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Social Justice against the Simulation of the Employment Relationship in Health Entities

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Abstract: The present article of scientific character, based on qualitative methodology of hermeneutic documentary cut, where techniques such as observation, documentary analysis, bibliographic review, summaries and conceptual maps were used, in relation to the Union Contract in the Institutions Providing Health Services, in this the themes of Summary Biography of the union contract are touched, Normative regulations of the union contract, Provision of services through unions of guilds, Obligations and prohibitions of the union contract, Health providers through union contract simulation, Abuse of rights and fraud with union contracts, Legal alternatives to reduce the union contract, Results and discussion.

Keywords: labor simulation, outsourcing, intermediation, union contract, rights abuses.

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1. Introduction

In Colombia, there are documented cases of abuse of the Right to Union Association, as of Rulings C-567 and C-797 of 2000, which allow the coexistence of several basic unions in the same company and therefore the right of workers to join multiple union organizations of the same class or activity, without any limitation by the State.

As a result, workers opted to join several unions, which is a legitimate act, however, the purpose of some of them was to be covered by the protection granted by the union privilege, either by founding a new union, by subscribing as a member of the board of directors or sub-directors of the unions, or by presenting a list of petitions resulting in the emergence of the circumstantial privilege; thus originating the so-called "Union Carousel" as an abuse of the right to union association.

These abuses are also present in relation to the circumstantial privilege that arises by virtue of the presentation of the list of demands, limiting the unilateral termination without just cause of the labor contract, with respect to the workers who are part of the union organization that presented the list. This protection extends from the presentation until the end of the collective labor conflict. Sometimes this practice has become a mechanism of indiscriminate attainment of circumstantial privileges without any legal limitation in this regard, causing that in some cases the circumstantial privilege is prolonged, through the presentation and successive withdrawal of the list of petitions, becoming a clear abusive exercise of the right of association (Puig,2014).

2. Methodology

This article is part of the interpretative paradigm, which emphasizes the understanding of reality in a

dynamic and diverse way, highlighting the meaning of human actions. Unlike approaches that seek to measure reality objectively, this paradigm is interested in the perception and interpretation of phenomena, as well as in social practice and its understanding from a meaningful perspective. The methodological framework adopted in this study follows a qualitative approach, which facilitates a better understanding and contextualization of the problem under investigation (Martinez et al., 2022).

The present legal study is carried out under the parameters of the qualitative (subjective) approach, of a documentary type and defined as hermeneutic. Documentary analysis, bibliographic review and observation techniques are used, together with instruments such as conceptual maps, summaries, synoptic tables and bibliographic references, all in relation to the research topics addressed. These topics are linked to the Health Service Providing Institutions, Trade Unions, and the researcher, a student of the specialization in Labour Law.

3. Biography Of The Union Contract.

The dissertation begins in relation to the concept of delaboralization: in the understanding that labor relations are being transformed until they leave their binding nature and protected by law to be covered by figures that although they are legal do not have the spirit that should have with the protection of the state to the worker.

The aforementioned is enshrined in the jurisprudential doctrine in several positions: In the first instance the Sentence T-781/98 of the Constitutional Court, which states: "The right enshrined in Article 38 of the Political Constitution, is seen from two points of view; in a positive sense, it enshrines the freedom of citizens to join for the constitution of associations, as well as the freedom to link to those that already exist; and in a negative sense, it brings the impossibility of constraining or forcing to be part of any" (Quevedo, 2008).

The real problem of the delaboralization is the form that the contracting takes (civil or labor nature), but also whether at a certain moment it is necessary to belong to the union in order to contract, under whatever denomination one wants to give to it, it is necessary to belong to the union.

The history of the subsequent jurisprudential doctrine leaves evidence in relation to the framework of the relationships given in the union contract that it is not a labor contract, a fact that should be highlighted and remembered: For example, in the CC T-303 of 2011. It is established that this relationship, which is given in the union contract, is not governed by the rules of the labor contract, noting that in it there is no subordination. There are no orders from the person receiving the service (Quintero, 2007).

Article 482 of the Substantive Labor Code -CST- determines that the union contract is for the provision of a service or the execution of a work through its affiliates. It has specific characteristics that separate it from an employment relationship:

- It is agreed between one or several workers' unions with one or several employers or employer unions. - It is of a civil or commercial nature: the nature of the union contract is to offer the labor force of its members as if they were independent employees. - The union contract is not a type of employment contract. - The union contract must always be in writing. - A price or fee is agreed upon, which in no case constitutes a salary. - The claims of the affiliated workers are the sole and exclusive responsibility of the contractor union and not of the contracting employer or employer's union.

Regarding the primacy of reality over formalities, the Constitutional Court stated in Ruling T - 616 of 2012, that: "(...) it does not matter the name given to the employment relationship, since, as long as the integral elements of the same are evidenced, it will give rise to the configuration of a true reality contract. It should always be considered that reality surpasses any written figure, it is superior to paper and the union contract is not alien to behaviors of delaborization or bad practices that should not affect the rights of the worker (Navarro, 2018).

3.1. Normative Regulations Of The Labor Union Contract

The union, in addition to paying compensation, must make discounts and appropriations for social security, develop risk prevention programs and training of workers in this area, select workers, carry out internal disciplinary processes, among many other obligations that legally frame it as the employer (Pinzón, 2021).

This type of contract is regulated in Chapter III in Article 482, it is defined as follows; "it is the one entered into by one or more workers' unions with one or more employers or employer unions for the provision of services or the execution of a work through its affiliates. One of the copies of the union contract must be deposited, in any case, at the Ministry of Labor, no later than fifteen (15) days after its signature.

The duration, revision and termination of the union contract are governed by the rules of the individual employment contract "To conclude, it can be analyzed that the obligations and prohibitions of both the employer and the worker are very important, many of them are stipulated in the famous employment contracts, which are given at the time of hiring or linking in a certain organization, being one of the main sources of rights and obligations in labor matters. In this contract, the terms and conditions that must be carried out during the duration of the agreed activity are jointly determined (Prirce, 2010).

The obligations and prohibitions are contemplated from the legal field in different regulations ranging from laws, decrees, articles, among others, which allow the protection of rights and guarantees, in addition to providing security to the related parties. The substantive labor code, which is the compendium of norms that regulates the relations between workers and employers, also provides concrete and precise conducts for the parties, which are foreseen as obligations and prohibitions that have been mentioned above.

3.2. Provision Of Services Through Trade Unions Of Guilds

In the understanding that the union contract, according to the law, does not configure an employment relationship with the employer with respect to the union members, it can configure the existence of employment contracts between the union member and the beneficiary of the service. In practice, the elements of an employment contract (personal rendering of services, salary and subordination) can be found in practice. The union member in the literal understanding does not receive salary, he/she receives compensation (money value) and may have the union contract clothing with which it is hidden as a labor contract.

According to the CSJ ruling SL3086-2021 more recently the court stated that the union contract was an instrument that promotes the dynamics and participation of the union in the collective work. From this perspective, the union contract serves to move relations in such a way that everyone achieves their objective. Since the union requires resources. All parties benefit. On the one hand, those who require the service in view of the civil relationship that binds them and those unionized with the attainment of their fees and with the union by offering the labor force.

However, as reality exceeds the legislator's projections, the union contract could mutate if the employer-union-affiliates relationship is used with the intention of taking the workers to supply permanent missionary activities. We would be in an evidentiary field in which reality prevails over formalities. It is possible to prove, redundantly, if necessary, the existence of an employment contract, limiting the full formality of the union contract as a simple intermediary.

The delaboralization, understood as the lack of protection of the worker and the lack of legal benefits of a real contract, is a constant phenomenon in our factual reality, being the task to observe when it may occur and the way to approach it in evidentiary matters in order to resort to justice to compensate the prejudices that the full denaturalization may bring.

3.3. Obligations And Prohibitions Of The Union Contract

To begin with this essay we must analyze or understand the word Obligation which has Latin origin öbligatio¨ from the Latin öbligare¨ ob meaning around and ligare tie, then joining these meanings we can say that the obligation is a tie that arises around one or more persons for the performance of an act.

Next we find the diverse meanings which indicates that the fulfillment of an obligation is called payment of the obligation by the doctrine, but it should not be understood as payment of money since it refers more to the determined payment of an obligation.

It is important to mention that for an obligation to exist there must be 3 elements: personal, the person who intervenes in the creation of a legal business would be the active subject (creditor), passive subject (debtor), real element which is the object of the obligation or performance, legal relationship is the legal union between the debtor and creditor.

On the other hand we have the breach of obligations which is nothing more than the non-performance of the same whether partial or total, permanent or temporary, based on facts attributable to the same, its foundations are applicable to all types of class or obligations of any nature regardless of their origin, it will only be influential in cases of culpable breach, which can be given in 3 forms according to its partial or total nature, permanent or temporary according to its voluntary or involuntary origin.

Then we go on to the diversity of culpability as the positive activity of doing and the negative activity of not doing the acts of malice intention and culpable acts such as negligence, we can also specify by the degree of fault would be the following: the serious fault is given by negligent acts, we have the slight fault that is no more than not contributing to the business of another what an ordinary person would contribute to his own and finally the slightest fault which is the one that only a very diligent, attentive or shrewd person would not incur.

Now then, to speak about the default, which is nothing more than the non-fulfillment of an obligation not fulfilled in the fixed time but in a later moment, it is considered as a temporary and guilty obligation.

It can also mention the Pauline action, that is to say that it was made with the purpose of avoiding fraud on the part of the debtor in the collection of the obligations that he had with the creditor, having this one the power to act in the patrimony of the debtor or in such case a patrimony of the debtor which would also be a creditor, that is to say that the debtor made use of different actions to avoid payment of the obligation or his patrimony or of the goods on the part of the debtor and of the third party.

It is worth expressing that the Union Contract There is freedom of affiliation in a union organization, for being an enabling right that allows the effective participation of every person, constituting the core of democracy and the rule of law, being this a fundamental right for the international labor organization, therefore, is to ensure the participation and representation of workers and employers is essential to ensure the effective functioning.

3.4 Health Care Providers Through Union Contract Simulation

Thus, according to the CSJ ruling SL3086- 2021, the Court emphasized that "unions cannot become a sad substitute for worker cooperatives, which used to provide personnel in a fraudulent manner, after the prohibition generated by regulations and jurisprudence, which was endorsed by Article 63 of Law 1429 of 2010". In this regard, the magnifying glass would be to be clear about which are the missionary activities that cannot be developed through the figure of union contract. Recalling that these must be developed by official workers. Recalling in this regard the primacy of reality over any substitute, which, although regulated, does not fulfill its purpose or may have the purpose of violating the right of the worker (Mercader, 2001).

Another part refers to the means or instruments of production for the exercise of the work, which, by the way, must be part of a union structure with technical, legal and administrative autonomy. Finally, in the same sentence SL3086-2021:

"it is reiterated that the guide of all such policy must be "[...] the concept of decent and dignified work in the terms defined by the ILO, which can be synthesized into four strategic objectives: fundamental principles and rights at work and international labor standards; employment and income opportunities; social protection and social security; and social dialogue."

The forms of labor in its social sense seek to generate dignity in the worker, as a prerogative to be achieved. The union has an essential line in this path. From our perspective, the union contract does not have this basic principle of compelling rights and on the contrary, it can lend itself to processes of de-laborization.

The ideal is to call things by their name, it is necessary to separate the labor contract from the union contract, being the protection that labor must have essential in a social state of law. All this while this figure, for some controversial, continues its legal history in Colombia, country of everything possible.

In the process of self-management of the union contract it is necessary that the labor relations are discarded, so that the union organism follows its course. For if I am a member of the union, I am in a civil relationship within the framework of said contract; but if I go on the same "bus" as the missionary workers and perform my work without autonomy with the resources of the entity, I am only a worker whose relationship is denaturalized.

The precariousness of labor is an issue that must be followed up in order to improve hiring structures to achieve equity and dignity in employment. Cheap labor is the least of the problems, when these structures are used to disguise labor contracting, since there is, for example, the problem of the absence of basic responsibilities in safety and health at work, so that the systems, not having those responsible, have no north and no one to claim the violations (T215, 2006). (T215, 2006).

Jobs then become short term, unstable and without real access to pension systems; with the elasticity in the relations, labor becomes cheaper, industrialists feel that the system adapts to their needs, the economy is compelled, but at the cost of the rights of workers, who do not have access to at least a minimum wage, social benefits, among other labor emoluments (Purcalla, 2009).

3.5 Abuse of rights and fraud with union contracts.

Respecting this right to freedom of association facilitates the fulfillment of the other objectives proposed by the international labor organization and to be able to count on social protection, social dialogue and participation can be achieved fully and immediately if there are strong, free and participatory trade union organizations, with the capacity to influence. In other words, guaranteeing freedom of association is one of the most effective means to make decent work a reality in the country.

At the same time it is also known, the case of Colombia involves other variables to explain the decline that unionization registered in a sustained manner from the 1980s until 2010: the persistent anti-union violence and the effect of the war on workers, old and new forms of persecution of unions by employers and the poor institutional capacity of the Colombian state to exercise oversight and effective control over labor relations and the activity of employers (Navarro, 2018).

During the last years in Colombia a {complex process of precarization of relations in the world of work has been forged, at the same time that strategies tending to the strengthening of the capitalist mode of production and attached to the neoliberal doctrine are promoted It is stated that the only ones who have a benefit from union contracts in Colombia are employers and union leaders, On the one hand, employers use them as a business strategy to recruit cheap labor in order to save labor, and on the other hand, union leaders are functional to the strategies used by employers in exchange for particular benefits (Mecader, 2001).

We have been studying the union contract which allows to warn that this figure today represents in Colombia a central trend within the strategies of business organizations whose implementation affects labor conditions when labor guarantees are found to be lacking, it enables the construction of common ideologies that allow to create processes of identification between human beings around work and common problems. It is important to mention about the affectation of individual labor rights. The labor conditions of a worker linked through a union contract are embodied in the contract itself agreed between the company and the union, which excludes the worker.

The worker simply adheres to pre-established labor conditions, to which he/she is entitled once he/she has been selected by the union. Likewise, the worker must receive a consideration for selling his labor force,

which must be equitable and fair and must compensate the work performed in overtime, night surcharges, regular bonuses, paid rest and social benefits, among others (T-1166 of 2004). (T-1166 of 2004).

3.5 Legal Alternatives To Reduce The Union Contract.

Likewise, the execution of the Union Contract must comply with the legal order and democratic principles. For such reason, in Union Contracts there are no absolute or unlimited rights, because "the Political Constitution and international treaties ratified by the Colombian State authorize restrictions to guarantee certain values and principles such as national security, order, public health or morals and the rights and duties of others (Barona, 2015).

However, the restrictions or limitations established by the legislator to the Union Contracts must be subject to the principle of reasonableness, as required with respect to all fundamental rights, which means that the purpose of those must be legitimate in light of the Political Constitution and that the means used to achieve it must be suitable, necessary and proportionate". Likewise, in the Union Contracts, union representatives are granted union privilege and the other guarantees necessary for the performance of their duties. Therefore, it is evident that "the performance of the unions requires protection to the workers for the effectiveness of the Union Contracts" (Méndez, 2009).

4. Results And Discussion.

The union is losing strength as a representative of a working class and the union contract is becoming an instrument for delaboralization, which compels a union movement that no longer has workers.

The rights of the employee take a back seat when what is relevant is to produce, which is an irony because the one who should defend the "proletariat", may be compelling paper relationships and outsourcing the labor relationship.

Attending to principles of primacy of reality, we reiterate, over the formal, the contractual relations of the union should be looked at with a magnifying glass because eventually there should be union contracts whose nature is a reality (Navarro, 2018).

Conclusions

The delaboralization, understood as the unprotection of the worker and lack of legal benefits of a real contract, is a constant phenomenon in our factual reality, being the task to observe when it may occur and the way to address it in evidentiary matters in order to resort to justice to compensate the prejudices that full denaturalization may bring.

The proper forms of work in its social sense seek the generation of dignity in the worker, as a prerogative to be achieved. The union has an essential line in this path. From our perspective, the union contract does not have this basic principle of compelling rights and on the contrary, it can lend itself to processes of de-laborization. The ideal is to call things by their name, it is necessary to separate the labor contract from the union contract, being the protection that labor must have essential in a social state of law.

Likewise, in the Union Contracts, union representatives are granted union privilege and the other guarantees necessary for the performance of their duties. Therefore, it is evident that "the performance of the unions requires protection to the workers for the effectiveness of the Union Contracts" (Méndez, 2009).

The precariousness of work in health care institutions is an issue that should be followed up in order to improve hiring structures to achieve equity and dignity in employment. Cheap labor is the least of the problems, when these structures are used to disguise labor contracting, since there is, for example, the problem of the absence of basic responsibilities in occupational safety and health, so that the systems, since they have no responsible parties, have no north and no one to whom to complain about violations.

The union is losing strength as a representative of a working class and the union contract is becoming an instrument for the delaboralization, which compulses a union movement that no longer has workers. The rights of the employee take a back seat when what is relevant is to produce, which is an irony because the

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