

**UNITED NATIONS**

**RESEARCH**

on

**The implementation by Armenian courts  
of the “Right to work and of the right to the enjoyment of just and  
favourable conditions of work” secured by the UN  
*International Covenant on Economic, Social and Cultural Rights***

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## ABBREVIATIONS

Covenant	<i>UN International Covenant on Economic, Social and Cultural Rights</i>
Declaration	<i>UN Universal Declaration of Human Rights</i>
Committee	<i>UN Committee on Economic, Social and Cultural Rights</i>
RoA LC	<i>Labour Code of the Republic of Armenia</i>

## PREFACE

### ***a. The role (authority) of the Covenant in the law-enforcement field***

The Republic of Armenia (RoA) acceded to the Covenant in 1993. Under Article 6 of the RoA Constitution, international treaties are a compound part of the RoA legal system. Nevertheless, the research of judicial Acts and of the law-enforcement Acts of the executive (State Labour Inspectorate, etc.) has found out that no reference has been made to the Covenant.

Inadequate perception of the essence of the positive obligations assumed by the Republic of Armenia under international treaties is not a rare occurrence. Therefore, proper fulfillment of the assumed obligations is predicated on the adoption of clear and efficient procedures. In contrast to the UN *International Covenant on Civil and Political Rights*, whereby the States Parties assume an obligation to respect and secure without any reservation the rights enunciated in the said Covenant, Article 2 of the *International Covenant on Economic, Social and Cultural Rights* establishes that the States Parties shall undertake to take steps, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures. To facilitate an adequate perception of the essence of the obligations taken on under the Covenant the Committee adopted the General Comment No. 3<sup>1</sup>. This Comment set forth that States Parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances<sup>2</sup>. In addition to legislation, the Committee attributes importance also to the provision of efficient judicial remedies<sup>3</sup>. The Committee urges the States Parties to fulfill the obligations assumed under the Covenant since as per Article 2 the States Parties take on an obligation to achieve progressively the full realization of the rights recognized in the Covenant.

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<sup>1</sup> The nature of States Parties obligations (Art. 2, par.1) : . 14/12/90, CESCR General Comment 3, [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument)

<sup>2</sup> Ibid., para. 4.

<sup>3</sup> Ibid., para. 5.

Thus, under the Covenant the States Parties have both the “obligation of the appropriate means” and “the obligation of result.” It means that a State Party’s obligation vis-à-vis the international public is not limited to taking appropriate measures but that it also entails the necessity of achieving real results. The States have to substantiate that the steps that they take at the moment are indeed the appropriate means and that all measures taken by the Government aim at achieving progressively the full realization in the RoA territory of the rights recognized in the Covenant.

The examination of over 100 judicial Acts by the experts in the course of this study has shown that not a single judge or defense attorney has evoked the Covenant. What is more, one of the experts acted in a certain case in the capacity of *amicus curiae*, which is widely used by civil society in the international practice, and requested the RoA Court of Cassation to accept a complaint for review and to clarify several disputable issues highlighted therein (February 2008). The expert pointed out the RoA courts at different instances apply in a different manner the law as regards the recognition as good of the reason for missing a 1-month deadline set for reinstating the person in his or her position held in employment, the legal consequences of the expiry of a 5-year term established for fixed-term labour contracts concluded with the same employer, etc. The Court of Cassation refused to accept the complaint and refrained from addressing any of the proposed issues. Intervention by a UN expert who made an analysis of compliance with the Covenant failed to convince the judges that the case merits review by the Court of Cassation with a view of securing a uniform application of law.

Meetings held with representatives of non-governmental organizations (*Sakharov* Armenian Center for Human Rights, Against Arbitrary Enforcement of Law and Vanadzor Office of Helsinki Citizens’ Assembly), State Labour Inspectorate and Confederation of Trade Unions of Armenia confirmed that the Covenant in question had not been invoked in their official letters and court documents. When asked by the experts if the omission of the Covenant was a result of indifference or a lack of knowledge, the human rights activists replied that courts, as a rule, “do not take seriously” those international legal instruments, which are not clearly formulated and which do not have effective enforcement procedures and that the only “effective” international legal instrument in the Republic of Armenia at this moment is *Convention for the Protection of*

*Human Rights and Fundamental Freedoms [European Convention on Human Rights]*. In their view a plausible reason is that the application of the Convention is envisioned by domestic legislation and that failure to apply it or to apply it adequately poses an immediate threat of adverse consequences. It is noteworthy that the RoA Judicial Department that deals with the analysis of the judicial practice has not conducted a single study on the application of individual international legal instruments so far.

**b. *The subject matter of the analysis***

Even though the public at large is not well aware of the **Covenant** and the law-enforcement authorities do not invoke it, nevertheless, a number of its norms are directly applicable and it sets forth a number of concrete and positive obligations for the States Parties. This fact provides an opportunity to examine the compliance with and the application of the said norms by the RoA judicial bodies.

Within the framework of this study the RoA courts' protection of the right to work and the right to the enjoyment of just and favourable conditions of work enunciated by the Covenant will be analyzed. In particular, gaps in the legislation and the most frequently occurring violations will be identified and the ways to eliminate or fill them out will be suggested.

Under Article 6 of the Covenant, the States Parties recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. It is noteworthy that the RoA Labour Code contains provisions dealing both with the right to work and with the freedom. Thus, the list of the labour legislation principles in Article 3 of the RoA Labour Code includes the freedom of work and the right to work as its component. From the perspective of the given international legal context this provision may give rise to ambiguity in perception since one principle incorporates not separate elements but independent concepts of equal value<sup>4</sup>. There is a certain difference between Article 6 of the Covenant and the mentioned part of Article 3 of the RoA Labour Code. While under Article 6 of the Covenant the right to work includes the right of everyone to the opportunity to gain his living by work

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<sup>4</sup> As per Article 3, para. 1 of the RoA Labor Code, the principles of the labor legislation are:

1. the freedom of work, including the right to work which everyone freely chooses or accepts, and the right to make use of one's own labor abilities (working skills) and to choose profession and type of occupation.

which he freely chooses or accepts, Article 3 of the RoA Labour Code in general terms provides for the freedom of work as a principle, which includes the right to work which everyone freely chooses or accepts, and the right to make use of one's own labour abilities (working skills) and to choose profession and type of occupation. The existing wording of the Labour Code does not include the right to earn a living into the right to work. Such neglect brings forth certain legal consequences since, while adjudicating labour disputes, the courts in some cases are guided by the labour legislation principles. For instance, the legislation has not established a norm to determine the size of remuneration of persons working without a labour contract, thereby reserving the right to the court to apply the labour legislation principles for the settlement of labour disputes, in particular a decision to grant the minimum wages or the wages usually paid for similar work or the maximum wages paid in the market for similar work or another kind of remuneration.

Under Article 7 of the Covenant, the States Parties recognize the right of everyone to the enjoyment of just and favourable conditions of work<sup>5</sup>. Even though the Covenant does not explicate the concept of "just and favourable conditions of work", nevertheless it indicates certain manifestations of such conditions. In particular, the States have to ensure safe and healthy conditions of work, rest, leisure and reasonable limitation of working hours and periodic holidays with pay, equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence and to secure remuneration which provides all workers, as a minimum, with fair wages and a decent living for themselves and their families in accordance with the provisions of the present Covenant.

With a view to defining the right to just and favourable conditions of work and to analyzing its implementation in domestic judicial practice one has first of all to understand what those conditions are and how their being just and favourable is determined. The international law does not give a clear definition of "just and favourable conditions of work" probably owing to the consideration of ensuring flexibility, which is

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<sup>5</sup> In a theoretical discourse, just conditions of work are defined as such minimum conditions, which, according to the public opinion, the person has gained through the status of his work. In their turn, favorable conditions of work can be defined as a complex of the minimum possible conditions meant to create an environment comfortable for existence and to secure full-fledged development and recognition for him and his family members in a given society.

necessary for accommodation of the specifics of the implementation of that provision in the context of domestic legislations. The Covenant invokes certain components of the human right to just and favourable conditions of work. However, that does not mean that only those components need to be preserved. Article 3 of the Labour Code, which sets forth the principles of the labour legislation, underscores in the content of the right to just conditions of work the right to safe conditions of work that meet the hygiene requirements and the right to rest<sup>6</sup>. It should be noted again that such an approach does not conflict either with the Declaration or with the Covenant since “just and favourable conditions of work” are not limited to the above ones. Furthermore, such a distinction in a theoretical discourse is accounted for only by the consideration of application advisability, even though the issues of remuneration for work are primarily mentioned in the context of just conditions of work, whereas issues related to living standards, or in the terminology of the Covenant, to decent living are addressed in the context of favourable conditions of work<sup>7</sup>.

In our view, the practical significance of the distinction between the just and the favourable conditions of work is important since in the event of the violation of just conditions of work the court guided only by the national legislation will point to the violation of Article 3 of the Labour Code (which is at the same time a violation of Article 7 of the Covenant) and in the event of the review of the issue of favourable conditions of work the violation of the provision of the Labour Code will not be found, even though the provision in Article 7 of the Covenant will be violated. At the same time it should be noted that favourable conditions of work are mentioned in Article 2 of the Labour Code where support to the creation of favourable conditions of work is stated as a goal of the labour legislation. However, as the practice has shown, while arbitrating between the parties to a labour dispute, the court does not pay special attention to the goals of the

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<sup>6</sup> The principles of the labor legislation are:

4. the securing the right of everyone to just conditions of work (including safe conditions of work that meet the hygiene requirements and the right to rest).

<sup>7</sup> In our view, just conditions of work should first of all incorporate remuneration of work, which should be, *inter alia*, fair, and various aspects of the prohibition of discrimination, in particular the requirement of equal remuneration, without discrimination, for work of equal value without discrimination of any kind (including gender-based discrimination) and the requirement of equal opportunity for everyone to be promoted in his employment, subject to no considerations other than those of seniority and competence. Therefore, safe and healthy working conditions reasonable limitation of working hours and the right to rest should respectively be categorized among favorable conditions of work.



legislation. Courts can directly invoke Article 7 of the Covenant and, if necessary, also interpret the concept of “just and favourable conditions of work” through an international legal or comparative analysis and apply the Covenant.

Taking into account what has been said above, a primary focus of the research and analysis within the framework of this study from the perspective of the international legal instrument in question will be on:

1. the protection of just and favourable conditions of work, and
2. the protection of the right to work.

### ***c. Methodology***

The following documents and materials have been examined within the framework of this study:

- study of aspects of the Covenant's application and analysis of international standards and criteria (General comments No. 3 and No. 18 of the UN Committee on Economic, Social and Cultural Rights);
- study of mass media;
- examination of the practice (and case law) of the Court of Cassation and of other courts;
- study of the materials provided by the State Labour Inspectorate and by the Confederation of the RoA Trade Unions;
- study of the database compiled by the staff of the Human Rights Defender (Ombudsman)<sup>8</sup>.

Special significance has been attached to the practice of the RoA Court of Cassation due to the newly constitutional status of the Court of Cassation, being the judicial policy-maker and its decisions having an impact on the law-enforcement practices of lower courts and real or potential guidance to lower courts through its Acts in terms of perception and application of international legal norms<sup>9</sup>. With a view to understanding the policy of the Court of Cassation close attention has been paid to the examination of the grounds on which the Court of Cassation had rejected complaints in labour disputes.

Another major focus in the course of this study has been on the examination of the case law of the RoA Court of Appeal for Civil Cases after the amended in 2006 RoA

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<sup>8</sup> According to the Ombudsman's annual report for 2006, the Ombudsman's Office received 2,687 petitions and complaints in February-December 2006, while in 2005 it received 2,640 complaints. The electronic database in the Ombudsman's Office is a most important source for identifying human rights violations and to get to know the entire process of the related cases.

<sup>9</sup> Besides issues of constitutional justice, the RoA Court of Cassation secures the uniform application of law (Article 92, para. 2 of the RoA Constitution). This norm that establishes a constitutional status of the RoA Court of Cassation predetermined a precedent (mandatory) legal nature and significance of the Acts of the RoA Court of Cassation. Article 15, para. 4 of the RoA Judicial Code establishes that arguments (including comments on the law) brought in a court Act of the Cassation Court in a case that has certain factual circumstances are mandatory for a court hearing a case with similar factual circumstances, except when the court in question cites cogent arguments to prove that the arguments indicated by the Court of Cassation are not applicable to given factual circumstances.

Labour Code took effect. This is accounted for by the fact that RoA Court of Cassation seldom accepts labour cases-related complaints for review; thus, the final decision of a greater part of cases is made in the Court of Appeal. The Court of Cassation takes a stance that those cases do not as a rule lead to grave consequences. For example, citing the absence of grave consequences, the Court of Cassation did not accept a complaint lodged by an employee who stated that he had worked for over 5 years without remuneration. The first instance court made it incumbent on the employer to pay a compensation of 450,000 AMD, while the Court of Appeal reduced that amount to a quarter of its original size. It is worth mentioning the provision in paragraph 1 of General Comment No. 18 on Article 6 of the Covenant saying that the right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Furthermore, considering the position as per the General Comment on the obligations under the Covenant, which particularly stresses judicial protection, it is obvious that the RoA judicial system as a separate branch of the State power, violates the Covenant's provisions and does not secure effective judicial protection. One of the reasons is low wages and salaries in the Republic of Armenia, as a result of which as a rule a small amount is charged as a fee for a statement of claim. Presumably that is what gives grounds to the RoA Court of Cassation to ignore those complaints. Such a trend reveals a necessity to make judges more knowledgeable about the specifics of the labour-related cases by means of additional training courses at the School for Judges.

A judge's conduct during the hearing of the is very important considering the fact that issues related to person's professional skills or dignity can be a subject matter of the trial. In that sense the judge's compliance with certain standards of conduct is of great significance. In particular, such standards are set in Chapter 12 of the RoA Judicial Code.

The experts attended a number of trials dealing with labour disputes as they sought to assess judge's conduct, *viz.* the extent to which the judge is delicate while arbitrating the cases involving person's dignity. In that respect it should be pointed out that while reviewing of and deciding on a case the judges' performance in terms of professionalism and of patient, dignified and polite attitude to the parties to the trial (and to other persons with whom they deal in their professional capacity) is far from adequate.

The experts examined over 100 cases of labour disputes that had been examined by the Court of Appeal. It is noteworthy that almost 100 percent of those cases were won by employers. That is the reason why with a view to studying the compliance with the provisions of the Covenant a large number of cases heard by first instance courts and won by the employees had been examined as well. Whenever the rulings handed down in those cases were appealed against in higher courts, the rulings were overturned in favor of employers and the arguments differed significantly from those presented by first instance courts. These issues should be carefully examined by the RoA Judicial Department, particularly the question of why employees win the case in a first instance court, whereas the Court of Appeal hands down a ruling in favor of employers and offers arguments that differ significantly from those put forward by first instance courts. Then, as a rule, the Court of Cassation refuses to accept those cases on the grounds that they did not lead to grave consequences; thus, those cases end up in an impasse. For example, in the aftermath of the well-known strike by “Armentel” Company employees, over a dozen employees submitted complaints to the Court of Cassation. However, only a few portion of these complaints was regarded as admissible, leading to a favourable outcome (decisions)for the employees, whereas for the other employees the rulings of the Court of Appeals remained as final.

Besides the analysis of the documents, the below-mentioned meetings were instrumental in narrowing down the focus on the cases that are noteworthy from the perspective of this study, thereby leading to the selection of the most controversial cases.

The meetings were held with:

1. staff members of the Human Rights Defender (Ombudsman) Office;
2. the opposition political party represented in the National Assembly (*Zharangutiun/Heritage* political party);
3. the human rights and non-governmental organizations (*Sakharov* Armenian Center for Human Rights, Helsinki Association, Helsinki Committee, Vanadzor Office of Helsinki Citizens’ Assembly and Against Arbitrary Enforcement of Law) that take part in trials as experts, representatives of plaintiffs/respondents or within the framework of *amicus curiae*. The selection

of the cases that constitute a subject matter of this study is to a large extent predicated on the information provided by them;

4. the Confederation of Trade Unions of Armenia and the RoA State Labour Inspectorate for the purpose of obtaining information related to the protection of the right to work and discussing the major issues of the field;
5. licensed attorneys. The most frequently occurring errors in the application of the substantive or procedural law in the labour disputes-related cases were discussed, as well as the information about the acceptance or rejection of the complaints lodged by licensed attorneys.

# **1. Protection of just and favourable conditions of work**

## **1.1 The right to fair remuneration**

Under Article 7 of the Covenant, the States Parties recognize the right of everyone to the enjoyment of just and favourable conditions of work, including remuneration which provides all workers, as a minimum, with:

a) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

b) A decent living for themselves and their families in accordance with the provisions of the present Covenant.

In contrast to the Covenant, Article 3 of the RoA Labour Code declares as a principle the securing of each worker's right to timely and full fair remuneration for work at the rate, which is not lower than the minimum wages set by the law. It is obvious that paragraph 2 of Article 7 of the Covenant, which requires "a decent living", has been transformed in the RoA domestic legislation into the right of remuneration, which is not less than the minimum wages.

The requirement of fair remuneration is quite abstract and can be affected by numerous factors, including the country's socioeconomic situation, person's subjective self-appraisal of his own knowledge, professional capabilities and qualification, etc. It seems that the person should not be paid lower wages than he deserves. However, in each individual case the decision on the minimum scope of employee's rights and on the size and fairness of wages is left to the discretion of the parties to a labour contract. The prevailing view in the international practice is that in case the parties have reached an agreement concerning certain rights and responsibilities, those could be regarded as fair. Consequently, fairness is in reality determined by the parties' consent within the framework of the contractual relations. In its turn, the State sets the minimum size of remuneration for work as a minimum guarantee for the protection of its citizens' labour and vital interests. That minimum size should essentially ensure a decent living for a worker and his family in conformity with Article 7 of the Covenant. Of course, the determination of the minimum size is left to the State's discretion. That decision is made

taking into account various factors, including an economic factor. Therefore, the incrimination of concrete States in failure to discharge the positive obligation stipulated by Article 7 of the Covenant seems unrealistic.

Summing up the description of the legislative regulation of the work remuneration issue, it should be pointed out that relevant provisions of Article 7 of the Covenant are properly reflected in the RoA legislation. Under this legislation, the worker and the employer have to sign a written contract before the worker starts to do the work and that contract has to be registered in the contracts registry. The contract has to state clearly the size and terms of remuneration, while the size of the remuneration may not be less than the minimum size set by the law. In the event the employer fails to comply with the said requirements he may be brought to administrative liability<sup>10</sup>.

Disputes concerning fairness of remuneration emerge, as a rule, when a person works without a labour contract or the labour contract that had been concluded with him does not contain a provision about the size of the wages. In such cases the court has to make a decision on the size of remuneration that the employer has to pay to the worker. Very important is the assessment of those criteria, which the court applies or has to apply when making a decision on the fairness of the terms and conditions of the contract and, first of all, of the size of the wages (salary).

Thus, the number of cases (on involuntary idle time or recovery of wages) had as their subject matter the question of what size of remuneration should be set for the worker who has already been dismissed and the size of whose wages had not been agreed with the employer (for various reasons; for example, a different procedure for remuneration is envisaged, while the contract is not concluded or the terms and conditions on remuneration are not stated in it). For instance, in April 2001 the administration of an outpatient clinic signed a one-year contract with a gastroenterologist,

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<sup>10</sup> The existence of remuneration, i.e. its inclusion in the labor contract and proper execution of the obligation to pay it are grounded in the content of the provision contained in Article 7 of the Covenant. The RoA Administrative Violations Code singled out those offenses and devoted a separate Article to each of those. In particular, administrative responsibility (imposition of a fine) emerges as a result, as per Article 169<sup>5</sup>, of failure to include the size and conditions of remuneration for work into the labor contract, or, as per Article 169<sup>8</sup>, as a result of failure on the part of the employer to comply with the procedure or timeframe set by the RoA legislation for the calculation or payment of wages (salary) or for non-payment of wages (salary) for the idle time, for which the employee is not responsible, or for setting a salary (wages) which is less than the size set by the RoA Law *On the minimum monthly salary (wages)* or for the erroneous calculation of the wages (salary) that exceeds that size.

which states that he will work half-time. However, the contract does not state the size of the salary. The employer violated Article 84 of the RoA Labour Code, *viz.* the employer failed to include into the labour contract signed between the employer and the employee the terms and conditions (the salary size) that are mandatory for a labour contract. The employer also violated the requirements of Article 3, paragraph 6, of the RoA Labour Code by failing to secure the minimum salary size for the employer. The administration terminated the contract with the gastroenterologist. The latter went to court with a claim to have the salary recovered. The first instance court regarded as proven the fact that the defendant had not secured the minimum salary size required by the RoA law on the minimum size of a salary. In other words, in 2004-December 2006 inclusive, the total salary amount of 355,634 AMD was neither calculated nor paid. The court applied in the given case the principle of calculation of a minimum salary regardless of other calculations and facts that have been invoked. In particular, with a view to determining a fair size, the court could and should take additional circumstances into account such as the statistical data published by State authorities on the work remuneration size applied in various sectors or take measures to clarify the size of the remuneration set for similar work by a given employer or by organizations engaged in similar activities. It should be noted that as per Article 178, paragraph 3, of the Labour Code, the size of worker's wages depends on the quantity and quality of work, on the results of the organization's activities and on the labour market demand for this work. Therefore, there are grounds to contend that the law requires certain differentiation between various terms of remuneration proceeding from the principle of fairness in remuneration for work and from the above-mentioned factors. Otherwise, should we accept the practice of remuneration at the minimum salary rate, the employer will not conclude a labour contract or will not state the remuneration size in it and when that comes out he will pay a fine of 50,000 AMD or 100,000 AMD (as per Article 169<sup>5</sup> of the RoA Administrative Violations Code) and will pay the minimum salary. Naturally enough, he will thus gain more than if operating in a lawful manner. Under the circumstances it is an urgent necessity to set a judicial precedent, *viz.* while compensating the person working without a labour contract or with a contract where no mention is made about the size of the salary, the decision should be made on the basis of at least an average salary usually paid for



similar work since that will ensure compliance with the principle of fair remuneration enunciated in the Covenant.

The court can proceed from the data of the RoA statistical services that publish annually the data on average salaries in various professions. It should be noted that the international practice has shown that considering the fact that the worker has been subjected by the employer to exploitation and has not been in a position to determine the salary size of his own free will, the court accepts the maximum size of the salary usually paid in the market for a similar work as a benchmark.

Courts do not take a uniform approach towards the elements of a salary (salary supplements, bonuses, etc.). What is salary composed of? Under Article 178, paragraph 3, of the Labour Code, salary incorporates basic salary and supplementary remuneration given by the employer in any manner to the employee for the work done. Article 179, paragraph 1, of the Labour Code states clearly that salary rise, salary supplements, bonuses and other incentive payments are not included into minimum salary. It seems that the legislation clearly regulates the salary elements and the salary formation procedure. It follows that the basic salary may not be less than the established minimum wages. The examination of the Acts of the Court of Appeal by the experts has revealed that the Court applied another calculation procedure in the examined cases related to this issue; in particular, ignoring the legislative ban, it included the received salary supplements into the minimum salary. As a result, the employer received a negligible compensation.

The analysis of the practice of the Court of Appeal has shown that the prevalent trend, which will be presented in greater detail below, is a lenient approach to the application of the prohibitive norms set by the labour legislation.

The RoA labour legislation draws a distinction between the concept of the size of remuneration for work and the concept of terms of remuneration for work. This distinction gives rise or may lead to certain problems in terms of a worker's fair remuneration, hence to violation of the Covenant's requirements. This issue was raised by the experts who pointed at Article 105 of the Labour Code, which provides an opportunity to make changes in the labour contract and which states that according to the general rule, the terms and conditions of the labour contract, which are established by

Article 84, paragraph 1, sub-paragraphs 1, 3 and 4, of the Labour Code, can be changed by a worker's prior consent in writing. In other words, a worker's prior consent in writing is required for transferring the worker to another location (structural unit) or position or for changing the worker's rights and responsibilities. However, the same Article 105 states that employer may change the terms of remuneration for work without employee's consent in writing only in case the terms of remuneration for work are changed by law or by a collective contract. Considering the fact that Article 84, paragraph 1 of the RoA Labour Code distinguishes between the size and the terms of remuneration for work, the said provision is interpreted as enabling the employer to change the terms of remuneration for the employee's work without the latter's consent. Of course, such an approach is not grounded in the content of the right to fair remuneration since it makes null and void any mutual agreement about remuneration for work. Therefore, courts may not give such an interpretation, whereas the legislative norm needs more precision and it should establish that employee's salary may not be changed without his consent.

Finally, while discussing the issue of salary, it is necessary to address the issue of a severance pay that is regulated by Article 129 of the Labour Code. As per that Article, in the event of the cancellation of a labour contract the employer shall provide a severance pay to the employee. Depending on the grounds for the cancellation of a labour contract, that pay can, as a rule, be equal to an average two-week's or a month's salary. In case an employee goes to court demanding that he be reinstated in his former position, it is natural that he does not mention a severance pay in his statement of claim. If the court rejects the worker's petition of getting him reinstated in his former position, in the cases that they examined the experts did not come across a single instance, where the court would rule to force the employer to pay a severance pay. However, severance pay is secondary to the cancellation of the labour contract and the employee cannot demand it in his statement of claim because his demand is to be reinstated in his position. In the event the latter demand is rejected, the court must address the severance pay issue and make sure that this guarantee provided by the RoA Labour Code materializes.

*Summing up the description of the legislative regulation of the issue of remuneration for work, a conclusion can be drawn that even though the relevant provisions of Article 7 of the Covenant are on the whole reflected in the RoA legislation,*

*nevertheless, in some cases violations of the requirement of fair remuneration can occur owing to gaps in the law or to interpretations given by court at its own discretion. Such violations can particularly be related to issues of remuneration size and of changing it and to the components of salary.*

## **1.2 Ensuring equal opportunity for everyone to be promoted in his employment**

The name itself of this component of the right to safe and healthy working conditions demonstrates that it is directly related to the principles of workers' legal equality and of prohibition of discrimination. These principles, too, are enunciated in Article 3 of the Labour Code (the labour legislation principles). As per paragraph 3 of that Article, the basic principle of the labour legislation is legal equality of parties to labour relations regardless of their sex, race, ethnicity, language, social origin, nationality, social status, religion, marital status and family situation, age, beliefs or views, membership in political parties, trade unions or non-governmental organizations, and of other circumstances unrelated to workers' professional features.

Besides this general provision, a reference to workers' promotion in their employment is found in Article 132 of the Labour Code. As per that Article, the processing of workers' personal data can be done exclusively for the purposes of ensuring the fulfillment of the requirements of laws and other normative legal Acts, of assisting workers in job placement, training and promotion and in securing their personal safety, of supervising quantity and quality of the work done and of making sure that property is intact.

Two important conclusions can be drawn from the above provisions:

- 1) the law allows a differentiated approach to workers on the basis of their professional features;
- 2) according to the law, promotion in employment can be done on the basis of personal data of workers.

At the same time it should be noted that on the whole the Labour Code is silent on the issue of promotion in employment and it does not specify the procedure and conditions for its implementation. That, in its turn, presupposes employer's wide discretionary powers in dealing with such issues, thereby inevitably leading to the violation of other workers' rights and, consequently, of Article 7 of the Covenant in case of the employer's unprincipled approach.

Under the circumstances it is crucially important that bodies that enforce the law should refrain from broad interpretations of the above-mentioned legislative provisions

and, in case the issue of promotion in employment becomes a matter for review, they should be guided exclusively by the criteria of worker's seniority and competence, as stated in Article 7 of the Covenant.

It is particularly important to rule out employers' use of other criteria such as, for instance, labour productivity. Under the conditions of free-market economic relations the latter should be directly dependent on economic indicators related to the employer, suppliers, commodities or services market and production sphere and on numerous other factors. Such an approach can undoubtedly lead to the violation of workers' legal equality, while disguising real motives behind the employer's preferences.

Besides, it should also be borne in mind that the Covenant enunciates the general concept of employment seniority and does not make any distinction between professional and non-professional seniority. In other words, professional seniority should be taken into account but to base promotion in employment solely on professional seniority would conflict with Article 7 of the Covenant. The issue of civil servants' performance assessment and evaluation is closely related to promotion in employment. In the course of the examination of the Acts of the Court of Appeal cases have been identified where the defendant was the RoA Ministry of Trade and Economic Development. The first instance court handed down a ruling for the plaintiff (civil servant), whereas the Court of Appeal rejected the statements of claim (the sessions were presided over by the Chairperson of the Court of Appeal).

The performance assessment and evaluation should not be used as an occasion to fire "disobedient" employees, i.e. those employees who protect their rights. To that end the Law *On Civil Service* provides a number of guarantees. In particular, periodical performance assessment and evaluation of the civil servant is conducted once every three years, whereas special performance assessment and evaluation of the civil servant is conducted on the basis of the well-grounded decision of the official who has the power to appoint the civil servant in question to his position or by the civil servant's consent. The same law sets out that a civil servant with a temporary disability shall be subject to performance assessment and evaluation only a month after he reports to work. In one of the cases examined by us the plaintiff contended at the trial that it was stated in the notification about the performance assessment and evaluation that the performance

assessment and evaluation was to be conducted by his consent, while in fact he had not given his consent.

Despite the legislative safeguards, the employee was dismissed from his job since he “refused to undergo performance assessment and evaluation”, even though, as to the plaintiff, he was not aware of it. The first instance court declared that the employer’s statement that the plaintiff had refused to accept the notification does not give grounds for dismissing the case and cannot be regarded as a proof since no convincing justification was offered and presented to the effect that the notification had been properly given to the civil servant and that he had refused to accept it. Furthermore, the statement merely indicates that the employee had refused to accept the notification slip. However, that is not confirmed by some other person and the slip bears no name or signature. There is no indication as to when the notification was given and when the person in question was notified. As a result, the civil servant was held administratively responsible and dismissed from his job. According to the lawyer, a precedent was established that those civil servants who fall out with their bosses will not be notified by the latter about the upcoming performance assessment and evaluation. Then the bosses will make up some notification alleging that the civil servant in question has refused to sign it and will use that allegation as the reason for dismissing the civil servant that they dislike. A number of guarantees established by the law notwithstanding, the Court of Appeal dismissed the civil suit brought by the civil servant and overturned the ruling handed down by the first instance court.

Speaking about equality in promotion in employment, we would like to address also transparency of the procedure for the competitive filling up the vacancies by bodies of public administration and the issue of Armenian citizens’ equality in that competition. In 2008, the *Radio Liberty* newscast contained information about the competition that was held to fill up a vacant position of a head of the hospital in Lori region. According to the procedure approved by the Regional Governor, the contenders must first of all take a written examination and in case they successfully pass it they must take an oral examination on the same day. The Regional Governor then has to make an appointment choosing from the contenders that successfully passed the oral examination. The two contenders passed successfully the written examination. However, they failed the oral

examination. Therefore, the Regional Governor announced a new competition. One of the contenders went to court disputing the results of the competition. He alleged that he successfully passed the oral examination but was declared as having failed the oral examination only because the other contender had failed the same examination. Had he been recognized as having successfully passed the oral examination, he would have been the only contender and would have been appointed as a head of the hospital. Therefore, according to the plaintiff, the commission declared that he, too, had failed the examination. Let us add that concerned that his rival can get assistance, the plaintiff invited a member of the RoA National Assembly from *Zharangutiun/Heritage* political party as an observer on the examination day as well as media people. As to the plaintiff it was those observers that prevented the scheme that was designed in advance. We met both with the employees from the Regional Governor's Office and with the plaintiff. The trial is in progress. Nevertheless, we would like to voice our concern. In particular, we were told by the Regional Governor's Office that the tape recording was not preserved. Even more, they erased the recording since they are not required by law to preserve it. We were also informed that the court found that it was impossible to use the tape recording since it had not been preserved.

The *Regulations* clearly state the grounds for one of the contenders to appeal against the decision made by the Competition Commission. We think that until that time expires all the materials of the competition have to be preserved. We found out that the court did not notify the Prosecutor's Office demanding to institute criminal proceedings because of the destruction of the evidence in the case. The trial is still in progress; however, the main piece of evidence with the record of the entire process of the examination was destroyed and that fact drew no response from the RoA judicial power.

*Due to a number of subjective and objective factors, the issues of promotion in employment probably require legal regulation to a less extent. However, it is important to ensure legal equality in this respect, i.e. to ensure equal opportunity of promotion in employment and to prevent possible abuses on the part of the employer. In that sense it is of utmost importance that bodies that enforce the law should refrain from broad interpretations of the above-mentioned legislative provisions and, in case the issue of promotion in employment becomes a matter for review, they should be guided exclusively*

*by the criteria of worker's seniority and competence, as stated in Article 7 of the Covenant.*



### **1.3 The right to rest, to reasonable limitation of working hours and to periodic holidays with pay**

The right to rest is one of the most widely recognized international rights. It applies not only to workers that have a labour contract but to all persons without exception. The labour-related international criteria define both the general right to rest and its individual elements. Of course, domestic legislation, too, must satisfy those criteria.

The basic provisions related to the right of rest are contained in the Covenant as well as in the Declaration and in various Conventions of the International Labour Organizations (№14, 47, 52 and 106). A general analysis of those documents makes it possible to single out the following components-rights of the right to rest:

- the right to rest,
- the right to leisure,
- the right to reasonable limitation of working hours,
- limitation of a workweek to no more than 40 hours,
- the right to reasonable limitation of a workday,
- the right to remuneration for public holidays,
- the right to periodic holidays with pay (not less than 6 days after an interrupted work for one year).

It may be stated that the above-mentioned components of the right to rest are adequately reflected in the RoA legislation, while the right to rest is enunciated both in the RoA Constitution (Article 33) and in the Labour Code, with a separate chapter (Chapter 18) regulating the time of rest. One can say that the labour-related norms contained in the domestic legislation are generally in line with the international criteria and in some cases they even provide more favourable conditions for workers. Thus, for instance, while as per the International Labour Organizations Conventions № 14 and № 106, workers are entitled to an uninterrupted weekly rest period comprising not less than 24 hours in the course of each period of seven days, under Article 155, paragraph 5, of the RoA Labour Code, the minimum weekly rest period shall comprise 35 hours. Likewise, while as per the International Labour Organizations Convention № 52, workers shall be entitled to an annual holiday with pay after one year of continuous employment,

under Article 164, paragraph 2, of the RoA Labour Code, such a holiday shall be granted after six months of continuous employment or, by the parties' consent, even at an earlier date. Of course, that does not mean that employers are entitled to limit workers' right to an uninterrupted weekly rest period or to an annual holiday with pay within the framework of the international criteria since the domestic legislative norm should be regarded as more favourable for workers, hence as legally binding.

It should also be pointed out that under the Covenant and other international legal instruments, which regulate the labour law issues, entitled to rest are not only parties to labour relations, i.e. workers who have a labour contract, but also to everyone, including persons who provide services or do work under a civil-law contract, even individual entrepreneurs. However, the said persons are left out of the sphere of the domestic labour legislation regulation. Therefore, under the circumstances it is important to know those concrete rights and/or privileges that are granted, according to the international standards, not only to parties to a labour contract, and to ensure the implementation of those rights, such as, for instance, the right to an annual holiday with pay of at least six working days, which is enunciated by Convention № 52.

It should be stressed that the rest or working hours-related disputes almost never make it to court. We would like to address a case that has been recently adjudicated by the Court of Appeal and where the worker contended that he worked more than the half-time stipulated by the labour contract. He requested the court to inspect the logs that registered the hours when he reported to work, to invite the accountant and the persons on duty as witnesses who would confirm what work shifts are used by the employer since that would prove that he had worked more than required. The worker asked to be compensated for the extra work he had done since he stayed in the workplace not of his own will but according to the work schedule approved by the employer in advance. The Court of Appeal rejected all motions to inspect the logs and to invite witnesses and ruled to reject the plaintiff's request since the worker failed to substantiate his demands.

The discussions with lawyers showed that that case was not unique. They confirmed that while reviewing the claims of workers who contend that they worked for longer hours than established by law, the courts dismiss cases on the same grounds that the worker failed to substantiate his demands. The lawyers noted that so far there had

been not a single case that the court would question witnesses or examine written documents and would try to figure out how much the worker had worked indeed. In the lawyers' view, sometimes such cases are thrown out because judges find them a sheer waste of time. Let us add that one of the experts attended one such session of the court and confirmed that the Court of Appeal discontentedly accepted the claim of compensation for extra time worked and rejected all motions that aimed to help to clarify the situation.

*On the whole, the right to rest is contained in the domestic legislation and the norms of the latter are for the most part in line with the international standards and in some cases they even provide more favourable conditions for workers. The disputes over that issue almost never make it to court, whereas the issues of registration of and compensation for the work done during the rest time may prove to be of practical significance.*

## **2. Protection of the right to work**

### **2.1 Legal capacity of foreigners in the labour law**

One of the most important issues in the labour law is that of its subjects. The Covenant recognizes everyone's right to work, i.e. on the whole the Covenant does not limit the list of labour law subjects. Article 15 of the RoA Labour Code states that the capacity to have labour rights and responsibilities (legal capacity in terms of the labour law) is recognized equally for all citizens of the Republic of Armenia. Foreign nationals and Stateless persons have in the Republic of Armenia the same legal capacity in terms of the labour law as citizens of the Republic of Armenia unless other provisions have been made by the law. At the same time the RoA *Law on Foreigners* establishes a work permit as a precondition for the emergence of labour relations and specifies exceptions from the general rule for receiving a work permit (Article 23).

Of course, making a provision for such limitations on a human right to work seems controversial. However, in support of the legitimacy of such limitations Article 29, paragraph 2, of the Declaration is invoked. Under it, the limitations are legitimate if they are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Similar provision is also contained in Article 43 of the RoA Constitution. As per that Article, the fundamental human and civil rights and freedoms may be temporarily restricted only by the law if it is necessary in a democratic society in the interests of national security, public order, crime prevention, protection of public health and morality, constitutional rights and freedoms, as well as honor and reputation of others.

Generally speaking, the provisions that impose limitations on the foreign nationals' right to work can be regarded as lawful from the perspective of both international and domestic labour law. However, it would not be amiss here to remark that such limitations have to be imposed exclusively by law. Thus, the RoA *Law on the Legal Status of Foreign Nationals*, which was in force prior to the passage of the RoA *Law on Foreigners* (on 25 December 2006), contained absolutely no provision with regard to obtaining a work permit. It established various residence statuses (temporary,

usual, special and diplomatic) and the person's situation was based on the type of status. The right to work was explicitly reserved for persons having a usual or special residence status, whereas the procedure for persons holding a temporary residence status to obtain the right to work was to be established by the Government Decree. In reality, however, the practice became prevalent, according to which in order to obtain the right to work in the Republic of Armenia a person had to get a usual or special residence status (with the latter granted only foreign nationals of the Armenian descent). In fact, the provisions of the RoA Labour Code, which establishes equal legal capacity in the field of work, and of the Covenant and the Declaration that spell out the right to work were not taken into consideration by State bodies.

At present the situation has changed considerably. Nevertheless, there are still obstacles for recognizing foreigners as full-fledged subjects of the labour law. Chapter 4 of the RoA *Law on Foreigners* deals specifically with the issues of foreigners' work. It is necessary to discern several groups of issues.

First of all, the provision in Article 23, sub-paragraph (e), of the Labour Code is not interpreted and thus it gives rise to disputes in real-life situations. As per that provision, authorized representatives of those commercial organizations, where foreign capital is also involved, do not need a work permit. The overall context of the said sub-paragraph gives grounds to assume that the matter concerns representatives of the organization's executive body or persons that have certain administrative functions. However, on the other hand, within the overall context of the right to work it can be construed that any employee of such an organization has the right to work without a permit.

Based on the analysis of Article 24, paragraph 2, of the RoA Labour Code it can be contended that a work permit to a foreign national can be granted not more than two successive times for the total duration of two years. A new work permit can be given to him only in case he resided outside the territory of the Republic of Armenia for at least one year. The problem is that with a view to obviate such an obstacle a person can apply for a residence status but that is a limited option. In particular, one, and probably the most applicable, of the requirements set for getting a permanent residence status is a 3-year residency qualification. That requirement cannot be met, if the person has worked only

for two years. Thus, a possible solution for the provision of the right to work without impediments could be an option of the extension of the work permit not for once but for two times or for the total duration of three years or the expansion of the grounds for granting a permanent residence status.

Summing up, we should point out that any instance that hinders a concrete person to be employed (to do work) should be regarded as a violation of the right to work, while person's involvement in any work without his consent should be construed as a violation of the freedom of work (with the exception of special cases, on a temporary basis at that).

*Summing up the issue of the foreign national's right to work in the Republic of Armenia, it should be noted that limitations on the foreign nationals' right to work, which have been imposed by the legislation, can be regarded as lawful from the perspective of both international and domestic labour law. However, the limitations on the said right of these specific subjects of the labour law because of regulatory flaws or contradictions are inadmissible.*

## 2.2. Retroactive recognition of legal relations in the field of work

According to the General Comment on Article 6 of the Covenant, the States Parties assume the obligations to respect, protect and fulfill the right to work. Besides, the States fulfill their obligations through the adoption of appropriate legislative measures and through efficient mechanisms of judicial protection. Courts have to find out if there are the labour-related legal relations regardless of whether a labour contract has been concluded or not. In case of the existence of legal relations the court has to apply the labour legislation, in particular the norms concerning rest, holidays, working hours, remuneration and labour-related legal relations. It is noteworthy that so far the judges have not validated retroactively any labour-related legal relations. In other words, labour-related legal relations are non-existent unless there is a labour contract. While examining the Acts of the Court of Appeal the experts came across a ruling in the case, where the defendant (the alleged employer) admits that he employed the plaintiff as a worker. That admission notwithstanding, the RoA Court of Appeal for Civil Cases rejected the plaintiff's request to recognize the labour-related legal relations and, naturally enough, his request to receive compensation, leaving the fact of exploitation unaddressed<sup>11</sup>. At the same time the justification part in the Acts of both the first instance court and of the Court of Appeal states that "under Article 437, paragraph 1, of the RoA Civil Code, conclude contracts of their own free will; it is not allowed to force persons to conclude a contract, with the exception of those cases, when the obligation to conclude a contract is stipulated by the RoA Civil Code, by law or by the commitment made of one's own free will. Taking into consideration the fact that the obligation to conclude the contract, which is referred to in the statement of claim, is not required by the RoA Civil Code or by other laws and that the defendant has not made such a commitment of his own free will, the court finds as unfounded and subject to rejection the plaintiff's demand that the court force the concluding of the contract. It should be pointed out that such a conclusion conflicts with Article 102 of the RoA Labour Code, which establishes the employer's obligation to conclude a labour contract. As per Article 102, the work, which is done without a concluded labour contract, shall be unlawful. The employer who allowed the

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<sup>11</sup> It should be noted in this respect that when one of the experts, who was taking part in a trial as an *amicus curiae* in a case, where a worker worked for 5 years without getting wages, used the word "exploitation", the judges expressed deep indignation and prohibited the use of such words.

unlawful work to be done shall be held liable through the procedure established by the RoA legislation. The RoA Labour Code makes it incumbent on the employer to conclude a labour contract or to make sure that such contract is concluded. The courts, however, did not take that into consideration.

What is more, the court should not rule out the existence of labour-related legal relations between the parties in case of civil-law relations (for example, the works contract). The court has to ascertain whether there are features of a labour contract set forth by Article 83 of the RoA Labour Code, and in case those are present the court has to apply the norms that regulate labour-related legal relations. Therefore, the issue of drawing a distinction between a labour contract and a civil-law contract (the works contract, the contract for the provision of paid services) has an important practical significance for judges. The scope of legal relations between the customer and the contractor is predicated to a large extent on the nature of the contract and on its proper definition. In particular, a civil-law contract deprives a person of such important privileges as the right to a lengthy vacation, the right to protection of one's right through the representative bodies, the cases when a contract can be cancelled, etc. That problem was very acute a few years ago, when with a view to avoiding the social security payments the employers often concluded civil-law contracts with workers, thereby causing a huge damage to the State and depriving the citizens of the right to receive an adequate pension in the future.

Even though a distinction between a labour contract and a civil-law contract is one of the controversial issues that are continuously discussed in theory, a number of criteria can be pointed out that could provide guidance in determining the nature of a given contract. The School for Judges should impart to learners aspiring to become judges the profound knowledge about the selection of various legal statuses so that they would be guided by a formalistic approach, such as, say, in case of a labour contract we deal with labour-related legal relations, whereas in case of the works contract we deal with civil-law relations. And in case the transaction has not been done in writing the court should not refrain from taking active steps to find out the applicable norms.

A labour contract presupposes:



- a) employee's compliance with the work order and with the disciplinary and other internal regulations of the organization;
- b) the existence of a workplace, provision of the working conditions on the part of the employer, provision of work materials, tools and devices/appliances;
- c) a seniority principle in the workplace based on certain ranks;
- d) monthly disbursement of wages, possibility of an extra pay;
- e) absence of a concrete work assignment (of an expected outcome of work);
- f) certain restrictions on holding more than one job.

As any other right, the right to work imposes three types of obligations on States: the obligations to *respect*, *protect* and *fulfill*. Owing to these obligations the State must ensure the recognition of the right to work not only from the moment a dispute arises but also for the entire period of actual work, including the additional privileges ensuing from this right.

The existence of labour relations should also be recognized in case a person, who has a labour contract, gets a notification of dismissal but the employer continues through his explicit actions to engage the said person in a process of work. In such cases it is necessary to regard the existence of labour-related legal relations as proven. Article 115, paragraph 5, should be invoked. As per it, the notification about cancellation of the labour contract shall be regarded as null and void, if more than 5 days passed after the expiration of the term stated in the notification but the employer has not cancelled the contract.

In the course of the examination of the Acts of the Court of Appeal the experts have come across the case, when a nurse who worked in a medical unit of the RoA Ministry of Defense was dismissed from her job. In 1993-2006, she worked under an open-end contract, which is of unspecified duration. In 2006, the earlier contract was replaced with a fixed-term labour contract. Without addressing the issue of a change in the type of a labour contract, we would like to note that upon the expiration of the term of the contract, it was not extended. However, after the termination of the labour contract the nurse continued to work for the employer, as evidenced by her name on the duty chart. The first instance court regarded as proven the existence of labour relations after the termination of the fixed-term contract and reinstated the nurse in her position.

However, the Court of Appeal rejected the employee's suit on the following grounds, "the presence of the nurse's name on the duty chart does not yet prove the fact that labour relations went on."

*The above-mentioned instances demonstrate that the RoA Court of Appeal for Civil Cases has subscribed to a formalistic approach, viz. that labour relation exist only if there is a labour contract. That, however, conflicts with the right to effective judicial protection of the right to work. Therefore, while adjudicating the labour disputes (or disputes related to the performance of work), close attention should be paid to a comprehensive assessment of the legal relations and, in case those qualified as labour relations, to the protection and granting of all the privileges and rights ensuing from the relevant status.*

### **2.3 Prevalence of open-ended labour contracts**

Article 95, paragraph 1, of the RoA Labour Code states that a fixed-term contract shall be concluded, if labour relations cannot be defined with certainty for a period of time of unspecified duration, given the nature of the work to be done or the conditions under which the work has to be done, unless other provisions have been made by the Labour Code or by another law.

The RoA labour legislation encourages the conclusion of open-end contracts viewing fixed-term contracts as an exception to the general rule. Such an approach is in line with the worldwide practice since the mission of the labour legislation is, first of all, to protect worker against unfounded/unlawful dismissal from his job, whereas a person who has signed a fixed-term contract ends up in a vulnerable situation as his contract can be cancelled simply for the reason of the expiration of the term. As a rule, it is more advantageous for the employer to conclude a fixed-term labour contract and upon the expiration of the term to extend it again for a specified period of time. Under those circumstances, workers will be very cautious and will not struggle for the protection of their rights. If necessary, they will work on weekends and holidays; they will not demand a pay raise, etc., being well aware that otherwise their current labour contract will not be extended. That is the reason why the developed countries, as a rule, set a time limit, after which it is prohibited to conclude a fixed-term contract. In other words, in the event of the expiration of the maximum time limit it is incumbent on the employer to conclude an open-end contract with the worker, which is much more difficult for the employer to cancel unilaterally because of the more exacting rules.

In the Republic of Armenia this time limit is 5 years. Thus, Article 95, paragraph 2, of the RoA Labour Code establishes that “the overall total period of time of the [worker’s] fixed-time labour contracts concluded with the same employers (with each contract concluded for the period of less than five years) shall not exceed five years, unless the period between the fixed-term contracts exceeds one month. In other words, the employer is prohibited to conclude fixed-term contracts continuously for over 5 years. When that limit is reached the contract becomes an open-end contract, which is of unspecified duration.

The analysis of the case law has shown that courts had never applied this norm and in the event the contract was at that moment a fixed-term one, the court applied the fixed-term contracts cancellation procedure regardless of the time period, for which the employee worked for the employer.

This norm is a prohibitive one, meaning that even the Court of Appeal must apply it when a party demands that, even if the plaintiff invokes it for the first time. Otherwise, the court sustains the violation prohibited by the State. In the judicial practice there is a case of the plaintiff making reference to that norm, when his demand to be reinstated in his position was heard in the court, because the procedure established for the cancellation of an open-end labour contract is much more rigorous. Nevertheless, so far the court has not changed the rules for the open-end labour contracts cancellation making a reference to Article 95, paragraph 2, of the RoA Labour Code. If the current contract has been concluded for a certain period time, in the event of its cancellation the court applies the procedure established by Article 111 of the RoA Labour Code.

Besides, it should also be pointed out that the restriction on the total timeframe of the validity of a fixed-term contract is dependent on yet another condition, *viz.* of an interval not exceeding one month. This provision gives cause in certain fields, such as, for instance, educational institutions, for an abuse of the right to work because during the summer vacations the contract is cancelled. Thus, the obstacle of a restriction on the overall period of time is obviated thereby making employees dependent. Therefore, it is necessary to consider changing the legislation in that regard.

An adequate protection of the right to work requires close attention to the issue of a timeframe of a labour contract. In particular, a general norm should be taken into consideration, according to which a certain timeframe has to be set only in special cases. At the same time conclusion of fixed-term contracts or non-labour contracts by employers for the purpose of avoiding “dependence” on employees and, conversely, of making the employees dependent have become a common practice. The bodies that enforce the law should pay close attention to such cases with a view to ruling out potential abuses of workers’ rights.

## **2.4 The limitation of action regarding the demand to be reinstated in one's position**

Under Article 265, paragraph 1, of the RoA Labour Code, in the event the employee does not consent to a change in the working conditions or to the labour contract termination or to the labour contract cancellation on the employer's initiative, the employee has the right to take the matter to court within one month from the day of the receipt of a corresponding order (a document).

In reality it is a frequent occurrence that persons turn to the regulatory State or representative bodies, for example, ministries, State Labour Inspectorate and trade unions with a view to getting their right to work restored and protected. They go to court only after the said options have been explored. In such cases the decision to regard the reasons for missing of the limitation period deadline as valid or invalid is left to the court's discretion. If that discretionary power is not exercised appropriately, that may pose a danger for the protection of the person's right to work.

The examination of the cases archived in the Court of Appeal has shown that the first instance court recognizes as valid the missing of the deadline justifying that decision, as a rule, by the fact that during that period an application was submitted to a body of executive power. In the same cases the Court of Appeal regards the missing by the employee of the established one-month deadline as an invalid reason without properly responding to the arguments, which are brought by the plaintiff in his statement of claim, why the reasons for his exceeding the limitation on action should be regarded as valid. In one of those cases the employee applied to the State Labour Inspectorate within one month. The Inspectorate concluded that the employer had violated the requirements of the RoA Labour Code when canceling the labour contract and made it incumbent on the employer to reinstate the employee in his former position. After the employer delayed the implementation of that decision the employee took the matter to the first instance court that regarded as valid the reason for missing the deadline. The court proceeded from the fact that that during that period the employee had applied to the relevant Government body, which is competent to subject the employer to administrative responsibility for the violation of the labour legislation. However, the Court of Appeal refused to review the plaintiff's demand on the grounds that the one-month deadline had been missed. Even

though the employee had at his disposal the State Labour Inspectorate' decision, which stated that the employer had violated the requirements of the RoA Labour Code when canceling the labour contract, the employee was, nevertheless, unable to protect his right to work. In that connection the State Labour Inspectorate officers expressed their indignation at the existing arbitrariness in the judicial practice and attached great significance to the position taken by the Court of Cassation in that regard. They pointed out that the State Labour Inspectorate had registered a number of violations in that particular case. It had fined the employer and had set a fixed date to redress the violations. The employer paid the fine. The use of the limitation on action under such conditions conflicts with the worker's effective judicial protection established by the Covenant since within the said period of time the employee had alerted the public authorities about the violation of his right and was denied the protection for his right on merely formalistic grounds.

*We think that in the event sufficient proofs are presented with regard to certain steps taken for the protection of the right to work the court should recognize the missing of the deadline as justified and should arbitrate the case.*

Thus, for example, the Court of Appeal heard a case, where an employee had been dismissed from his job on suspicion of stealing 2,000 AMD. After receiving the dismissal order, the employee applied to the police demanding that criminal proceedings be instituted with the regard to the fact of libel. The police reject the demand on the grounds of the lack of the *corpus delicti* and declare that the employee can go to court with the demand of being reinstated in his position. The employer goes to court; however, the latter refuses to adjudicate the case arguing that the one-month deadline was missed, thereby demonstrating a formalistic approach and failing to address the issue of interrelation between the disciplinary and criminal judicial procedures.

*The judicial Act of the Court of Cassation will be of great significance for the uniform application of the law since the lower courts do not provide an unambiguous substantiation when recognizing as invalid the missing of the one-month deadline for applying to court with the request of being reinstated in one's position at work, even if the person in question have during that period applied to the State Labour Inspectorate,*

*to a superior body (for instance, a deputy school principal applies to the Education Department in the Regional Governor's Office), to police, etc.*

## **2.5 Recognition of the predominance of the employer's will**

Article 265, paragraph 2, of the RoA Labour Code is controversial. Under it, owing to economic, technological, organizational or other reasons or in case the restoration of further labour relations between the employer and the employee is impossible the court may reject the employee's request to reinstate him in his former position, at the same time making it incumbent on the employer to pay the employee compensation at the rate of an average salary for the entire period of forced idleness until the court ruling takes effect. On the day the court ruling goes into effect the labour contract shall be regarded as cancelled.

Putting aside economic, technological and organizational reasons, which content is not so easy to interpret, another issue should be specially addressed. It is the issue of what the legislative body has in mind by regarding as permissible the cancellation of a labour contract "owing to other reasons" or "in case the restoration of further labour relations between the employer and the employee is impossible." In fact, any argument put forward by the employer **against reinstating** the employee in his position can be regarded as an obstacle to the reinstatement of the worker in his former position even in case of unlawful dismissal. The employer will merely be required in such cases to pay the employee compensation at the rate of an average salary for the period of forced idleness. Such a formulation makes meaningless Article 113 of the Labour Code that outlines grounds for the cancellation of a labour contract on the employer's initiative. It unquestionably leads to a real threat of the violation of the human right to work and is a serious obstacle in terms of person's employment.

After the examination of the law-enforcement practice of this norm we would like to address the case containing a demand by a Yerevan State University (YSU) professor of economic geography to be reinstated in his position. In 2007, the YSU president dismissed the associate professor from his job. In its ruling the Court of Appeal pointed out that the employer failed to prove the existence of sufficient grounds for dismissing the professor from his job. However, on the basis of Article 265, which is discussed here, the court found that a moral and psychological climate in the relations between the professor and students is hostile and that there is a conflict between the professor and the university president; therefore, further labour relations between the parties are not



possible. Numerous articles covering this case appeared in the print media. According to them, the professor who taught economic geography in Geography Department organized after classes the meetings with various politicians both from the pro-government and from the opposition camps. The university president justified the dismissal order by the fact that as a result of those lectures many students no longer wish to reside in Armenia, that they become bitterly disappointed, etc.

The Court of Appeal found that there is a conflict between the professor and the university president; hence, it does not think it possible to reinstate the professor in his position. The court did not address the fact that about 200 students who took classes with the professor submitted a written request to get their professor reinstated in his position. Furthermore, the court did not take into consideration the facts that the professor taught a subject falling within the political science domain, that in teaching the course it is not possible to refrain from political assessments and that according to the results of an anonymous evaluation of professors in the department he turned out to be one of the best. Finally, the academic sphere is one of those unique fields, where professor can work regardless of very bad relations with the administration since he has academic freedom, is engaged in teaching and, as a rule, the contacts between professor and the administration are minimal.

The definition in the said Article poses a real danger, especially given the practice of the application of this Article by the RoA courts, as it gives an opportunity to dismiss the unwanted employees.

In another case, while adjudicating a labour dispute, the Court of Appeal viewed the dismissal order issued by the employer as sufficient grounds, even though the employee had not been informed about that order. Thus, in **Tashir region** a teacher was hired. The order states that this person will work only until a properly qualified specialist is hired. No entry to that effect was made in the teacher's employment record and the teacher claims having no knowledge of that proviso. The first instance court reinstated the teacher in the position held, whereas the Court of Appeal dismissed the suit viewing the school principal's order as sufficient grounds. The Court of Appeal did not address the facts that a labour contract was non-existent and that the teacher had not been shown the order. These issues are directly related to the normative legal requirement to have a

concluded labour contract. That requirement is stated in Article 85 of the RoA Labour Code, which establishes that labour contract shall be concluded in writing by way of a single document signed by the parties. This provision came to replace the procedure, which was formerly in effect, according to which a person was officially registered as an employee through the issuance of an appropriate order, and it is meant to secure legal definitiveness in the labour relations between employer and employee.

In contrast to the first instance court, the Court of Appeal viewed the statement made and the order issued by the employer as sufficient grounds and disregarded the facts that the contract had been non-existent, that the employee had not been informed about the order and that the proviso in question had not been stated in the worker's employments record. In other words, the Court of Appeal recognized the predominance of the employer's will, while attaching no importance to the employee's consent or at least to the fact that the employee should be informed.

*We think that the controversial Article is in need of certain editing or that the said provision contain therein should be subject to further clarification so that a uniform approach will be ensured in the interpretation of the term "impossibility of reinstatement in the position."*

## **2.6 Provision of safeguards for the cancellation of a labour contract**

The RoA legislation contains a number of safeguards for the situation, when a labour contract is cancelled on the employer's initiative. The guarantees aim to solve to some extent the workers' employment problem as well as to secure effective protection of the right to work.

- Prior notice

Under Article 115 of the RoA Labour Code, in case when a labour contract is cancelled on the grounds of the organization dissolution or of a change in the production output and in the economic, technological and labour management conditions as well as of the reduction in the number of employees owing to the production necessity, it shall be incumbent on the employer to give the employee at least a two-month notice. In case the labour contract is cancelled because the employee does not meet the requirements of the position held or of the work done or because the worker reached a retirement age, it will be incumbent on the employer to give the employee at least a two-week notice. Failing to observe those notification terms, the employer will pay a fine to the employee for each overdue day. The fine will be calculated on the basis of the employee's average hourly wages. Of course, such a measure of securing the fulfillment of the notification obligation does not conflict with the **labour criteria**. However, totally unacceptable is the application of that norm by analogy (i.e. imposition of a fine for the overdue notification) in those cases, when the law stipulates certain legal consequences of the compliance or non-compliance with the notification requirement, such as, for instance, the recognition of the contract as renewed for an unspecified period of time.

The first instance court and the Court of Appeal subscribe to contrary viewpoints with regard to this issue. We have mentioned time and again that the examination of the judicial practice in the Republic of Armenia makes it clear that while the first instance courts sometimes take a position that benefits workers, the higher courts overturn it.

With regard to this issue the first instance court of Lori region handed down a ruling that "the payment of the fine by the respondent from the overdue notification days is an employer's responsibility, which is established by the law and which he discharges by compensating the worker for the loss of the salary as a result of not working for the

entire two-month period guaranteed by the law. The payment of the fine may not be viewed as a redress for the violated procedure for dismissing the worker from his job.” This position, however, was not accepted either by the Court of Appeal or by the Court of Cassation. In its ruling the Court of Appeal stated that “the employer notified the worker about the impending dismissal 24 days in advance and he paid the worker for the overdue 36 days at the rate of the worker’s average wages, with the calculation made on the basis of the plaintiff’s average hourly wages rate.” As a result, the two-month term established for notification lost its mission of being a guarantee for the protection of worker’s rights.

- Prohibition against cancellation of a labour contract in the event of a temporary disability

Under Article 114, paragraph 1, of the RoA Labour Code, cancellation of a labour contract on the employer’s initiative shall be prohibited during the period of the worker’s temporary disability and during the worker’s vacation. As regards this issue, the examination of the Acts of the Court of Appeal has shown that the imperative prohibition, which is subject to no exception, is not always applied in practice. Thus, in one case the ruling of the Court of Appeal stated that “the plaintiff, i.e. the worker has not provided any proof to the court that he had submitted the medical certificate of temporary disability to the employer.” It is noteworthy that the worker submitted that certificate to the court. The court demanded from the plaintiff to prove that he had duly notified the employer about his temporary disability. Finally, declaring that they have not been notified about the worker’s temporary disability, the employers cancel the labour contract.

- Alternative options for the provision of employment

a) Article 115, paragraph 3, of the RoA Labour Code sets forth that in case of the reduction in the number of employees (Article 113, paragraph 1, sub-paragraph 3) or in case the employee does not meet the requirements of the position held or of the work done the employer shall be in a position to cancel the labour contract, if he has offered the employee, within the boundaries of the opportunities that he has, another job, which is in line with the worker’s professional training, qualification and health status but the worker has declined the offer. The final paragraph of the same Article sets forth that in case the employer does not have an adequate opportunity the contract shall be cancelled

without an offer of another job to the worker. The practice of legal application of that norm has shown that courts do not take workers' interest into consideration. In particular, the courts produce on a mass scale the rulings where judges content themselves with the employers' statements to the effect that they do not have jobs or the work that would be appropriate for the worker. Our examination of the statements of claims has revealed that workers point at the information about new jobs posted on the internet or published through media and claim that those jobs require the qualifications and competence that they have or that they used when they held other positions. As a rule, courts pay no attention to those statements and proceeds exclusively from the employer's oral statement, which thus acquires a legal power of irrefutable proof. In regard of that issue the court stated in its ruling that "in his capacity of an employer, the respondent exercised his right enunciated in Article 113, paragraph 3, sub-paragraph 2, *viz.* in case the employer does not have an adequate opportunity the contract shall be cancelled without an offer of another job." We would like to draw attention to the terminology used by the Court of Appeal, which is based on the term "the employer's right." The worldwide practice has shown that courts more often proceed from the concept of the worker's right. Accordingly, the court should have at least used the following wording, "the real conditions for the worker to enjoy the right to getting another job are non-existent." The Covenant, too, dictates such a stance. Under the Covenant, all branches of government in States Parties have the obligation to adopt all measures to protect, respect and ensure the worker's right to work.

b) Mass dismissals

Under Article 116 of the RoA Labour Code, in case of the dissolution of the organization or of the reduction in the number of employees it shall be incumbent on the employer to present data on the number of employees to be dismissed to the RoA State Employment Service and to the employees' representative at least 3 months in advance of the cancellation of labour contracts, if it is planned to dismiss over ten percent of the overall number of employees but not fewer than 10 employees during a two-month period. This provision is in line with General Comment No. 18 on Article 6 of the Covenant. According to it, States Parties must adopt measures aiming at achieving full

employment; besides the Comment also states that information/assistance should be accessible to all citizens.

The application of norms established in connection with mass dismissals became clear due to the examination of the Acts of the Court of Appeal. Even though this issue was raised many a time by employees, the court, nevertheless, did not address it in any way. The court also rejected the plaintiff's motion to engage the RoA Employment Service as co-plaintiff.

- Engagement of trade unions

One of the cases adjudicated by the Court of Appeal shows that a collective contract in the organizations stipulates that in case of a change in the production output and in the economic, technological and labour management conditions as well as of the reduction in the number of employees owing to the production necessity, it shall be incumbent on the employer to discuss the issue in advance with the trade union committee prior to the cancellation of the labour contract and to submit a list of the employees to be dismissed with a view to identify the situation of those individuals and to try to find alternative ways to make their situation easier as much as possible (persons that have worked for over 7 years, persons who are the only breadwinners in their families, etc.). The court disregarded those requirements in all cases and the court established no legal consequences of non-compliance with those requirements.

- Burden of proof

The examination of the court Acts has shown that taking a formalistic approach, the court finds that the burden of proof rests with the worker as a plaintiff. In the worldwide practice the burden of proof rests with the employer since it is the latter who is engaged in administration (the archiving of documents). For example, in one of the cases a deputy school principal was dismissed from the job. The deputy school principal claims no knowledge of the decision made by the Educators' Council as the reason why that decision was not appealed against (the second disciplinary fine). The first disciplinary fine was appealed against with the superior body; however, the response was not given yet. The court found it as not proven that the employee had not been informed about the decision made by the Educators' Council. The burden of proof was placed on the

employee and that is unacceptable since the employer had to notify the employee through the procedure established by law.

In another case a former Village Head went to court demanding a 3-year salary that had not been paid to him. Based on the respondent's statement, the Court of Appeal rejected the claim of the salary for those months that the respondent contended that the employee had not worked. In fact the employee had to prove that he had come to work, that no disciplinary action had been taken against him and that he had had labour relations.

As regards the notifications, there are many cases when the employer presents a document in court that he notified the employee claiming that the latter refused to sign it. In that respect we find exemplary the ruling of the first instance court. The judge ruled that "the employer's statement that the plaintiff's allegedly refused to receive the notification cannot serve as grounds for dismissing the case and cannot be seen as a proof since no convincing justification has been given or presented to the effect that the notification was duly given to the employee and that he refused to sign it." The Court of Appeal took a different approach. It accepted the employer's statement as grounds and did not place on the employer the burden of proof with regard of proper notification.

## **2.7 Protection of pregnant women's right to work**

Under Article 117 of the RoA Labour Code, a labour contract with a pregnant woman cannot be cancelled from the day a medical certificate about pregnancy is submitted to the employer until one month after the day the childbirth and maternity leave ends. This norm is in line with Article 10, paragraph 2, of the Covenant. Under it, special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

While examining the Acts of the Court of Appeal, we came across one case, where the plaintiff went to court contending that she was dismissed from her job because she was pregnant. The facts in the case are the following: the worker starts working under a fixed-term contract, which expires on July 7. On July 2 the worker submitted to the employer a medical certificate stating that she was in her 11-12<sup>th</sup> month of pregnancy. The employer offered the employee to move to a lower-paid job but the employee declined that offer. Two days later, on July 4, the labour contract with the employee was cancelled on the grounds that it expired. The Court of Appeal rejected the woman's suit t on the grounds that the prohibition established by Article 117 applies to open-end labour contracts. The court did not take into consideration the plaintiff's following statements:

a) Under Article 111, paragraph 2, of the RoA Labour Code, the employer shall be in a position to cancel a fixed-term labour contract owing to the expiration of the contractual period, notifying the worker in writing at least 10 days in advance.

b) Under Article 111, paragraph 5, of the RoA Labour Code, in the event a concluded fixed-term labour contract is not cancelled upon the expiration of the contractual period through the procedure established by this Article, i.e. 10 days earlier and labour relations are continued, the contract is regarded as concluded for an unspecified period of time.

In fact, the employer failed to comply with the above-mentioned procedure for cancellation of a fixed-term contract, as a result of which the worker's contract became a contract concluded for an unspecified period of time. The court did not take into consideration the violation of the labour contract cancellation procedure, did not qualify



the labour relations resulting from the violation of the said procedure and did not apply Article 117 to the employee, even though it became applicable.

*The common conclusion in this and the previous sections is that perceiving potential vulnerability of the right to work of certain categories of workers or in general of all workers, the labour legislation provides certain guarantees for the protection of that right. During the arbitration in court of the cases related to the application of those guarantees, the latter should be properly taken into consideration so as to rule out the likelihood of violation of the right to work and, accordingly, to make sure that the guarantees remain valid.*

## **Recommendations**

### ***To international organizations:***

These organizations should:

- take measures aimed to raise public awareness about the general comments adopted by the Committee with regard to the Covenant and its implementation;
- organize training sessions for judges on the specifics of labour disputes with a view to assisting judges in developing special skills at adjudicating labour disputes, particularly in being ‘sensitive’ while hearing these cases that to a large extent deal with human dignity;
- provide the Cassation Court judges with information about the role that higher courts have in other countries with regard to labour disputes; that will change their stance that these cases do not lead to grave consequences and will involve the Cassation Court as much as possible in the protection of the right to work; also presented should be as many as possible the practical examples of negative consequences of exploitation;
- use training sessions to make judges more knowledgeable about the components of wages/salaries and the procedure for their formation as well as about the criteria by which the court should be guided while determining the fairness of the working conditions and first of all of the size of wages; also presented should be the methods used in other countries to determine remuneration in cases of work without a labour contract;
- organize courses on the working hours calculation methods, assist judges in realizing the importance of this institution and, in general, in being guided not by the size of the suit fee but by the fact that the right to work is essential for the enjoyment of other rights and is an integral part of human dignity;

- organize courses on methods of retroactive recognition of legal relations with regard to labour, particularly on the distinction between a civil-law transaction and a labour contract;
- organize special courses on principles of and legislation on civil service and on the international experience in the protection of labour rights of civil servants;
- organize training sessions on the norms of concluded fixed-term and open-end labour contracts and on the legitimacy of changing them as well as on cases of application of the norms of the open-end labour contract to labour relations;
- organize training sessions and use practical examples to show in what cases who should bear the burden of proof.

***To judges:***

Judges should:

- respect workers' dignity while adjudicating labour disputes and should take into consideration the fact that labour dispute are, as a rule, grounded in wounded self-respect; they should be very much attentive to workers and their claims; while arbitrating the disputes in case a clear-cut legislative regulation is non-existent they should prioritize as much as possible the protection of workers' rights; the example of the developed social States demonstrates that courts as a rule take a pro-worker stance, while that is not the case in the Republic of Armenia and that is the reason why human rights advocates qualified the Armenian judicial system as "bourgeois";
- proceed primarily from the "worker's rights" term; even when rejecting the worker's case, judges should proceed from the absence of this or that guarantee established for the protection of worker's rights; they should avoid using the "employer's right" term;
- avoid being guided exclusively by a formalistic approach and should make use of other methods of the application and interpretation of law;

- provided a well-reason answer to the plaintiff's claims, while recognizing as valid or invalid the reasons for missing the limitation-of-action deadline; preference, as a rule, should be given to recognition those reasons as valid, if within the required one-month period the plaintiff has lodged an application with the State Labour Inspectorate or the police or if he has in some other way alerted a relevant government body about the problem that had arisen;
- take a maximum rigorous approach to the protection of pregnant women's rights; while adjudicating the case of the cancellation of the labour contract with a pregnant women, **they should proceed from the assumption that the contract was cancelled because of pregnancy**; it should be incumbent on the employer to prove that there was another fundamental reason;
- take into consideration, while making a decision on the burden of proof, the fact that the employer is engaged in administration and the burden of proof should, as a rule, rest with him;
- rule only in exceptional cases that labour relations are impossible because of bad personal relations between the worker and the employer (application of Article 265, paragraph 2 of the RoA Labour Code);
- give a legal response to the violation of the established guarantees in case of the labour contract cancellation on the employer's initiative (in the event of mass dismissals, failure on the part of the employer to inform the Employment **Inspectorate** or to involve the trade union organization as stipulated by the collective contract, etc.); the existing practice of leaving some of the plaintiff's claims unanswered should be ruled out.

***To the Judicial Department:***

The Department should:

- make an analysis of the judicial practice related to labour disputes, paying close attention to extremely different approaches taken by the first instance court and the Court of Appeal. While the first instance court frequently hands

down a ruling that aims to protect workers' rights, such rulings are almost non-existent in the practice of the Court of Appeal.