GEPLAC ACTIVITIES

Draft Labour Code of Georgia and some Basic Principles of Labour Law in Continental European Countries

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This introduction focuses on some basic principles that characterise employment contracts and employment relations reflected in the general and individual parts of the draft Labour Code. There is also a short historical background concerning the draft and some of the drafting working group's deliberations.

1. Regulation of Employment Relations in the Continental European Countries

Continental European countries have chosen different ways to regulate employment relations. For example:
Articles 2060-2135 of Book 5 of the 1942 Civil Code of Italy *(Codice civile, Cc)* contain general provisions regulating labour law;

Title Ten (in effect since 1972) of Book 5 on the Law of Obligations *(Obligationenrecht, OR)* of the 1911 Swiss Civil Code regulates contractual labour law;

Title Ten (in effect since 1997) of Book 3 of the 1992 New Dutch Civil code *(Nieuw Nederlands Burgerlijk Wetboek, NBW)* provides for exhaustive regulation of individual employment relations.

Civil Codes in other countries by regulating specific contractual regimes, like the service contract, cover general-abstract principles concerning labour law. While these codes include several prototypes of employment contracts in the law of obligations, special laws govern employment relations. For example:

In France, by adopting the laws on trade unions (*liberté d'association professionelle*) in 1884 and labour protection in 1898 the regulation of employment relations by special legislation has been initiated. Since 1910 the rules regulating employment relations are gathered in the Labour Code *(Code du Travail, CT)*. However, there are special laws regulating certain employment relations as well;

Spain adopted a special law *(Estatuto de los Trabajadores, ET)* in 1980 that separated labour law from the scope of application of the Civil Code *(Código civil)* of 1889 and regulated it exhaustively;

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Post-soviet countries have kept the tradition established within soviet legal space and thus new labour codes were adopted in Azerbaijan, Russia, Kazakhstan and other states.

One contrasting country is Germany. All efforts to adopt a labour code or a single law regulating the contractual labour relations (*Arbeitsvertragsgesetz*) have failed. Instead, the more general rules on service contracts of § 611 *et seq*. of the Civil Code *(Bürgerliches Gesetzbuch, BGB*), special laws and legal practice regulate employment relations.

2. Legislative Framework Existing in Georgia

Employment relations in Georgia are regulated by the old soviet Labour Code of 1 October 1973. However, fundamental changes were made to it, mainly, by Law of 12 November 1997 on Changes and Amendments to the Georgian Labour Code. There are also special laws that provide the regulations for some specific employment relations, such as Laws on Trade Unions, on Collective Bargaining and on the Rule of Settlement of Collective Labour Dispute.

The Book on labour law was not incorporated into the Civil Code of 1997 notwithstanding the views expressed by some scholars. Thus, the issue of adopting a new law or code to regulate employment relations remains pressing. Such a code would establish modern rules applicable under market economy conditions.

The draft Labour Code prepared by a working group established at the Ministry of Labour, Healthcare and Social Affairs (working group) is the attempt to do such.

3. GEPLAC Participation in the Elaboration of the Draft Labour Code

Based on a letter No.01/05-243 of 12 April 2001 from the Ministry of Labour, Health and Social Affairs and an application No.8-09/515 of 28 May 2001 of the Ministry of Foreign Affairs, rendering of advice in the field of labour law was envisaged in the work plan of Georgian-European Policy and Legal Advice Centre (GEPLAC). Specifically, GEPLAC analysed the draft Labour Code, prepared by the working group with a view to its compatibility with EU legislation.

On 12 October 2001 the Ministry of Labour, Health and Social Affairs and GEPLAC held a joint seminar on the Draft Georgian Labour Code. Some of the results of the discussion are reflected in the draft code that is now available for public discussion.

4. Structure of Individual Part (Individual Employment Relations)

Traditionally "general provisions" precede the regulation of individual employment relations. Such provisions specify the scope of application of the code and the general basics of employment relations.

For individual employment relations a system was chosen that, following the principles of the system of general-abstract concepts sequentially regulate the employment relations from their origination until their termination. The authors of the draft rejected the disorderly regulation that characterized the soviet system when, for example, the termination of an employment contract preceded the provisions on working time and rest period, as well as remuneration for work.

Given that the labour rights and duties between an employer and employee originate with a conclusion of employment contract (in exceptional cases at the stage of its preparation), the rights and duties of the parties originating during pre-contractual relations and those arising after the conclusion of an employment contract were sequentially reflected in the structure of the code.

There are exceptions in terms of rights and freedoms guaranteed by the Constitution such as freedom of labour, freedom of association and right to strike (Articles 30, 26 and 33 of the Georgian Constitution). They are reflected in the general provisions of the code together with other rights and duties of the parties particularly characterising the essence of employment relation that are further concretised and explored in separate chapters.

5. Scope of Application

The legislations of continental European countries do not provide a specific definition of the scope of normative acts regulating labour law. However, when defining the scope of application of the respective normative act, account should be taken of the differentiating characteristics that generally distinguish the employment relations from other relations in the law of obligations. The regulation of employment relations by a separate law or code is due to their specific character, which distinguishes them from relations regulated under a civil code. Consequently, a definition of an employment contract (e.g. Article 319 OR) or of an employee in any country should be considered as a specificity of labour law in general and thus of the scope of its regulatory normative acts (according to a group of persons).

The authors of the draft Labour Code chose a similar way. Thus, Article 1 of the draft contains a reference to employment relations as originating on the basis of an employment contract (Article 2) and separation of which from other contractual relations is achieved through the concept of an employer and especially an employee that are central for labour law (Article 4).

Article 1 defines the place of the labour code in the regulation of employment relations. Moreover, it was found reasonable to underline the principle set forth by Article 2 II of the Civil Code that special laws take precedence over rather general laws (no post-soviet legal system has done so). Thus, relations "that are not otherwise regulated by the law regulating special legal relations or by international treaty of Georgia" shall fall within the scope of the Labour Code. As for the "issues related to employment relations not regulated by this Code and other special legislation, rules of the Civil Code shall be applicable".

6. Sources of Labour Law

In the legal systems of continental European Countries it is not considered appropriate to regulate repeatedly the hierarchy of normative acts in individual legal acts. As a rule, this happens in the constitution. In Georgia, apart from the Constitution, a special law on Normative Acts addresses this issue. Although the authors of the draft did not consider it reasonable to make such a list, they partly responded to established tradition in Georgia and presented a list of legal norms applicable to employment relations in a way that acquires additional legal meaning. It contains a reference to additional source of labour law such as collective agreement (Article 2.2) widespread in continental European countries, which is similar e.g. to Article 3.1 ET.

7. Employment Contract as a Basis for Employment Relations

An employment contract is the basis of employment relations. It is a special form of contract under the law of obligations. Its peculiarity lies in the legal relation between the parties to a contract, because the principle of equality of parties, which is fundamental to private law, undergoes certain modifications from the moment of the conclusion of a contract. Namely, an employee is under the impact of an employer's will and depends on the latter's instructions and working conditions set by him.

According to the definition in French law, an employment contract differs from a contract under law of obligations as an employee assumes an obligation to personally perform work in a subordinated position (*lien de subordination*). This peculiarity (subordinated position) involves an employee's obligation to follow the employer's instructions and thus perform paid work in working conditions set by the latter (L.121-1 etseq. CT). This definition is dominant in continental European countries (e.g. Article 1.1 ET, Article 2094 Cc, in Germany: *Schaub, Arbeitsrechtshandbuch, §8, RdNr. 1 et seq.; Hueck/Nipperdey, Lehrbuch des Arbeitsrechts, §9 II*).

The employee, as a less protected party to a contract, is protected by labour law, which sets minimum standards for his protection. Modification of these standards shall be acceptable only for the benefit of an employee (e.g. Article 3.1 ET, Article 6 of Labour Code in force).

The authors of the draft shared this opinion and proceeding from its significance found reasonable to make appropriate reference directly in general provisions (Article 2.3).

8. Freedom to Enter into a Contract

Usually, all freedoms fundamental in private legal relations are maintained in employment relations. Parties conclude a contract on the basis of free expression of will (declaration of intention). Unlike soviet law, neither party can be forced to conclude a contract. However, the requirement to prohibit any kind of discrimination, deriving directly from the constitution (principle of equality) should be taken into account. The general provisions (Article 5) as well as provisions regulating pre-contractual relations (e.g. Article 19) set out the principles of non-discrimination.

However, under the labour law of continental European countries freedom of an employer to enter into a contract in selection of employees can be restricted in certain cases. In France, for example, it is obligatory to employ a handicapped person in a company with more than 20 employees. The authors of the draft considered it inexpedient at this stage to set any exception. Restriction of freedom to enter into a contract is acceptable only in exceptional cases and should be defined by a special law.

9. Freedom to Shape Conditions of Contract

The conditions of a contract agreed upon by the parties are defined to their point of view and only minimum protection standards stipulated by a law or collective agreement is taken into account. Moreover, any restriction of freedom to shape the conditions of a contract under law or, for instance, to determine the conditions that a contract should necessarily contain, should be based upon the interests of the parties, especially the employee (Articles 24-33).

10. Restriction of Freedom of (Contract) Form

The principle of freedom of (contract) form applicable in the law of obligations, as a rule, applies in the labour law of continental European countries. However, there are some restrictions. For example, the presumption of a conclusion of contract with unlimited term in France and Spain (e.g. Spanish *Sentencia del Tribunal Supremo, Aranzadi, Repertorio de Jurisprudencia, 1989, 4547*) leads to the necessity of a written form for fixed term and part-time contracts. Under Spanish law, a written contract is obligatory for training, working from home and for probation periods. In the Nederlands, besides notifying an employee in writing with information essential for employment relations as stipulated by Article 7:655 NBW, this also applies to an agreement to forfeit (Article 7:650 NBW) and

prohibit competition (Article 7:653 NBW) in the contract. In Italy Article 2096 Cc states that probationary periods should be subject to a written contract.

The Georgian draft, like labour codes of other post-soviet countries, states that an employment contract must be concluded in written form. However, Article 28.2 lays down a significant principle that contracts without a written form shall be deemed as concluded, "if an employee has actually started work with the employer's consent".

The language of a contract deserves attention. In France, the requirement of Article L.121-1 CT (as of 4 August 1994) on the conclusion of a contract in the French language was considered as unconstitutional under the Decision of the Constitutional Court of France *(Conseil Constitutionnel, 29.07.94-345 DC)*. The draft provides for a conclusion of a contract in the state language, but if a party to the contract does not know the state language, it "shall be concluded also in a language acceptable for the latter and both copies shall have equal legal force" (Article 28.1).

Deficiency (grounds for nullity) at the time of concluding an employment contract, unlike the general principle applicable in civil law, does not make the contract void from the beginning i.e. upon its conclusion. It should be considered void only when the grounds are revealed. Moreover, the employee does not lose the right to require remuneration for the work performed (e.g. Article 320.3 OR, Article 9.2 ET).

11. Fixed Term Contracts

As a rule, employment contracts are concluded without time limits. A fixed term contract is possible only in special cases exhaustively stipulated by the law. This is provided in France by Articles L 122-1-122-3-17 CT, in Spain by Article 15 ET and in Germany by the relevant list in §14 of the Law on Part-Time and Fixed Term Contracts *(Teilzeit- und Befristungsgesetz)* enacted in 2001.

However, the legislation of continental European countries provides for quite a broad spectre of possibility of conclusion of fixed term contracts. Some countries allow concluding such contracts in order to replace other employees (in the case of military service or maternity leave), to fulfil temporary tasks or due to extraordinary situations in the market. In some countries, even without any additional grounds, conclusion of a fixed term contract is possible if it is carried out for the purpose of supporting the solution of employment-related problem.

Article 34 of the draft aims at incorporation of this very principle. An employment contract shall be concluded with unlimited term, it can be concluded with a fixed term only in cases exhaustively regulated by law.

12. Employee's Main Obligations

An employee's main obligation is to perform the job diligently, in a subordinated position (Article 3.1). This obligation applies equally to all types of employment relations. The fundamental element of the concept of an employee's "subordinated position" *(lien de subordination, dipendenze, Unterodnungsverhältnis)* conditions the content of employment relations and distinguishes it from other relations under the law of obligations. In addition, an employee should perform the work himself (personally) and display a loyal attitude towards his employer.

An employee must perform work diligently (e.g. Article 321.a.1 OR, Article 2104.1 Cc), demonstrate professional customs and skills that are considered by the parties as an essential for the performance of work (Article 40). When concluding a contract an employer bases his expression of will upon these circumstances. In Spain, the employee is obliged to work "diligently" *(diligencia)* and even "promote increasing productivity"(Article 5 ET).

An employee shall perform the work himself (personally) (e.g. Article 320.3 OR and §613 BGB), although subject to the specificity of work, it could be performed by a third party (Article 38).

The working group did not consider the duty of loyalty (e.g. Article 321a.3 and 321a.4 OR, Article 2105 Cc) as an employee's main obligation. The fact that during performance of duties employee must be guided with the principle of loyalty – not to perform work in favour of third party (especially competitor), to keep commercial secrets and expertise (e.g. Article 321a.3 and 321a.4 OR) are important but ancillary obligations (Article 41).

13. Employer's Right to Instruct

How an employee should perform the work is basically stipulated by the application of the employer's right to instruct (e.g. *Weisungen* of Article 321d.1 OR, *Direzione* of Article 2094 Cc also in Germany, *Weisungsrecht, BAG NJW 1996, 1770*). An employee's subordinated position obliges him to obey instructions and special rules applicable within the organisation.

In addition, he should have an opportunity to get familiar with all the requirements applicable within the organisation including ones set by collective agreement already before the conclusion of the contract. In France since 1982, an organisation employing more than 20 employees must have a special charter i.e. internal rules laying down hygiene, safety and disciplinary rules (Article L.122-33 CT). In the Nederlands, so-called regulations *(reglementen)* apply which resemble internal labour rules regulated under soviet or post-soviet legislation. However, since 2000 an employer's right to unilater-

ally change the provisions of such internal rules (Article 7:613 NBW) has significantly been restricted.

An employee has the right to refuse performance of work or instruction when doing so breaks the law or due to safety conditions, that threatens the employee's or third parties' life or health. In such cases, an employee shall inform the employer immediately. The obligation to inform applies also to the case of an employee's conflict of interests (Article 43).

14. Employer's Main Obligations

An employer's main obligations include the obligation to provide work, remuneration and care for the employee.

14.1 Obligation to Provide Work

Subject to constitutional right "to free personal development" (Article 16 of the Constitution) and one of the key principles of contract law, *pacta sunt servanda*, an employee has the right to demand work congruent with an employment contract (in Germany so called *Beschäftigungsanspruch – Schaub, Arbeitsrechtshandbuch, , §110, RdNr. 1 et seq.)*. The right to demand work prescribed by an employment contract promotes employee's personal development and increases his/her professional skills.

Moreover, an employer's obligation to provide work to an employee directly leads to the latter's right to demand wages (first sentence of Article 8.2 and Article 8.3), because remuneration depends only on performed work. Thus, it is in the employee's interest to obtain work from an employer after performing of which he/she acquires the right to demand wages.

If the employer does not provide the employee with work, in other words in case of forced idleness caused by the employer's fault, the employee shall be paid compensation in the full amount of wages (first sentence of Article 72). An employee must offer the employer his service i.e. be ready to perform work and must not be obliged to additionally make up the period of forced idleness (also provided for e.g. by Article 324.1 OR and §615(1) BGB). Failure to fulfil the obligation to provide work does not usually raise the right to require compensation for non-performance. However some employees (e.g. stage artists) can be granted the right to demand this (in Germany: *Schaub*, *Arbeitsrechtshandbuch, §110, RdNr. 5)*.

14.2 Obligation to Remunerate

An employee's obligation to perform work countervails the employer's obligation to remunerate. The term remuneration includes wages and might also cover supplementary remuneration (Article 8).

The obligation to pay wages derives from the contract and depends only on the performance of work assumed by the employee under the employment contract. If the work is not performed, it should not be remunerated. This concerns the cases that in Germany and France are called as suspension of the validity of a contract (*Aussetzung des Vertrages, suspension du contract*).

Wages are not paid throughout the vacation, absence from work for health (exception is provided e.g. in §616 BGB) and maternity reasons, as well as due to strikes. In such cases, an employee receives compensation or social allowances. Only in cases of forced idleness, which is the result of industrial risk of the employer, the obligation to pay the wage remains unchanged (Article 72).

The amount of the wage and terms of payment shall be stipulated in the contract or collective agreement. The law provides a minimum wage that should not be less than the cost of living fixed in the country (Article 8.2).

Supplementary remuneration is also a part of remuneration. The right to demand supplementary remuneration arises when performing overtime work or for specific working conditions or in contract-stipulated other cases.

The offset of the claim to remuneration in any other claim is prohibited. In other words, the law prohibits the fulfilment of an obligation by offsetting mutual obligations (claims). In Spain, sometimes the fulfilment of an employee's claim to require remuneration takes precedence even over a mortgage or hypothecation. However, the Supreme Court of Spain (*Sentencia del Tribunal Supremo, Aranzadi, Repertorio de Jurisprudencia, 1988, 9877*) found the requirement of Article 32 ET as excessive ("*superprivilegio*").

14.3 Duty of Care

Employer's obligation of caring for employees means the protection of an employee's health, safety and dignity, and to a certain extent property. Their non-fulfilment causes the obligation to indemnify damage for non-fulfilment or not proper fulfilment of the contract. Special labour regulations apply in cases of industrial accidents (injuries). In France, for example, there are measures for "the best reemployment of an employee" (Article L.122-32-1 CT).

15. Working Time

Performance of work is stipulated within a certain legal framework regarding daily and weekly working hours. The working day is eight hours and the working week thirty-nine (sometimes forty hours, Art. 34 II ET).

In the continental European countries there is a tendency to reduce the maximum hourly limit per week. In France, a first step to limit working time was made in 1919 by

adopting the law on 48 hours working week. The law of 13 June 1998 – that is in force from 1 January 2000 and only since 1 January 2002 for small enterprises – has set 35 hours-long week.

The hourly amount of working week may be modified on the basis of collective agreement or employment contract (the rule of summed calculation of working time). However it can be done by retaining the hourly amount relevant for the respective period (Article 55 of the Draft).

Overtime is permitted within certain limits. However, after a transitional period as set by the EU Directive 2000/34/EC, the working week including overtime should not exceed 48 hours (Article 56 of the Draft). In such cases, overtime should be remunerated by one-half. Work performed on rest days or holidays should be double paid or can be made up in hours off (Article 69). Night work shall be remunerated in the amount of 20% of the hourly rate (Article 70).

Special rules apply for minors' labour. For instance, night work is prohibited (this restriction is not applied to women due to a prohibition of gender-based discrimination under EU directives).

16. Annual Leave

In France and Spain, annual leave consists of 30 days. This is a compulsory minimum leave of 5 weeks in the case of 6 working days per week (Article L 221-2 CT and Article 38 ET). In the Nederlands, the minimum vacation is calculated on the basis of hours worked per week and makes up four times the average worked hours i.e. four weeks. Moreover, an employee must be able to rest for two successive weeks between 30 April to 1 October (Articles 7:634 and 7:638.3 NBW).

Authors of the draft propose four weeks period for the minimum vacation. To protect each employee with equal minimum standards account should be taken of the type of working week. An employee working for five days a week (39 hours during five days) must rest 20 days and one working for six days a week (39 hours for six days) must rest 24 days in order to insure equal amount of minimum annual leave for all – four calendar weeks i.e. 156 hours (39x4).

17. Employee's Liability

If a contract is violated an employee is liable under the general rules stipulated by the Civil Code. His liability towards his employer for damages arising from the process of work is limited to damage caused intentionally or by gross negligence (French *Cour de Cassation, Chambre sociale, 27.11.1958, D 1959 J 20*). However, Article 321e.1 OR provides liability for any kind of negligence.

18. Termination by Notice as a Ground to Terminate an Employment Contract

Expression of will by one of the parties to the contract serves as a ground for termination by notice of an employment contract. However, an employer must indicate reasons for termination of a contract. There are different rules for ordinary dissolution (by observing the period of notice, e.g. §§620 II, 622 BGB) (Article 118) and dissolution under special rules (disregarding period of notice, e.g. §626 BGB) (Article 122).

Termination by notice by the employer must be stated due to industrial necessity, reasons deriving from an employee's person or behaviour (breaching the contract).

Moreover, some specific requirements apply to termination by notice. It must be reasonable i.e. it must be impossible to avoid this measure by other means with less severe consequences for the employee (Article 119). If several employees are made redundant due to industrial necessity, in addition to employees' skills, an employer shall take due account of social circumstances (Article 120, also provided by §1 of the German *Kündigungsschutzgesetz*).

The dissolution of a contract without notice depends on a particular circumstance due to which further employment becomes unreasonable or even impossible (also provided by §626 BGB).