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ASTRA anti trafficking action

Republic of Serbia
GOVERNMENT
Office for Cooperation with Civil Society

LEGAL AND INSTITUTIONAL FRAMEWORK FOR COMBATING LABOR EXPLOITATION IN SERBIA

- SUMMARY -

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PREFACE

Trafficking in human beings for the purpose of labor exploitation is an increasing problem in Serbia. However, adequate institutional response is still lacking. Due to high youth unemployment rate, thousands of young men and women are migrating to bigger towns in Serbia or to foreign countries in search for employment. In the process of labor migration, they are faced with serious challenges, ranging from frauds and harassment to forced labor.

Young people between 18 and 30 years of age living in poverty and with weak professional qualifications are at highest risk. Out of fear for their safety, they rarely report exploitation they experienced. Serious systemic and regulatory gaps, lack of capacities, unclear division of competences and insufficient cooperation of state authorities disable preventive actions and efficient sanctioning of such practices which at the same time can be serious criminal offence and violation of human rights.

Wishing to draw attention of both professional and broader public to the problem of labor exploitation and widespread practices in the labor market in Serbia which are increasing tolerance to exploitative labor and result in its normalization, organization ASTRA – Anti Trafficking Action, with support of the European Union (EIDHR program), has launched the project "Make It Work for Youth". This project is aimed at the analysis of normative regulation of the entire area of labor and employment in Serbia in order to detect shortcomings and gaps that enable exploitation of youth labor, as well as at analyzing views, experiences and needs of young people when it comes to employment and vulnerability to labor exploitation.

An important characteristic of this project is youth participation. Namely, three studies – the analyses of legal and institutional frameworks for combating labor exploitation and the analysis of views, experiences and needs of youth – have been conducted by the students of the Belgrade University Law School, Union University Law School, Kragujevac University Law School, Niš Unviersity Law School, Belgrade University Faculty of Philosophy (Psychology Department), Singidunum University Faculty for Media and Communication (Psychology Department), Belgrade University Faculty of Political Sciences and Faculty for Economics, Finance and Administration (Creative Production Department) with support of professors-mentors Ljubinka Kovačević, Mario Reljanović and Milutin Petrović. Young people will be actively involved in other project activities as well, in particular in the creation and production of media campaign.

In the next phase of the project, the findings will be presented to the representatives of competent institutions, hoping to come together to the solutions for identified problems. At the same time, an awareness raining campaign will be produced which should help young people better protect themselves from labor exploitation as well as seek appropriate assistance if they find themselves in the situation of exploitation.

Through these activities, ASTRA continues its work, started almost 20 years ago, on combating trafficking in human beings and all other forms of exploitation, as well as all other practices that contribute to trafficking in trafficking in human beings.

1. LEGAL FRAMEWORK FOR COMBATING LABOR EXPLOITATION IN SERBIA

1.1. Definitions of basic concepts – forced labor, slavery and servitude position, trafficking in human beings

Republic of Serbia has made a significant progress with regard to combating trafficking in human beings for the purpose of labor exploitation. However, various challenges are still present that need to be addressed. This includes, *inter alia*, the differentiation of trafficking in human beings, especially for the purpose of labor exploitation, from other similar concepts, in particular forced labor, slavery and servitude position, all the more so because some of these concepts are not clearly defined in the legislation and theory, while in practice, they often arise one after another. The research has shown that criminal legislation does not provide even a solid framework for protection from forced labor, slavery and servitude position, although it has very important role in combating them.

Legislator's attention should be kept on the regulation of flexible forms of labor and work performed outside employer's registered office, but also of labor in the areas that are not regulated or their regulation is insufficient (agriculture, fisheries), i.e. in the areas where the implementation of regulations in practice is unsatisfactory (construction industry). Such regulation should provide the workers engaged in these areas with minimum social and labor rights and update concepts accepted through the learning through work model.

As far as the definition of labor exploitation is concerned, there is a good solution in German criminal legislation, where labor exploitation is present in the case of work under conditions that are clearly different (less favorable) than the conditions under which other workers perform the same or similar work, that is, where there is an obvious imbalance between guaranteed minimum working conditions and the conditions that are provided to the victim of exploitation. It should be considered to include similar definition in Serbian labor legislation, too.

Appropriate criminalization is a prerequisite of effective prosecution and only strict sanctions can dissuade a perpetrator from practicing such activities. However, these very sanctions are what is missing. This is due to a fluid difference between trafficking in human beings, forced labor, slavery and servitude position. As trafficking in human beings is the most profitable activity and the most frequent method of committing the latter two, the problem of forced labor and enslavement are left in the background. Quite broad normative definition of the crime of human trafficking, where forced labor and enslavement are listed only as two of several its purposes, thus creating an illusion that these crimes can only be committed through trafficking in human beings, does not contribute to understanding the significance of these two phenomena. Another problem with regard to slavery and servitude position is that, although being criminalized as a separate offence, a consumption of the offence under Article 390 of the Criminal Code of Serbia (hereinafter CC) with the offence under Article 388 of CC probably takes place in practice, due to close correlative relations with trafficking in human beings, similarity of the acts of commission of these two offences and the identicality of their purpose. This results – according to available data from poor and non-precise statistics - in not recognizing the offence under Article 390 and consequently not prosecuting it separately from trafficking

in human beings. Having in mind the existing legal framework for combating of and protection from forced labor, slavery, servitude position and trafficking in human beings for the purpose of labor exploitation, the following should be done to improve it:

- Clearly define forced labor, slavery and servitude position in the law;
- Change normative definition of the offence of trafficking in human beings under Article 388 CC, or recognize and distinguish forced labor as a separate offence, or redefine the offence of holding in slavery and transportation of enslaved persons under Article 390 CC in such a way as to include forced labor in the newly defined offence under Article 390 CC;
- Ratify the 2014 Protocol to ILO Forced Labor Convention no. 29;
- Different specialist courses should be organized on discovering trafficking in human beings for the purpose of labor exploitation for both labor and market inspectors, as well as for police officers and other public officers who come in contact with labor exploitation cases (courts, prosecutor's offices);
- As far as the Strategy to Prevent and Suppress Trafficking in Human Beings, Especially Women and Children and Protect Its Victims for the period 2017-2022 is concerned, there are several essential issues that should be changed. Firstly, the resources projected by the Strategy should be allocated in a different way. Public awareness raising is important for combating trafficking in human beings and the Ministry of Culture and Information should certainly allocate certain funds for that purpose. However, the role of the Ministry of Interior is much more important and consequently, more substantial funds should be allocated for their work. Also, as stated in the Strategy, joint and comprehensive system of collecting and analyzing data on human trafficking does not exist and this issue should be addressed.

1.2. Protection of categories of persons who are especially vulnerable to labor exploitation

1.2.1. Children

A lot has been done in the previous years to improve the position of children who are included in labor process and to combat the abuse of child labor. However, there are important segments of legislation that can be improved, while the situation with regard to potential labor exploitation and forced labor of children is significantly aggravated by the solutions introduced by the newly adopted the Dual Education Law. Potential measures that are recommended in the area of legislation changes include:

- Amend the Law on the Foundations of the Education System so as to introduce mandatory cooperation of school principals and teaching staff in all schools with social welfare centers and, where needed, with court, and to specify clear and precise criteria and conditions based on which a school can impose an obligation on pupils to perform a community service or humanitarian work;
- Amend the Dual Education Law first by envisaging the manner of grading pupils' success in implementing the learning through work contract and then by providing the obligation of an employer to conclude an employment contract with a pupil who has shown excellent results, or amend the Dual Education Law by envisaging an employment relation as a model of engaging pupils, for the purpose of full protection of their labor rights;
- Amend the Dual Education Law to provide better protection of child's interests, specifically, it is necessary to define what is the interest of the child first and then to introduce mandatory cooperation between the school, the employer, the Chamber of Commerce and labor unions in concluding dual education contracts;

- Improve legal framework in the area of education inspection by broadening education inspection's prerogatives based on which they would perform the oversight of pupils' work at the employers' with whom the school has concluded dual education contract;
- Amend the Dual Education Law to envisage mandatory consent of a child older than 15 for concluding the learning through work contract (otherwise, current manner of work engagement of a child has some elements of forced labor).

Further, it is necessary to establish an agency, or broaden the capacities of the existing labor inspection, that would control the conditions under which minors work. This means the control of performing jobs and includes the assessment by a competent authority whether the specific job is harmful for child's health and moral, as well as to his/her education. The concept of the Dual Education Law should be changed in accordance with the principle of the autonomy of will and the principle that work should not have detrimental effect on minor's education. More detailed regulations are necessary with regard to minors' night work as well as for engaging children under 15 who are not allowed to work according to the Constitution, but are in practice *de facto* engaged in acting and folkdance clubs, advertising campaigns or sports events.

1.2.2 Irregular migrants

Based on the analysis, it can be concluded that irregular migrants are an especially vulnerable category of workers since they are explicitly recognized only in the Migration Management Law; the Law on Foreigners and the Law on Employment of Foreigners speak only about how to treat such persons, that is, about sanctioning employers who employ irregular migrants. In view of such situation, it is necessary for relevant authorities to consider adopting measures to regularize the position of irregular migrants and to refrain to the extent possible from criminalizing irregular migrations.

One recommendation to the competent authorities can be that migration policy and migration management should be planned, developed and included in political priorities, especially with regard to irregular migrants, who are in temporary vacuum without access to basic economic, social and cultural human rights.

Another measure that can improve the position of irregular migrants is a suggestion to the Ministry of Labor, Employment, Veteran and Social Affairs to consider a possibility of inclusion of other categories in the labor market during their stay in Serbia and to make sure that migrants, in particular irregular migrants, are not discriminated, taking into account the fact that they could be limited to informal economy and that national legislation does not recognize them as vulnerable category.

1.2.3. Workers assigned to work with another employer

It is not hard to observe that the institute of assigning to work with another employer has been established in employers' interest. This very fact should be sufficient to understand a need of special protection of employees who are in these cases at risk of becoming "a means" through which employers achieve their various goals. Instead of protection, the legislator is going towards aggravating the position of employees assigned to work with another employer, primarily by erasing the provision which used to prohibit the reduction of employees' rights during their work with another employer. Further, in view of frequent abuses in practice (indefinite number of assigning of the same employee, faking the assignment etc.), it is clear that employees are constantly brought to less favorable position.

Further, it should be noted that this institute could be abused in various different ways, such as indefinite assigning of the same employee. The Labor Law does not provide any limitation which can be

imposed on the employer in that respect; it is therefore not unrealistic to imagine a situation in which the employer assigns the same employee to work with another employer every year. Such result is especially possible when the employer simulates assigning to work with another employer. This is another method of abusing this institute, when the employer sets up several businesses and then "assigns" the employee to work in such companies, while effectively the employee continues working for the same employer. In addition, the employee is repeatedly concluding fixed-term contracts with those "another employers", in which his/her rights are often reduced, leading to unstable and insecure position of such an employee. Further, during the whole time, the employee has a fixed-term contract, which constitutes a violation of the Labor Law. For this reason, a possibility should be considered to introduce rules which would reduce employers' right to indefinite number of assigning of the same employee to work with another employer, primarily by establishing a requirement of mandatory consent of the employee in question regardless of the duration of the assigning. Also, in such situations the justification of the assigning should be examined, that is, whether there are effective reasons for assigning an employee to work with another employer.

Finally, another problem is insufficient activity and engagement of state institutions (in particular, labor inspection). Workers' protection could also be achieved through intensifying the activity of these institutions in the area of oversight and control of the implementation of regulations on assigning to work with another employer.

1.2.4. Workers temporarily assigned to work in a foreign country

With regard to the position of employees temporarily assigned to work in a foreign country (hereinafter posted workers), it should be noted that Serbia is a country of emigration and a country with a long history of posting. Posting is a result of contemporary market conditions and the expanding of doing business beyond the borders of Serbia, as well as of high unemployment rate and low wages. By adopting the Law on Requirements for Temporary Assigning Employees to a Foreign Country and Their Protection (the Posted Workers Law), an important step has been made regarding the protection of basic rights of employees in the process of posting and during their work in a foreign country, right to mandatory social insurance, occupational safety and health, and the regulation of conditions, procedure and obligations of the employer relating to the posting of workers and the oversight of the implementation of this law. Challenges that arise in practice relate to poor control of posting by competent authorities, the abuse of legal gaps by employers and the absence of provisions which would more comprehensively regulate this segment of labor legislation.

Analyzing the Posted Workers Law, it can be concluded that it is clearly possible in practice that an employer posts a worker abroad only one day after concluding employment contract, because the Law does not provide appropriate workers' protection in that area.

Further, the Law does not provide requirements which every employer must fulfill when posting workers in a foreign country, unlike the Croatian Posted Workers Law, which contains requirements to prevent abuses. Thus, one of the requirements which Croatian employer must fulfill is that at least 25% of its employees have to be engaged in Croatia, not including administrative staff. It seems that such solution should serve as an inspiration or a model to our legislator in regulating the position of posted workers. The reform of the Law should go towards envisaging certain financial capital as a requirement for registering a company which would be posting workers or that, before posting workers to a foreign country, the company should make a deposit in the amount of wages to be paid out to the workers during this period. Otherwise, it is possible to register a company with a symbolic capital which would be posting its workers to the companies abroad with such intermediary action being the only source of their income, although they are not registered for employment brokering.

One of the biggest problems with regard to the implementation of the Posted Workers Law and the realization and protection of employees' rights is Article 8 of the Law, which puts posted workers with fixed-term contract in less favorable position compared to fixed-term employees in the country. Namely, according to the Labor Law, an employee may work on fixed-term contract for 24 months at longest, with or without interruption. On the other hand, according to the Posted Workers Law, time spent at work abroad is not included in the total period of time which an employee may spend in the status of fixed-term employee.

Also, regardless of the competences of oversight authorities, the control of the implementation of the law and of the protection of workers' rights is weak in practice, which leads to the violation of law and workers' rights.

1.2.5. Persons at risk of poverty

What would contribute to better position of persons at risk of poverty is a change on the labor market through increasing the number of free jobs, but this can be achieved only through adequate state policies. If we take into account that the elderly, who live in multi-member families they support with their pensions, are also at risk of poverty, the issue of state policy of reducing wages and pensions of 2013 is still open. Although the government is making first steps towards resolving social exclusion, it is necessary to take concrete measures though legislation which would make this category legally visible in order to ensure that they have the same position as all other employees and thus prevent discrimination. A good example is the Law on Mandatory Social Insurance Contribution, which provides the return of the portion of paid contributions for an employer who employs persons younger than 30 registered as unemployed for more than six months, as well as for older persons and persons with disabilities. Such policy of incentives would lead to decrease in unemployment, increase in monthly income per household member, decrease of discrimination of less employable categories of population, and consequently social inclusion.

1.3. Risk of labor exploitation in the process of employment

In the process of employment, persons seeking a job may face different risks which lead to the exploitation of their labor. Several legal interventions are necessary in order to eliminate or at least reduce such risks.

The National Employment Agency (NEA) is not a classical employment broker, but a public agency with various competences that go beyond a simple job brokering and job matching role. In that respect, NEA's prerogatives should be expanded to include the period after job brokering and job matching. From the moment of registration until finding employment, a job seeker is required to fulfil a range of obligations. Otherwise, it is considered that cooperation has not been achieved in full and that the candidate is not interested in looking for a job. On the other hand, if the job seeker is not satisfied with NEA's service, he/she can only give up seeking a job with the assistance of employment counselor. Employer's obligations as the beneficiary of NEA's services are more of a technical nature. There is no examination of what the employer is looking for, that is, requirements that the candidate shall fulfil in terms of their validity and working conditions the employer presents. This is where the greatest danger of discrimination rests with regard to the requirements which the candidate shall fulfill or future labor exploitation of the employee. It would be desirable for the NEA to have the authority to correct, together with the employer, criteria which are requested from the candidate to fulfil in order to perform specific jobs if they obviously do not fall within specific requirements of the profession. Further, when selected candidate is supposed to conclude a contracts, it may occur that the employer changes initially offered conditions. In such case, the NEA has no influence;

even if the NEA insisted that the employer should fulfill what it promised, and the employer fails to comply, there are no sanctions for the employer. Such situations should affect further cooperation of the NEA with that specific employer, while employment councilors should be obliged to report them to the labor inspection.

Private employment agencies should be obliged to react adequately in such situations, too. The engagement of employment agencies in conducting the control of employment after the employment contract has been concluded should certainly not be an efficient solution, as it would create additional costs for agencies that must be borne by someone. The employer would certainly not have interest to bear these costs or then it would not use agency's services at all. It would be in employee's interest to cover such costs, but the closer to the minimum the employee's salary is, his/her wish for such type of control declines and a wish to maintain just any employment rises. A functional solution could be found in the mechanism of mandatory reporting to the NEA on concluded contracts following job brokering and in accordance with previously elaborated proposal to establish a controlling prerogative of this institution.

Also, when the license of an employment agency is revoked, sanction should be expanded to include not only prohibiting the founder of such agency to conduct employment affairs through employment agencies, but also through students' and youth cooperatives and temporary employment agencies.

The problem of registering several legal entities performing the same or similar activities (employment agencies, students' or youth cooperatives, temporary employment agencies) can be solved through the amendments to the Regulation on criteria, manner and other issues of significance for implementing active labor market measures, by explicitly prohibiting that an employment agency, youth cooperative or temporary employment agency conduct their business activity on the same premises.

Cooperatives could be popularized on the market and enable young people quicker employment. As internship is increasingly becoming a mandatory part of higher education, cooperatives could help universities and colleges in organizing it. Also, the work of cooperatives and satisfaction of employers and its members can be improved through better analysis of data which cooperatives possess and better matching of candidates' qualifications with job requirements.

Higher degree of security of cooperative members is necessary in practice. The control of work of students' cooperatives is needed to prevent abuses. The Cooperatives Act allows for a possibility of control by cooperative members who actively participate in decision making and formulating business policy. Beside internal control, the work of cooperatives should be controlled externally, as well. External control is done by cooperative review, which can be conducted by local or regional cooperative unions. Some of the problems can be solved by aligning the Cooperatives Act with the General Rules of Students' and Youth Cooperatives.

Temporary employment agencies appear as a response to modern supply and demand in the labor market which requires first of all speed both on the part of employers who need labor force as quickly as possible and of persons who want to work. By passing a law in this area and strict oversight of its implementation, this manner of employment could contribute to more efficient employment and protection of rights of temporary workers, starting with the responsibility of agencies towards engaged workers and the scope of assigning workers in comparison to persons directly employed by the employer. Precise regulation of mutual relations of all three sides implies regulating occupational safety and health issues, compensation of damages that may arise for all three sides and a possibility of realization of collective rights of persons engaged through the agencies

1.4. Working conditions that may lead to labor exploitation

1.4.1. Combating and punishing informal work and abuse of non-standard employment contracts

Due to unequal relation between contractual parties to an employment contract, an employer, as a stronger party, making use of legislative solutions which allow them so, circumvent their implementation, which results in a discrepancy between contracted and factual working conditions and inevitably lead to labor exploitation. Having examined legislative solutions with regard to employment contract as a legal basis of engagement for work, it may be concluded that introducing a *fiction of the existence of employment relation* in order to prevent informal work would contribute to its reduction. However, this would not fully eliminate the risk of labor exploitation because failure to fulfil the form of employment contract, which is of protective character, lead to the possibility of unilateral definition (that is, imposition) of working conditions by the employer.

Discrepancy between contracted and factual working conditions is visible also in the case of "business trip abroad", when, in order to avoid the implementation of provisions of the Posted Workers Law, employers do not conclude an annex to the employment contract with the employee for the purpose of relocation to another place of work, but send them to "business trip".

Although it is not standard employment contract, a fixed-term contract appears in practice as a rule and not as an exception. The abuse of this institute is contributed to by its maximum duration of 24 months, which should be reduced.

The practice of not concluding employment contract is accompanied by probation work, which is performed contrary to regulations, that is, it serves for employers to establish factual work by abusing lack of knowledge of regulations of persons they engage. By avoiding to conclude employment contract, employers search an alternative also in contracts which do not form employment relationship, thus circumventing the implementation of the provisions of the Labor Law that are not favorable to them, that is, provisions which implementation is linked primarily to not insignificant (direct and indirect) costs as well as undesirable limitations of employers' authority (managerial, normative and disciplinary). Absence of detailed legal regulations in the area of engagement for work outside employment relation and imprecise provisions of the law leave to employers a broad field for abuse and put workers in a vulnerable position favorable for labor exploitation. Informal labor has serious implications, especially on young people, who, because of their position, often accept insecure working conditions, salaries that are considerably lower than legal minimum and considerably smaller protection of their rights guaranteed by the Labor Law, in which way they are deprived of social contributions, rights related to pension and disability insurance and access to health insurance.

1.4.2. Risk of discrimination at work

As far as discrimination in the area of labor is concerned, legislative framework is considered to be of good quality, fairly comprehensive and completed. However, various difficulties appear in the implementation of the Law, for which reason victims of discrimination are deprived of protection. This especially relates to judicial protection, since a range of court decisions has been registered in which anti-discrimination regulations are not properly applied. Solving the problem of unsatisfactory implementation of a good law in practice should begin with education and training of judges which will help them do their job in accordance with the law. Discrepancy between the law and practice is also present with regard to data on the efficiency of judges in these proceedings which the law itself defines as "urgent", but which are not treated as such. A good solution would be a possibility of using the review as an extraordinary legal remedy which is always allowed. This provides a certain level of legal security because the Supreme Court of Cassation will be deciding on the

proceedings. However, an additional problem here is prolonged duration of the proceedings, higher costs for the party and the fact that this court also does not have unified practice.

1.4.3. Risk of workplace harassment

Prevention of harassment at workplace has not produced satisfactory results in the practice of implementation of the Law on Prevention of Harassment at Workplace. The shortcomings of this regulation are significant and give rise both to impossibility of its implementation and wrong implementation and legal uncertainty. All these situations result in the absence of protection of an employee from workplace harassment.

In that respect, it is possible, *inter alia*, to note the following challenges with regard to the implementation of the Law on Prevention of Harassment at Work:

- The first challenge with regard to practical implementation of this Law is conflation of discrimination at work (in connection with employment, at work and related to work) and workplace harassment. These are two different phenomena – the difference refers to different manner of their legal regulation, resulting in different sanctions, since they involve different actions and motives. Motive is the main point of differentiations. With regard to discrimination, a person is deprived of his/her rights because he/she possesses specific personal characteristics which define such person as a member of a broader group. Regarding workplace harassment, the main generator of unlawful behavior is a personal relationship with victim (jealousy, anger, intolerance) which is not connected with prejudices towards a group to which such person belongs, or pure economic benefit (so called strategic mobbing). What is similar and leads to conflating these two concepts refers to the same or similar consequences: humiliation of the employee, isolation, personal devaluation, not fitting in, impaired health as a consequence of prolonged stress and the like. Because different legal provisions are applied and different authorities are involved, it is necessary to clearly distinguish which actions constitute discrimination at work and which ones constitute workplace harassment. The fact that the Law on Prevention of Harassment at Work provides that its provisions shall be applied on cases of sexual harassment in accordance with the Labor Law, which envisages sexual harassment as a form of discrimination, contributes to the conflation of these two phenomena, too. In specific situations, where it is difficult to distinguish whether an act which constitutes sexual harassment is a form of discrimination or workplace harassment, the injured party is advised to decide depending on the regime of protection under which he/she will realize their rights more easily.
- Another shortcoming is related to insufficiently precise specification of active and passive legitimation. Firstly, in Article 6 of the Law on Prevention of Harassment at Work, it is clearly specified that the perpetrator of harassment is considered to be an employer with the capacity of natural person or an official of the employer with the capacity of legal person, an employee or a group of employees of the employer who committed the harassment. However, there are articles in the Law which are not clearly formulated for which reason it may appear that some persons are not passively legitimated. Specifically, under Article 29, Paragraph 2, an employee who is not satisfied with the outcome of the workplace proceedings of protection against harassment has the right to file a complaint for harassment at work. Based on this provision, it can be concluded that the very perpetrators of workplace harassment does not have passive legitimation although they certainly do. Insufficient specification of the Law regarding passive legitimation has already resulted in practice that victims of harassment do not decide to initiate the proceedings in situations when harassment has resulted in termination of employment. The Law on Prevention of Harassment at Work must be interpreted in such a way so as to include the employer and the

official of the employer where the victim of harassment was engaged for work in the period when harassment was committed.

- Under this Law, many persons can be potentially deprived of protection against harassment. For example, when several legal persons share premises; when a person is engaged by an employer who conclude a contract on business cooperation, that is, conducting certain tasks for another legal entity. In such situations, the employee who suffers harassment by an employee of another legal entity cannot file a complaint against the employer of a person committing harassment because it is not his/her employer, neither can he/she sue his/her employer because harassment is done by a person over whom such employer does not have any authority. The Law also cannot be applied in the case when harassment is committed by a founder or owner of a legal entity. In that respect, it is recommended to expand the scope of the Law to include such persons and consequently enable to a larger number of persons who potentially can suffer harassment at work, to request judicial protection.
- Regulation on the rules of conduct of employers and employees with regard to prevention and protection from workplace harassment confirms that "an individual decision (act) of an employer regulating rights, obligations and responsibilities related to employment relation against which an employee has the right to protection according to the law" (Article 13) shall not be considered workplace harassment. This way, the Regulation completely excludes individual decisions as a matter of proceedings for protection against workplace harassment, while the very adoption of such decisions is an instrument by which harassment is committed. In that respect, we hope that future changes of the Law and bylaws for its implementation will enable filing a complaint against individual acts of the employer.
- Another shortcoming of the Law is an obligation of the victim of harassment to initiate previous proceedings at the workplace unless the perpetrator of harassment is the employer itself, that is, the official of the legal person. Employee harassed by another employee cannot go to court immediately. Legislator's wish to come to peaceful resolution in an internal, confidential proceedings, in situations where it is possible, is understandable. However, the problem is that the initiation of previous proceedings is prescribed as an obligation (and not a possibility, which would be better solution), which has turned out not to be practical in situations when it is clear that the reconciliation proceedings will not have positive outcome and the employee continues to suffer harassment until the completion of previous proceedings in order to qualify for the right to file a complaint in court.
- In the very definition of harassment under Article 6 of the Law on Prevention of Harassment at Work, it is required that a behavior towards an employee or a group of employees of an employer is repeating. In further text of the Law, it is not specified when an action shall be considered to be repeating, and it is on courts to define it more precisely. It is possible to imagine a situation in which one-time action would produce lasting consequences. The solution would be to focus on the duration of consequences of an action or act and not on the duration of the action itself. One action can certainly not be observed as isolated, but all circumstances of the case should be taken into account and behavior of a person committing harassment, an intent expressed through such behavior and effects such behavior produced on the harassed persons should be assessed.
- With regard to the sanctions for a person committing harassment, after successfully completing previous proceedings, i.e. after an agreement has been reached with a help of a mediator, it is obvious that there will not be any sanctions. The procedure is not public and the harasser will probably not agree to any sanction in the agreement. In case of conviction, the Law on Prevention of Harassment at Work does not say anything. Pursuant to the Labor Law, such conviction may constitute ground for termination, and compensation which the employer may be obliged to pay to the victim may be the subject of employer's recourse request towards the perpetrator. When the employer is not a direct perpetrator of harassment, there will be no sanctions although it was

employer's duty to ensure healthy working environment. The employer has the right to recourse request if the employee caused damages on purpose or by negligence, and since an intent is a constitutional element of harassment, it is obvious that the employers will always have the right to recourse request, and the only sanction that may affect them is moral judgment because of publicized court decision. The Law also does not sanction employers who failed to create healthy working environment, which directly affects their lack of interest in providing preventive protection to employees or to get involved in the proceedings related to harassment. It should be noted here that in this way the Law only enabled employer's passivity. We cannot count on employer's awareness that harassment can have negative impact on profits because of increased number of employees who use their right to paid leave for health reasons (sick leave), quitting and severance payments, reduction of labor productivity in such atmosphere etc., and that this would be a motive to ensure healthy working environment. It is necessary to introduce objective responsibility of the employer in cases when an employee harasses other employees.

1.4.4. Risk of violation of occupational safety and health

Occupational safety and health are not regulated in a satisfactory way. There are significant obstacles to efficient implementation of the Occupational Safety and Health Law. Employers often see the fulfillment of legal obligations in the area of occupational safety and health an unnecessary expenditure, trying to eliminate or at least reduce it. This is especially visible regarding ensuring adequate working conditions and equipment in construction industry and manufacturing. It is additionally worrying that as many as 30% of persons who lost their lives were engaged informally. In their case, inadequate attention is paid to whether workers are sufficiently qualified for performing specific tasks and their training for safe and healthy work. Further, employers do not provide such workers with adequate equipment for personal occupational protection. As a result, risk of getting hurt is increased, which, having in mind that informal work does not include contributions for mandatory social insurance, additionally aggravate their position.

1.4.5. Prevention of worsening of working conditions, denying basic rights related to employment relation and reduction of their scope

The Labor Law contains several unclear provisions and legal gaps that may lead to significant worsening of working conditions and result in labor exploitation. Some of the main shortcomings are the following:

- The Labor Law does not precisely define duty hours and standby time period – they should be specified better, i.e. limits should be set for how long an employee can be on this regimen).
- It is necessary to expressly stipulate in the Labor Law that overtime work is forbidden for part-time jobs. For persons who work part-time, wages increased for overtime work are paid only when they work longer than full-time working hours, in which way part-time employees are put in less favorable position. They can work overtime, but with increased salary for any work performed over contracted working hours.
- It is necessary to change Article 53 of the Labor Law which regulates overtime work:
  a) Overtime work shall be employee's choice and not responsibility;
  b) It is necessary to regulate the form of introduction of overtime work by employer – this should be done by a written document signed by an employee, in which way he/she explicitly gives consent;
  c) A time period should be specified during which the employer shall be obliged to notify employees of overtime work.

- - With regard to the structure of earnings, it is necessary to clearly distinguish earnings from other income on the basis of employment – the best solution would be if the legislator applied the same fiscal regime on the different categories of income.
- - An obligation for the employers shall be introduced to adopt a special regulation on criteria for determining the results of employees' work and the evaluation of employees' performance and capacities.
- - The existing text of Article 67 Paragraph 5 of the Labor Law should be changed in such a way to clearly stress that the employer is obliged to ensure both weekly rest previously denied to the employee and weekly rest that belongs to the employee in that week under the Labor Law.
- - The employer should be obliged to establish a time interval during working hours when the employee will be allowed to use his/her right to rest period in course of daily work and timely notify the employee thereof.
- - The duration of the corresponding part of the annual leave should be precisely defined when the employee acquires such right for the first time with the new employer (make it conditional to the time spent at work).
- - Employee's right to choose between financial compensation for unused part of annual leave, the issuance of a certificate on the remained days of annual leave or even a possibility to use the right based on the certificate in the period of one year from the day of issuance should be considered.
- - Article 77 Paragraph 4 of the Labor Law, which specifies members of immediate family, should be changed to include civil partnership (i.e. list civil partners as immediate family members, because according to the Family Law, civil partners with children are members of family). The same applies on Article 79 Paragraph 3 of the Labor Law, which provides conditions for stay of employment in case of employee's spouse being assigned to work abroad. This would eliminate discrimination against civil partners in case of using stay of employment.
- - It is desirable to envisage an obligation of the employer to accept an elaborated and justified request of an employee for paid leave in case of serious illness or death of a member of family household. Current solution is good because the right is realized automatically, but at the same time, it creates uncertainty for the employee on whether the employer has taken note of his/her request to use paid leave.

If proposed amendments were taken into consideration, some of possible abuses could be avoided, in which way employees would be enabled to fully enjoy their rights.

1.5. Regulations in the area of social protection that can lead to exploitation

There are several provisions in social protection regulations which are disputable from the point of view of prohibition of labor exploitation and forced labor. All observed shortcomings refer to the fact that right to social protection must not be conditioned with imposed work engagement. Social protection rights result from socially responsible role of the government which takes care of citizens who are currently in the state of social need. However, this cannot produce the right of the state to request their work engagement at any job, regardless of qualifications and psychological and physical condition of a person. By threatening those who refuse work engagement with a possibility of losing some social rights, the state actually forces them into work activation regardless of their will and as a rule under conditions which are below the minimum standards that apply on employment. In that respect, the following is recommended:

- Amend the Social Protection Law so that it regulates more thoroughly conditions for accessing right to financial social assistance (cash benefits) and erase Article 86 which provides that the beneficiary of financial social assistance shall be obliged to accept work offered by an organization responsible for employment activities in accordance with the Law on Employment and

Unemployment Insurance. Right to cash benefits should not be linked to the obligation of work engagement, especially if it involves jobs that do not correspond to the professional profile and capabilities of a job seeker.

- The Regulation on Social Inclusion Measures for Beneficiaries of Financial Social Assistance should be amended by erasing Article 2 Paragraph 2 Point 5 which introduces an obligation of community work as a condition for accessing the right to financial social assistance. Such work is contrary to the Constitution (Article 26, prohibiting forced labor) and represent an example of forced labor under conditions which are far below decent work standards.
- The Regulation on Social Inclusion Measures for Beneficiaries of Financial Social Assistance should be amended by erasing Article 4 Point 1 which gives authority to the social welfare center to reduce or deny the right to financial social assistance to a beneficiary who failed, without justification, to fulfil obligations from the individual activation plan. Measures implemented by the National Employment Agency should aim at working out the most favorable option of work engagement for persons seeking job and not at mechanical data processing on persons in question, with a possibility to take away social protection rights which must not depend on the factors of their employability.

1.6. Other observed challenges

It has been observed during the research that it is difficult to conduct statistical analysis of court practice due to poor manner of registering and processing cases. Courts need to keep more accurate, precise, clear and detailed statistics; besides annual reports containing statistical data on the total number of processed offences, they should have a detailed database which would enable search according to the name of the offence or specific article of the Criminal Code. Such statistics could be operated jointly for all basic courts, all higher courts and all courts of appeal of the same subject matter jurisdiction, which would enable easier insight into data. Consequently such statistics would be better and more credible.

Further, one of the main problems in the realization of the existing legal framework is a weak system of supervision over its implementation. This is due to different reasons, some of which are objective and can be solved by legislative initiative or by intervention of competent authorities in the field. Although the Labor Inspectorate has relatively broad jurisdiction, it does not include all economic activities where substantial risk of labor exploitation of employees and other categories of workers is present (especially agriculture and domestic work). Consequently, legislation should be adopted to enable such jurisdiction. On the other hand, the number of labor inspectors is not proportional to the number of registered economic entities (at the moment, 240 labor inspectors are responsible for 350,000 registered economic entities). Therefore, their number should be increased, at the same time ensuring better working conditions for them.

2. INSTITUTIONAL FRAMEWORK FOR COMBATING LABOR EXPLOITATION

2.1. Realization and internal protection of labor rights as an instrument of prevention and protection from labor exploitation

Moving away from the guarantees of basic labor rights is relatively connected with employers' attempts to reduce labor costs in order to keep the continuity of doing business, avoid insolvency and achieve competitive advantages and maximization of profits. Therefore workers must be provided with effective protection in case of deprivation or excessive limitation of their rights, starting from internal protection, that is, protection which is achieved in the work environment. In that respect, particular shortcoming in the system of instruments for combating labor exploitation is the *absence of legal rules on the procedure of decision-making on rights, obligations and responsibility from employment relation* and *especially the absence of two-instance principle in terms of absence of internal protection of employee's rights in relation to complaints or objections*. This is contrary to the constitutional guarantee of right to complaint or other legal means against any decision on someone's right, obligation or lawful interest, as well as the guarantee that every decision shall be made in the procedure prescribed by the law beforehand. In that respect, there is a need to improve the position of workers who work for the employer in the capacity of private person, while solutions from foreign laws can serve as inspiration or model for building a new system of internal protection of rights related to employment relation. This especially applies on the introduction of bipartite commissions for (internal) resolution of labor disputes, which may be formed for the whole work environment or for specific units in order to take into consideration specific characteristics of certain sectors, plants or other organizational units (like corresponding solutions from the Russian law). Similar applies on the attempt of settling (individual) labor disputes in the process of negotiations between trade unions and employers (e.g. in Sweden) as well as for encouraging the establishment of workers' councils, which existence and operation can empower the legitimacy of decision-making process in the company and absorb labor disputes, which has turned out in the practice of implementation of such labor law provisions in Germany. Yugoslav self-management labor law also contained solid solution on mandatory two-stage procedure regarding employee's complaints, which implementation represented also a prerequisite for initiating a case in court, which, also, can be an inspiration or a model for our legislator having in mind a need to ensure quick and effective reaction to violation of labor rights and thus contribute to the prevention of labor exploitation.

The same applies on the rights of candidates for employment in the private sector as they do not enjoy any protection and are exposed to the risk of forced labor, discrimination and other forms of arbitrary actions of the employer. In that respect, it can be proposed that, similarly to candidates for employment in state authorities, other job seekers should also be recognized the right to complaint against decision on the selection of candidates as a sort of supplement and support to the guarantee of right to work and right to availability of all work places under equal conditions.

2.2. Inspection oversight and the prerogatives of labor inspection, market inspection and tax inspection of significance for combating labor exploitation

Inspection oversight has a significant place in the institutional framework for combating labor exploitation not only with regard to the process of employment, but also after a person has been engaged for work. This especially applies on the authority of labor inspection, which is set rather broadly and include a

range of (preventive, corrective and repressive) measures. However, the existing prerogative of labor inspection still fails to produce optimum results when it comes to combating labor exploitation. This is for both legal and technical reasons, starting from insufficient number of labor inspectors and their insufficient training. Further, the structure of prerogatives of labor inspection is not clear, which often results in it stating not to have jurisdiction for reported cases. On the other hand, extending the jurisdiction of labor inspection to include unregistered entities is a very good solution from the Law on Inspection Oversight. However, it substantially increased the workload of labor inspectors, which is a special problem having in mind their lack of human resources. In that respect, it is recommended to employ new labor inspectors, especially in view of the age structure of the Labor Inspectorate. An alternative proposal can be directed towards reducing the number of regulations whose control is required, thus focusing professional attention of labor inspectors on the industries linked to the highest risk of labor exploitation, i.e. categories of workers whose engagement bears a strong risk of labor exploitation (migrants, minors, informal workers, bogus self-employed persons etc.). This proposal does not imply narrowing the authority of labor inspection, because it is good for inspectors to have broad jurisdiction until more efficient work of courts is ensured, even jurisdiction that exceeds classical administrative oversight of the implementation of regulations (such as authority to postpone the enforcement of the decision on termination of employment contract or authority to order the conclusion of permanent employment contract). This is all the more so since the significance of labor inspection in fight against labor exploitation is really substantial because of the possibility to file anonymous complaints, relatively quick action of labor inspectors against complaints and the absence of costs for "activating" such protection measures. Because of these advantages of inspection oversight, it must be pointed out to the need to ensure inspection oversight of the implementation of relevant regulations also in cases of paid domestic work (assisting household personnel) and on private farms. Further, it is necessary to ensure continuous education of labor inspectors in the area of preventing and combating labor exploitation in terms of acquiring additional skills and knowledge (including, *inter alia*, labor legislation, criminal legislation, misdemeanor legislation, administrative legislation, migration legislation, social and other legislation) of significance for recognizing, identifying and discovering labor exploitation and identifying and assisting victims of labor exploitation, regardless of the fact that listed tasks, especially in cases of trafficking in human beings for the purpose of labor exploitation, fall within the jurisdiction of other authorities – law enforcement and public prosecutor's office. It is necessary that they are joined by labor inspectors on this task, as well as by social welfare centers and local self-government, in order to achieve coordination of activities and respond to the dynamics of a process such as trafficking in human beings. In addition, courses aimed at learning and gaining proficiency of foreign languages and developing social skills should be organized in order to enable inspectors to identify and assist victims of labor exploitation more easily. Moreover, it could be advisable to establish specialized teams of labor inspectors who would be trained for the issues of labor exploitation, forced labor and trafficking in human beings for the purpose of labor exploitation, as is the case of the Belgium law.

Inspection oversight is especially significant instrument for protection of job seekers since it includes taking adequate measures not only towards registered, but also towards unregistered businesses, and especially towards business that act as intermediaries for employment in foreign countries. This all the more so because employment of persons based on job brokering by unregistered entities leads to tax evasion and unfair competition regarding registered businesses which act in accordance with the law. *Oversight of unregistered employment agencies*, therefore, is done by several inspections: *market inspection* (making the decision ordering unregistered entity to apply for registration), *tax inspection* (prerogatives under the Law on Tax Procedure and Tax Administration regarding tax payments) and *labor inspection* (regarding implementation of labor legislation). Market inspection conducts the oversight of activities of unregistered businesses where workers are factually engaged and the activities of companies which are registered in accordance with the law, but are not licensed for employment brokering under the Law on Employment and Unemployment Insurance, but still operate as employment brokers. In that respect, there is a need to align the provisions of the Trade Law and the Inspection Oversight Law, in order to avoid conflict of jurisdiction with regard to unregistered businesses. As

the tax inspection also has the jurisdiction over unregistered businesses in accordance with the Tax Procedure and Tax Administration Act, there is also a need to exclude possible conflict of jurisdiction of these two inspections and regulate the manner of joint oversight of unregistered businesses. In determining the authority responsible for issuing the decision ordering unregistered business to register with the Business Registers Agency, it seems appropriate to apply the Public Administration Law, which starts from the assumption that in the process of joint inspection oversight of unregistered business, responsible shall be inspection in whose primary scope of work is taking inspection oversight measures (which is specified in the law determining the scope of work of inspections). Further, having in mind certain specific characteristics of division of jurisdictions and powers of inspections in imposing measures on unregistered businesses in the process of employment, it is necessary to ensure adequate exchange of information between inspection oversight authorities in order to achieve coordination of actions towards unregistered businesses. On the other hand, due to insufficient number of labor inspectors and their modest technical equipment, labor inspection is effectively deprived of possibility to efficiently oversee violations of labor legislation by unregistered businesses. The market inspection does not suffer from these problems, for which reason it would be important for the market inspection, until the consolidation of (personnel and technical) capacities of the labor inspection, to keep current jurisdiction regarding unregistered entities, especially with regard to taking measures for rectifying shortcoming in the registration of the business and ordering registration with the Business Registers Agency.

Having in mind that fight against labor exploitation requires cooperation and implementation of joint actions of numerous authorities, it is necessary to work on building information system that would enable quicker flow of information, more efficient and effective work of labor inspectors as well as of other authorities in the chain, with regard to the possibility to forward, in a short period of time, data collected in the field to the competent authority.

A need to establish and enhance cooperation of the labor inspection with other authorities, institutions and agencies is especially visible in the area of occupational safety and health. This could also contribute to combating labor exploitation having in mind the attempts of some employers, especially in construction industry and manufacturing, to reduce labor costs and consequently made their products or services cheaper on the market by circumventing obligations provided by occupational safety and health legislation. In that respect, there is a need to maintain and improve cooperation of the labor inspection with the Occupational Safety and Health Administration, the Occupational Safety and Health Council, the Occupational Medicine Agency, the Association for the Protection Occupational Safety and Health and the Socio-Economic Council of Serbia. In that respect, one of the serious issues is inconsistency in regulating protection from injuries at work and occupational diseases, which gives room to the employers to present the number of injuries and occupational diseases differently. This is especially challenging with informal work and the engagement of especially vulnerable categories of workers.

The effectiveness of inspection oversight depends on the work of other authorities and institutions, as well, starting with *misdemeanor courts*, since the initiation of misdemeanor and other proceedings does not always lead to final outcome, in terms of prevention of labor exploitation or removal of its consequences, primarily because of sluggishness of our judiciary and a risk of statute of limitation of initiated proceedings. Also, misdemeanor courts sometimes overly reduce penalties, thus devaluating the work of labor inspection.

2.3. Institutional framework for the protection of workers who are especially vulnerable to labor exploitation

A need for special protection from labor exploitation exists with regard to especially vulnerable categories of workers, i.e. workers who are in such position which employers can abuse for achieving their economic interests. This primarily applies on minors, whose risk of exploitation is intensified by their

immaturity, lack of experience and insufficient knowledge of the work process and labor rights, as well as by the fact that their employment is linked to a prejudice that they are cheaper and less demanding workers who are easier to control than their adult colleagues. This is all the more so because regarding minors, in addition to protectionism, there is also abolitionism (in terms of establishing the age of 15 as a general condition for employment), which unfortunately result in the engagement of children for actual work (so-called informal work) and other forms of exploitation. In that respect, there is a need to reconsider a possibility to introduce, in addition to the existing rules regarding jobs for which higher age limit is required, special rules that could allow, in very exceptional cases, the engagement of children under 15 for work in the area of culture, sport and advertising. It seems that this issue should be regulated in order to take into consideration a need for participation of children in cultural and similar events, but only providing the approval of competent public authority (*social welfare center, labor inspection, ministry responsible for labor affairs*), all the more so as these forms of child labor are present in practice and are often linked to the abuse of authority of the contractors and other employers of children. It is therefore important that some practices of labor engagement of children, as much as they may seem socially acceptable at first glance, must be qualified as child labor with awareness that, without proper protection of children, it may produce quite negative consequences on children. In that respect, it is especially important that, besides the protection of health, moral and education of children, effective measures are provided to prevent their economic exploitation or putting them in unfavorable position in another way, *inter alia* with regard to the organization of their working hours and specifying the amount of compensation for their work. In that case, it would also be necessary to establish lower age limit for engaging children in artistic or similar activities, e.g. 14 years of age, unless the work implies acting or dancing roles which cannot be performed by older child.

The legislator does not limit establishing employment relation by the request of *mandatory education,* which is required by international standards. This means that persons aged 15-18 can conclude employment contract although they still go to primary school. In such cases, instruments should be ensured which would make sure that minors who have not completed mandatory education fulfil their obligation in that respect. We believe that this issue should be regulated by the Labor Law too, by stipulating that a person older than 15 who still attend primary school can also establish employment relation providing that such engagement does not have negative impact on attending school, participation in school activities, or in professional guidance or training programs approved by competent authority. In addition, competent authority (e.g. a *minister responsible for labor affairs, individually or together with a minister responsible for education*) should specify activities in which it is possible to employ persons who fulfil general condition for employment, but have not completed primary school. Competent authority should also prescribe maximum number of working hours and working conditions for these persons. Further, we believe that it would extremely important that, in addition to the issue of minimum age for employment, the legislator regulates the issue of engaging minors for work outside employment relation, which is a basic obligation of every state that has ratified ILO Convention no. 138. This further means that there is a need to establish minimum age for every form of (paid or unpaid) work of minors in terms of respecting a need to provide special protection to children regardless of whether they have concluded employment contract or actually perform work for other.

Labor inspection should have broader powers regarding the employment of minors, regardless of the fact that according to Serbian legislation, the inclusion of minors in the labor market is conditioned by a written consent of parents, adoptive parents or guardians. This is because domestic legislation does not have the procedure for *examining the absence of harmfulness of specific job for health, moral and education of minors*, which could be included into the prerogatives of labor inspection or social welfare center. Namely, the request related to the consent of legal representative seems insufficient to prevent minors to perform inappropriate jobs that could even be harmful. Involvement of labor inspection and/or social welfare center in the process of assessing jobs in which minors are engaged would enable careful consideration of every specific situation regarding the assumption that certain types of work are useful (or harmful) for the development of a minor.

Finally, this would recognize the fact that the performance of certain kind of job can affect minors differently, depending on specific characteristics of their family environment, cultural environment and the like, and hence competent authority could assess how certain job, otherwise safe, would affect all aspects of child's life in a specific case. If such procedure were introduced into domestic legislation, it would not be necessary that legal representative's consent represents special condition for establishing employment relation with a minor, but parent or other legal representative could be recognized only the right to initiate termination of employment if they find that such employment is against the best interest of the child. Further, it seems that special prerogative of labor inspectors should be introduced regarding the implementation of new measures against employers who violate rules on the employment of minors. This could be contributed to by employers' obligation to keep special records on minor employees that should be available to labor inspectors at any moment. Further, *education inspection's oversight of the engagement of pupils for conducting the so-called school's extended activity should be strengthened*, in order to prevent possible abuses of the work of minors within education process (e.g. if such work does not contribute to the better quality of their education).

On the other hand, work engagement of migrants can turn into labor exploitation first of all because of not speaking the language and consequently not knowing their subjective rights (and objective law of the reception country in general). This is accompanied with the isolation of foreigners from society, which also have negative impact on the availability of information of significance for realizing, using and protecting rights from employment relation, which is often contributed to by limited freedom of movement and limited contacts with third parties. These factors are sometimes so strong that employers do not need to use additional means of pressure on workers, especially when it comes to migrants irregularly staying in the country of reception, since they are permanently in fear of being discovered. All the more so, irregular migrants wish to remain "invisible" for public authorities (for which reason they will not initiate proceedings for the protection of their rights), while employers do not have legal obligation to ensure conditions for effective realization of basic rights of this category of migrants. This is where the significance of labor inspection for combating labor exploitation become more significant. The same applies on other public authorities, such as the Ministry of Interior and the National Employment Agency, which, unfortunately, do not have elaborated system of protection of persons irregularly staying in our territory. In addition to advancing this system, it is also necessary to align relevant regulations, in order to provide necessary free legal aid to migrant workers and certain social benefits to those most vulnerable.

Bogus self-employed persons are also particularly vulnerable to labor exploitation, especially in the area of transportation, construction industry, hotel management and consulting services, where a significant number persons work based on civil law contracts even when there are elements of employment relation. The main reason for concluding simulated contract should be searched in employers' attempt to reduce labor costs by circumventing obligations arising out of labor, social and tax legislation. The qualification of self-employed persons in this case makes the position of bogus self-employed persons unstable and deepen their dependence on the employer, as they are less protected than employees. This problem should be solved, based on the model of international labor law, by applying the rule of primacy of actual over declarative will of contractual parties. More precisely, this means that when deciding on the existence of employment relation, one should be guided by facts and not by a title or form given to a certain legal relation by its parties. The existence of employment relation, thus, does not depend on how parties describe their relation but on the fulfillment of certain objective conditions, so that in the case of abuse of this legal institute it is possible to establish the existence of employment contract and invalidity of legal acts that are used to cover it. The government therefore has a task, in addition to adequate legislative intervention, also ensure mechanisms that would contribute to the prevention of bogus independent work and protect persons who actually work for the other, especially when it comes to ensuring a possibility for cheap and quick (in court and out of curt) resolution of disputes on the existence of employment relation, timely and effective action of labor inspectors, social insurance authorities and tax administration, and the encouragement of collective bargaining and social dialogue on relevant issues.

In that respect, it should always be borne in mind that bogus self-employment and informal work damage the budget of the Republic of Serbia and mandatory social insurance funds, for which reason it is necessary to ensure better collection of mandatory social insurance contributions. This includes, *inter alia*, the introduction of clear rules for applying for social insurance and adequate sanctions in case of failure to submit the application based on simulated contracts. It is necessary to create conditions *for proper and effective functioning of Central Registry of Mandatory Social Insurance* since it is not possible at the moment to conduct regular monthly analysis and adjustment of data from the Central Registry's database on the payment of mandatory social insurance contributions. The overcoming of this problem will considerably improve the work of the Tax Administration with regard to the control of payment of mandatory social insurance contributions and taking measures from their jurisdiction in order to increase the collection of mandatory social insurance contributions. Further, the level of workers' protection in case of non-payment of contributions may be improved also by strengthening employers' responsibility, along with introducing joint and several responsibility of the state. This is all the more so as relevant regulations do not envisage direct sanctions for employers who do not conclude employment contracts with their workers, but some other type of contracts (civil or company law), although significant elements of employment relation exist in thus established relationship. In that respect, criminal offence of non-payment of tax after deduction under Article 226 of the Criminal Code should apply also when a responsible person of the employer who has concluded a simulated contract with a worker is paying taxes and mandatory social insurance contributions in the amount smaller than what should have been paid if the employment contract had been concluded. Finally, the Tax Administration could contribute to the prevention and combating labor exploitation also if it had authority to request from the employer periodical reports in which imbalance between costs and profits could indicate to the presence of labor exploitation (e.g. generation of large profits by the employer who engages small number of workers can be a signal for the violation of right to limited working hours, unpaid wages, informal labor, etc.).

2.4. Cooperation of the ministry responsible for labor affairs with other ministries in light of combating labor exploitation

The findings of the research confirm a gap between what is written in applicable sources of (heteronomous and autonomous) labor legislation and how relevant general documents are applied. Further, a need has been observed to amend and supplement relevant regulations since some of their provisions are incomplete, unclear and/or imprecise. This is independent from the fact that domestic legislation of significance for combating labor exploitation is to a great extent harmonized with the standards of the International Labor Organization and the Council of Europe, because in many cases this is only formal harmonization without persistent harmonization of domestic practice with corresponding standards. In that sense, the Ministry of Labor, Employment, Veteran and Social Affairs, especially the Labor Inspectorate, Occupational Safety and Health Inspectorate, and the sectors of this Ministry (Labor and Employment Sector, International Cooperation, EU Integrations and Projects Sector, Family Care and Social Protection Sector, Sector for the Protection of Persons with Disabilities and the Sector for Anti-Discrimination Policy and Improvement of Gender Equality) have a serious task to create conditions for more persistent implementation of the existing and the development of new instruments for preventing and combating labor exploitation. These instruments, *inter alia*, may refer to the initiation of updating of relevant legislation, especially with regard to expanding some forms of protection of workers who work outside employment relation (e.g. for ensuring fair compensation for their work and protection from unjustified termination of contracts based on which they were engaged). The same applies on taking into account particular needs of employees who work on the basis of certain flexible employment contracts, since labor (and social) legislation is traditionally designed according to the model of standard employment relation.

Fight against labor exploitation may be contributed to by the improvement of cooperation of the *Ministry of Labor, Employment, Veteran and Social Affairs* with *the Ministry of Agriculture, Forestry and Water Management* in part related to inspection oversight in agriculture in terms of creating conditions for effective inspection oversight in agricultural households, where one can often find persons who work and whom the employer denies decent working conditions and exploit their work. This should include, *inter alia*, the establishment of rules for the action of the Ministry of Agriculture, Forestry and Water Management in situations when there is doubt that vulnerable position of workers is abused for profits generation in the farm. Cooperation is desirable also between the *Ministry responsible for labor issues* with the *Ministry of Foreign Affairs* aimed at enhancing the protection of our citizens who go to work abroad and where our embassies and consulates can provide more effective assistance both in terms of checking future employer and working conditions, and with regard to assistance in case of violation of labor rights of our workers in a foreign country. Diplomatic and consular missions could network better with the Interior Ministries of Serbia and receiving countries and their data, for the purpose of quick and efficient examination of potential employers and jobs.

2.5. Prerogatives of the National Employment Agency of significance for combating labor

Employment activities are assigned by law to the National Employment Agency, which has been established by government with the prerogative to conduct employment activities and the activities of unemployment insurance, and to private employment agencies, which can be established by legal and natural persons for the purpose of conducting employment activities. Mutual relation and cooperation of these entities is fundamental for tackling unemployment, but it is also very important for preventing labor exploitation. Namely, in employment procedure there is always a risk of fraud (either fraud with regard to the nature of work, place of work or employer, or fraud directed at job seekers regarding working conditions, the content or legality of the contract on engagement for work, gaining the status of a migrant; conditions for travelling and employment in a foreign country and the like) and of employment with abuse of vulnerable position of other (e.g. abuse of difficult family situation, irregular status, lack of education, the fact that job seeker does not speak the language that is used in the place of work, or offering false information on labor, social and tax rights of the receiving country). In that respect, it is necessary to develop the prerogative of the National Employment Agency regarding the observance and monitoring of the basic trends in the labor market, including trends related to the work of private employment agencies. Further, a possibility should be considered to train the employees of the National Employment Agency in terms of raising awareness of significance for fight against labor exploitation and acquiring additional skills and knowledge of significance for recognizing and identifying risks of labor exploitation and provision of assistance to its victims, especially in the area of construction industry, agriculture and other industries and activities in which such risk is the most intensive. This could include the obligation of the National Employment Agency to provide job seekers with information about what labor exploitation is, especially when it comes to persons who are considered to be especially vulnerable to the risks of forced labor, trafficking in human beings and labor exploitation, in order to prevent them from falling victim to such practices. Appropriate information should be offered to employers, as well, also with a view of preventing their involvement in forced labor, trafficking in human beings or labor exploitation. Further, there is also a need to change the existing legislation in order to create more productive and quality jobs where employees can work in decent conditions, with decent pay and a possibility to develop their personality through work. To the greatest extent, these changes should relate to the introduction of new active employment policy measures and the improvement of the position of foreigners, and measures that can help them find employment more easily. In order to prevent abuses of vulnerable position of foreigners and their labor exploitation, the existing legal limitations, such as the prohibition of employment of foreigners through private employment agencies should be kept.

Further, there is a need to legally formalize the exchange of information between the *National*

Employment Agency, labor inspection and the Ministry of Interior so that the exchange of information does not depend on personal contacts of their staff. The drafting of the action plan could contribute to this; such action plan should include national strategies of significance for discovering frauds in employment and employment involving abuse of other's vulnerable position, as well as the rules for handling information, including an obligation to ensure feedback from entities whom the National Employment Agency warned of the risk of labor exploitation (in terms of creating conditions for the National Employment Agency to understand the significance of information it forwarded to the labor inspection, the Interior Ministry or social welfare centers).

2.6. Development of amicable resolution of labor disputes as an instrument for preventing and combating labor exploitation

Prevention and combating of labor exploitation could be contributed to by the strengthening of the methods of amicable resolution of labor disputes since they enable the parties to the dispute related to violation of labor rights to save time, money and energy. Moreover, these methods are also attractive for persons who could afford judicial dispute resolution, but give advantage to mediation and arbitration as procedures which are more intimate and more interactive. Despite these adventages, judicial labor disputes resolution has precedence in domestic legal life. This can be explained by a specific legal culture in which judicial dispute resolution appears as unquestionable method in spite of all problems related to its usage (*inter alia* because of degradation of judicial power due to failed judicial reform and insufficient number of judges and the lack of their both initial or continuous education and specialization in labor law issues). In addition, workers are insufficiently informed about the possibilities and advantages of amicable dispute settlement, they do not trust arbiters and the regulation of amicable resolution of labor disputes in our country is not precise. Further, arbitration decision-making does not have two stages and there are dilemmas regarding the possibility of realizing the right to legal means before the court and the problems linked to the enforcement of arbitration decision, especially the absence of sanctions for parties who fail to implement the agreement.

Arbitration can be a successful replacement for judicial dispute resolution in case of violation of labor rights only if its usage can bring benefits to both the employer and the employee. Common benefit of parties to the dispute is reflected in a possibility to settle the dispute in more flexible and more informal manner compared to court decision, which can be shaped in such a way to suit their needs and the circumstances of a specific case. Still, the settlement of labor disputes is accompanied by the risk of abuse by the employer as a stronger party in employment or any other labor-related relation. This is because employers will seek to avoid negative publicity resulting from unfavorable court decision, penalty and the costs of court proceedings and legal representations, as well as indirect costs of participating in litigation (in terms of trying to make sure that working environment continues to operate without the burden of long proceedings). This should certainly be taken into account when assessing whether it is convenient to settle a dispute related to the violation of certain labor rights outside court. This is all the more so because in case of dispute settlement both by mediation and arbitration, there is an objection that private atmosphere in which they are resolved, as much as it can be convenient for parties to the dispute, denies the possibility of insight into decisions by a broader public while such decisions may affect the change of public's attitude towards labor exploitation. Namely, amicable dispute resolution has much smaller capacity to contribute to the building of practice in the area of protection from labor exploitation that when it is done in court. Still, in spite of these reservations, there is a need, in certain cases, where amicable dispute resolution is suitable, to make use of all its advantages.

Since the Proposal of the Law on amendments and supplements to the Law on Amicable Resolution of Labor Disputes has been created in the meantime, it seems especially important for combating labor exploitation that it envisages the extension of the catalogue of individual labor disputes that can be settled before arbiters from the List of Mediators and Arbiters of the National Agency for Peaceful Settlement

of Labor Disputes. According to this Proposal, arbitration dispute resolution can be considered not only with regard to the payment of minimum wages, but also with regard to the payment of wages in general and retirement gratuity. The same applies on disputes regarding the determination of working hours and realization of right to annual leave, all of which are important proposals which should be supported, having in mind that the abuse of vulnerable position of workers is often achieved by denial or narrowing of these very rights deriving from employment relation.

These and other proposed novelties represent a favorable ground for further enhancement of peaceful settlement of labor disputes and consequently provide better security in the area of employment relations. In order to achieve this, it also of crucial significance to promote and affirm the National Agency for Peaceful Settlement of Labor Disputes both in media and in trainings or seminars, as this is the only way to build awareness in society of the importance of these methods and trust in this institution. Also, it is necessary to encourage social partners to bring disputes that may arise during the conclusion, changes, supplements or implementation of collective agreements before the National Agency for Peaceful Settlement of Labor Disputes. Further, a proposal can be made to introduce two stages of decision making in arbitration procedure within the National Agency for Peaceful Settlement of Labor Disputes in order to fully realize the right to legal protection guaranteed by the Constitution. Two-stage procedure could be achieved through setting up a second-instance panel within the National Agency for Peaceful Settlement of Labor Disputes with specifying basis and time frames for its usage. Furthermore, there is a need to align the provisions of the Law on Amicable Resolution of Labor Disputes with the provision of the Law on Enforcement and Security in order to create conditions for undisturbed conducting of enforcement procedure of decisions made by arbiters. Also, the Government should pay special attention to developing social dialogue in Serbia as it is a key factor for preventing labor exploitation and labor disputes. This is especially because workers in environments where there are obstacles for forming and operating trade unions are often not aware of their rights and feel less powerful to initiate proceedings against the employers for violation of labor rights.

2.7. Improvement of judicial protection of labor rights

Judicial protection is inevitable form of protection of labor rights and an obstacle for further expansion of labor exploitation. In the legislation of the Republic of Serbia, the highest level of protection in terms of access to social justice is provided to persons who are permanently employed (full time permanent employment, where the work is performed on employer's premises); lower level of protection is ensured for flexible forms of employment and work outside employment relation. Namely, judicial protection of rights of persons who work outside employment relation is not achieved in accordance with special rules applied on labor-related litigation but with general rules of litigation. For this reason, it is suggested, in terms of access to judicial protection, to broaden the term "employee" in such a way as to include workers who are engaged outside employment relation, i.e. to expand the scope of application of rules on labor disputes settlement on these categories of workers.

Although relevant regulations confirm the rule of urgent resolution of labor disputes, the statistics on the number of unresolved cases leads to the conclusion that substantial changes in judiciary are necessary. Moreover, it has been observed that special, that is, shorter time frame for appeals has not been determined with regard to labor disputes, as it is the case with regard to bill of exchange and cheque disputes. Similar applies on the response to the appeal. As the urgency of resolving labor disputes is their significant characteristic, it may be suggested to establish shorter time frame for appeal and for response to the appeal. Another inconsistency has been observed with regard to judicial resolution of collective labor disputes since special rules prescribed by the Civil Procedure Law are applied only on interest labor disputes, while legal collective labor disputes are unjustly left out from the subject matter scope of implementation of relevant regulations.

It seems that the majority of objections that may be made to the legal and institutional framework for judicial protection of labor rights can be overcome by the *specialization of judiciary in terms of introducing labor courts*. This would enable independent, rapid and efficient resolution of labor disputes either if the specialization of judiciary were achieved at all levels or if the government decided for partial specialization, i.e. specialization at first instance, while the second and the third instances could imply the establishment of special departments within the courts of general jurisdiction. Since the implementation of provisions on urgency of labor disputes resolution in Serbia is challenging and judicial practice is not uniform, it is suggested to set up such judiciary, providing the obligation of judges to deepen their knowledge through continuous education on relevant issues. Such system would have unquestionable importance for the protection of labor rights and would represent a key obstacle for the practice of labor exploitation providing the obligation of legislative intervention of the state both in the area of criminal and misdemeanor legislation and in the area of labor rights.

Since the Republic of Serbia, having ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, has accepted the jurisdiction of the European Court of Human Rights (ECHR), the procedure before this court is an inevitable element of combating labor exploitation and work-related abuse. Such role is of subsidiary character, since the protection of human rights is primarily the task of the state. In that respect, there is *a need to ensure greater impact of ECHR jurisprudence on our courts* which, unfortunately, do not recognize its interpretative value. Similar applies on the practice of other treaty supervisory bodies whose impact on domestic judicial practice is negligible, if not inexistent, especially with regard to ILO Committee of Experts on the Application of Conventions and Recommendations and the European Committee of Social Rights. This should certainly be changed in future since proper and full implementation of international regulations, which have become an integral part of our legal system following ratification, is not possible without knowing the practice of ILO and Council of Europe's supervisory bodies, especially with regard to standards related to the protection from forced labor, slavery, servitude position, trafficking in human beings for the purpose of labor exploitation, the worst forms of child labor, union freedoms and decent work.

2.8. Activities of social partners and nongovernmental organizations as a supplement and guarantee of institutional instruments for combating labor exploitation

An important addition to the activities of competent authorities and institutions in combating labor exploitation are the activities of social partners (trade unions, employers and employers' associations) and nongovernmental organizations in this area. This should, *inter alia*, include a change of attitude towards irregular migrants and cooperation of trade unions with nongovernmental organizations in order to achieve, through joint actions, protection, compensation and rehabilitation of victims of labor exploitation. Furthermore, information sharing should be improved, as well as trade union organizing of (ir)regular migrants and their inclusion in collective bargaining. There is also a need to conclude international framework agreements which would prevent abuses in the supply chains of big multinational companies, as well as to oblige contractors, as well as the groups of employers from certain industry, by the norms of conduct and doing business. This especially implies adopting the codes of protection from labor exploitation or conclusion of agreements on inclusive labor market, by which employers' obligations with regard to the process of employment could be established, especially having in mind the absence of obligation of publication of job openings, the fact that the valuation of capabilities of a candidate for employment and their notification are not regulated.

On the other hand, it seems that the best method in combating labor exploitation which is produced by the violation of provisions of employment contracts is trade unions' fight for creating quality jobs and

not insisting only on pure implementation of what has been agreed. The success of such tactic depends to a great extent on the culture of social dialogue, the number of unionized workers and the development of collective rights of workers, for which reason an important instrument in combating labor exploitation can be the overcoming of the crisis of social dialogue, that is, the development of social dialogue and collective bargaining in Serbia.

There is also a need to develop cooperation of nongovernmental organizations and trade unions which is logical and desirable, especially in view of different, but still close types of experiences of these associations. Namely, as nongovernmental organizations mostly operate in the area of human rights, while trade unions implement actions relying on labor rights standards, the principles of their activity can cross-cut. Flexibility and quickness of reaction of nongovernmental organizations is invaluable in situations when the unionizing of workers is weak and when trade unions act more defensively than proactively, that is, when they are not capable to request the fulfilment of the conception of decent work in practice. On the other hand, the existence of strong unions, aware of power of their collective actions, can contribute significantly to the eradication of conditions which usually lead to labor exploitation, forced labor and trafficking in human beings. Since it is considered that labor exploitation is a result of imbalance of power, poor regulation of the labor market and inadequate implementation of labor regulations, the empowerment of trade unions and beyond, of the whole civil society, is certainly a powerful tool in combating these undesirable social phenomena.