminate the main causes of conflicts and workers' dissatisfaction operating in past stages of privatization process. This is the hardest core of Serbian Labor Law's transitional and provisory capacity. There is no transition to a normal market economy until a compensation for dismissal has an overwhelming place in desires of employees and concerns of employers.

Non-discrimination principle in Serbian Labor Law

One of the attempts to modernize Serbian Labor Law is done with introducing and elaborating the non-discrimination principle. This principle is formulated in Art. 18 in the following manner: the direct and indirect discrimination of persons seeking employment, as well as employees, in relation to their sex, birth, language, race, complexion, age, pregnancy, health status or disability, ethnic affiliation, faith, marriage status, family commitments, sexual orien-

tation, political or other conviction, social origin, possession of movable or immovable property, membership in political organizations or trade unions and any other personal property is prohibited. The citing of prohibited reasons for discrimination is not an exhaustive one; discrimination in relation to any conceivable personal characteristic, even if it is not expressly mentioned in Art. 18, is prohibited by Labor Law. Then what is use of this numbering? The legislator has pointed to the most characteristic, frequent or socially dangerous reasons for discriminatory behavior. Nor all mentioned reasons have an equal weight in social reality: ethnic affiliation and reasons related to it (language, faith, the racial attributes), sex and reasons related to it (pregnancy, family commitments), disability and sexual determination, are far more important reasons for discrimination than other mentioned ones because they reflect the rooted prejudices and stereotypes towards parts of population defined by them – members of national, religious or sexual minorities, as well as women in a patriarchal cultural pattern. There are two groups of persons enjoying the protection of non-discrimination principle in Serbian Labor Law: the employees and persons seeking employment. This is the only case when persons who are neither employers nor employees make their appearance in Labor Law as the holders of certain rights. This matter, strictly speaking, belongs to Employment Act, and it is mentioned there because the employees and persons seeking employment are exposed to discriminatory measures of employers on the same unacceptable foundations.

An even more general and comprehensive definition of discrimination and discriminatory acts is found in 2009 Law Prohibiting Discrimination. It is any unjustified making a difference or unequal acting or failing to act (exclusion, restriction or giving a preference) regarding persons and groups, as well as their families' members and other persons intimate to them, in open or concealed way, founded in a race, complexion, ancestors, nationality, ethnic affiliation or ethnic origin, language, religious or political convictions, sex, gender identity, sexual orientation, possession of movable or immovable property or income level, birth, genetic peculiarities, health status disability, marriage and family status, fact of his/her condemnation, age, appearance, membership in political, trade union and other organizations and other real or supposed personal characteristics (Art 2). It is interesting to compare both lists of possible foundations for discrimination, since there is no exact correspondence between them although they are equally non-exhaustive. The list in the Law Prohibiting Discrimination is undoubtedly a more modern as well as a more recent one; it incorporates foundations related to new developments in bio-medical sciences

like genetic peculiarities, but there is no guarantee that this kind of elaborated casuistic is sensible in an evidently endless, non-exhaustive numbering. It is remarkable that this Law provides more foundations for discrimination relating to sexual life than the older legal texts did. This led to criticism and resistance of the more conservative part of Serbian public opinion feeling that the traditional family values are in jeopardy without really improving the sexual minorities' social position and legal protection. That a sexual (or any other) minority is expressly mentioned in an open, non-exhaustive listing of possible discrimination victims is of less relevance than their effective legal protection. The legal texts are not the most suitable means for raising consciousness and changing attitudes campaigns; legislative acts have no educative but protective social function. It is noteworthy that the list in question has failed to mention the pregnancy as a foundation for discriminatory acts. This failing is due to the fact that the positive social attitudes towards pregnancy and pregnant women tend to prevail in a nation facing a demographic decline. That is why a pregnant woman is not likely to be insulted, degraded or maltreated in public places. In contrast to this, a pregnant employee or pregnant woman seeking employment has against herself an employer's rational economic interest to cut down his/her costs by her dismissal or escaping to give her a job. In this respect a labor market condition cannot be identical with an entire social climate.

As already noted, there are two distinct forms of discrimination – a direct and indirect one. Direct discrimination is every act caused by just cited foundations of discriminatory behavior by which an employee as well as a person seeking employment is put into a less favorable position than other persons in a similar situation (Art 19). If certain seemingly neutral provision (or act) on the part of an employer practically put or might put an employee as well as a person seeking employment into a less favorable position than other persons in a similar situation, there is an indirect discrimination. Both forms are expressly prohibited by Serbian Labor Law. Basically same definitions exist in the Law Prohibiting Discrimination – Arts. 6 and 7.

The dividing line between permissible and unallowable act of an employer lies in the act's purpose. If employer employs a person with better qualifications for a given job or promotes an employee with higher working results, there is no discrimination even if the chosen or promoted persons do not belong to any group personal properties which might be a foundation for discrimination. In this case employer follows his/her own legally recognized and protected economic interest. However, when an employer chooses or promotes one not for one's working results and expected profit but for any personal property, he/she

abuses the work contract for a purpose not pertaining to it and makes a discrimination entering into the scope of Labor Law. In order to point out more strongly the difference between discriminatory acts and those being not so, the Serbian legislator expressly states that the exclusion or preferring employees for doing a job having features related to some of the foundations for discrimination specified in Art 18, but at the same time being a real and decisive condition for doing a job, and if intended purpose of job is justified, has not to be considered as discrimination (Art 22). This is unambiguously clear in theory, but it is hard to distinguish and prove employer's real intentions in a lawsuit. Whenever an employer acts disregarding his/her economic interest in the matter relating work contract, his/her behavior is subject to doubt for discriminatory conduct. Employer can display his/her devotion to non-profit ends only beyond work contract and labor market, beyond an economic sphere.

Law Prohibiting Discrimination similarly defines discriminatory behavior in labor sphere as any violation of equal opportunities for entering the work or enjoying all rights arising out of work under equal conditions (Art. 16). These rights, as Law explicitly states, includes:

- right to be employed (right to work in Law's terms);
- right to a free choice of profession;
- right to advance in a career;
- right to acquire added professional qualifications;
- right to professional rehabilitation;
- right to an equal reward for equally worth work;
- right to just and satisfying work conditions;
- right to absence from work;
- right to form a trade union and to join it, as well as
- right to protection from unemployment.

The principle of equal opportunities must be observed in using every of these rights. This is a more detailed set of particular rights being expressly ordered to be under a non-discrimination regime than one contained in Labor Law. Recent Serbian legal texts are more devoted to the strict respect for an entire body of human rights integral part of which is a non-discrimination principle.

In addition, the provisions of laws, general acts, or work contracts securing a special protection and support for certain groups of employees, particularly provisions protecting persons with disabilities, women during a childbirth absence and absence for childcare, as well as provisions containing special rights and benefits for parents and persons equaled with them, are not discriminato-

ry ones. Shortly speaking, it is not only permissible but desirable to make a positive discrimination of certain unprivileged social group members which are likely to be victims of discriminatory acts. Analogous provisions are also found in the Law Prohibiting Discrimination.

Discrimination in terms of Labor Law can make its appearance in any point of an employee's career. Consequently, discriminatory acts are prohibited especially if they are related to:

4) the employment conditions and selection of candidates for doing certain job;
5) work conditions and all rights arising from work;
6) education, making better qualifications and perfection in expertise;
7) promoting the professional career, as well as to
8) rescission of work contract (Art 20).

The provisions of work contract determining discrimination for any of foundations contained in Labor Law are null and void. Professional and sexual harassing is also prohibited. Professional harassing in terms of Labor Law is any undesirable behavior, due to any of foundations contained in Art 18. of Labor Law, having an aim to injure the dignity of a person seeking employment as well as an employee, and acts causing a fear or creating an inimical, degrading and offensive work environment (Art 21). Sexual harassing is similarly any verbal, wordless or physical behavior having an aim to injure the dignity of a person seeking employment as well as an employee in the sphere of sexual life, or any action causing fear or creating inimical, degrading and offensive work environment. There are two controversial points in these definitions. Firstly, it is a too little distinction separating the concept of harassing at work from sexual harassing at work: the latter is evidently a special case of the former, but in legal text these are distinct, parallel offences with largely coinciding definitions. That is a matter of clumsy legal technique. A more serious problem goes into essence. If the harassing – either common or sexual – is to be defined as an unwanted behavior, an act contrary to the victim's will, it implies that materially identical act with victim's consent would be permissible. This interpretation is of course a too extensive one, but the language of cited definitions seems supporting it.

Any discriminatory act entitles to require indemnification for the damage suffered – by employees or persons seeking employment. This can be a powerful weapon against a discriminating employer, unless the ensuing lawsuit is too long, costly and with an uncertain outcome.

A distinctively widespread form of discrimination is founded on the present or future family condition. The employers prefer to employ unmarried women, or at least women having no children and ready to commit themselves in having no children in a foreseeable future, rather than women with children.

The women seeking employment are openly asked if they have or intend to have an issue. Such behavior is in perfect harmony with employer's economic interests and his/her position in labor market, but it is quite opposite to the needs of an ageing society and to measures taken by a state facing demographical decline. Serbia has for years endeavored to find and apply a set of stimuli to counter the unfavorable demographic trends, particularly in rural and peripheral regions. This is a need rooted in reality, quite independently from right-wing lamentations over the fate of an extinguishing nation. But the level of Serbian labor market's regulation allows few active steps to be taken in preventing the employers' discriminatory acts towards women having or intending to have children. Thus, Labor Law provides that an employer cannot require from persons seeking employment the information on their marriage or family status as well as on their family planning (Art. 26). He/she cannot also make an insight into documents and other evidence having no direct importance for doing a job as a condition for entering it. For an actual situation in labor market it is very instructing that Labor Law explicitly states that an employer cannot condition employment of a woman with her submitting to a pregnancy test, except if she is to be employed in jobs being a substantial risk for woman's and child's health confirmed by competent health service body.

Conclusion

This article by no means pretends at exhaustiveness. It is not a general or practical review of Serbian Labor Law, however desiring and needed such review is for any foreign investor in Serbian economy. Task its author put before himself is simultaneously a more restricted and more profound one: to indicate main points in which Serbian Labor Law displays its transitional nature. This is neither mere exposition of legal provisions concomitant with suitable explanations of its sense, nor an excusing confession that a reality is more powerful from any law. Is this account overcritical? Perhaps, but I know no easy way to overcome or bypass the uncomfortable things related to transition, such as uncertain position in labor market and an ever increasing gap between haves and have-nots. This condition leaves an ample space for acting to the real Right and the real Left; Serbia lacks a well-regulated labor market with rules peremptory for all actors in it, but also a more efficient and practicably workable protection of employees' rights. We need more competition than one now existing, and more regulation in spheres where the competition is excluded by a social consensus. The mentioned urgent requirements, seemingly opposed to each other, meet in a point – rule of law. Legislative acts must be written with a frank

intention and persistent determination to be implemented. Copying or blind imitating of EU standards is helpful as little as a headstrong remaining at legal solutions from the nineties. It is time for Serbian Labor Law to be rewritten. This means a kind of a new Social Contract as an integral part of efforts in joining EU. Eagerness in achieving it must not be taken for granted. It is to be reached by patient collaboration of social partners and the State in rather narrow limits of economically possible solutions. Provisions failing to stand test of time must be altogether rejected, however they be ideologically attractive to certain political parties and/or social groups. A voice of jurisprudence must also be heard in order to eliminate the meaningless or impracticable laws.

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Ključne reči: Zakon o radu, poslodavac, zaposleni, diskriminacija