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LABOR LAW REGULATION OF MATERNITY PROTECTION IN SERBIA AND THE CRIMINAL – LAW TREATMENT OF VIOLATIONS OF RIGHTS ARISING FROM EMPLOYMENT AND SOCIAL INSURANCE

ABSTRACT: The rights to special protection of maternity, maternity leave, and leave from work for the purpose of childcare, as well as for the special care of a child or another person, are regulated by labor law provisions and are grounded in constitutional norms. The purpose of these provisions is reflected in the protection of the best interests not only of the mother, and not only of the child, but of the family as a whole. In addition to a theoretical analysis of the protection of women at work and in connection with work, as well as the right to work, this paper, through the application of a normative methodological approach, also presents the statutory standards relating to maternity protection, maternity leave, and leave from work for the purpose of childcare or special care of a child or another person. Furthermore, the paper addresses the fundamental issues concerning the criminal-law treatment of violations of rights arising from employment and social insurance rights, which are considered the basic incrimination within the entire chapter.

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1. Introduction

The protection of women at work and in connection with work is an area that may be viewed from several aspects. One such aspect is, among others, protection based on the particularly important role that women have in the biological reproduction of the population (pregnancy, childbirth, motherhood), which is crucial for the survival and genetic continuity of the species. In principle, if the protection of women in this context is considered more broadly, it may be observed that the treatment offered to women with regard to protection related to pregnancy, childbirth and, generally speaking, motherhood does not relate exclusively and solely to them, but also extends to the segment of the care and protection of children, and, therefore, to the treatment of both parents (including the child's father) in certain circumstances, and to the treatment of a single parent in specific situations. This essentially leads to the conclusion that the constitutional and labour-law treatment in matters of motherhood, pregnancy and childbirth generally concerns the protection of parenthood. It should also be noted that certain rights in this field may also be enjoyed by adoptive parents, foster parents or guardians of a child.

The provisions of Article 66 of the Constitution of the Republic of Serbia (2006) regulate the special protection of the family, the mother, the single parent and the child, foreseeing that "the family, the mother, the single parent and the child in the Republic of Serbia shall enjoy special protection, in accordance with the law. The mother shall be provided with special support and protection before and after childbirth. Special protection shall be afforded to children without parental care and to children with physical or mental disabilities." The provisions of Article 60, paragraph 5 further stipulate that "women, young people and persons with disabilities shall be guaranteed special protection at work and special working conditions, in accordance with the law."

Firstly, it is certainly necessary to mention the most important international acts that have established standards of special protection of maternity within national legal systems. The Universal Declaration of Human Rights (1948), in Article 25, paragraph 2, provides that "motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." Convention No. 183 on Maternity Protection of 2000, which revised Convention No. 103 of the same title, provides in Article 2 that its provisions "apply to all employed women,

including those in atypical forms of dependent work,” while Articles 3 and 4 regulate issues related to health protection and maternity leave, foreseeing that “each member state shall, after the consultation with representative organizations of employers and workers, adopt appropriate measures to ensure that pregnant or breastfeeding women are not obligated to perform work which has been determined by the competent authority to be harmful to the health of the mother or the child, or where a significant risk to the health of the mother or the child has been assessed,” and that based “on of a medical certificate or other appropriate certification, as determined by national law and practice, stating the presumed date of childbirth, a woman to whom this Convention applies shall be entitled to maternity leave of a duration of not less than 14 weeks” (Law on the Ratification of the International Labour Organization Convention no. 183 on Maternity Protection, 2010).

The Labour Law of the Republic of Serbia (2005), with its provisions, in addition to general protection, also regulates the areas of maternity protection, maternity leave and leave from work for child care, as well as leave from work for special care of a child or another person (see also: Đan & Vrbaški, 2019, p. 10-11). One of the objectives of the amendments to the Law was “to strengthen the position of women in the workplace and to establish a balance between family obligations and the professional duties of employed mothers” (Misailović, 2020, p. 239). The aspect of occupational safety and health was further supplemented by “extending maternity protection to an employed woman who is breastfeeding” (Ivošević & Ivošević, 2016, p. 223). This is particularly important issue, as “the labour-law position of an employed breastfeeding woman lies at the centre of the confrontation between the requirement to ensure special protection at work and the requirement to promote equality between women and men in the sphere of work” (Radovanović, 2016, p. 247).

2. Protection of women at work and in connection with work and the right to work in legal theory

In the law of the Republic of Serbia, “special labour-law protection of women has the following aspects: prohibition of work during pregnancy and later on, during breastfeeding, in jobs that are harmful to the health of the woman and the child; protection within the framework of the institute of working time; the right to maternity leave and leave from work for child care” (Jovanović, 2015, p. 1464). The legal regulation of special protection for women “has occupied the attention of legal scholars since women entered the labour market” (Rajić Čalić, 2024, p. 133). In legal theory, it is often emphasized that women, in the process of

emancipation, have come a long way and have faced various challenges, ranging from the “leaving the employment upon entering into marriage” (Lubarda, 2012, p. 128), through the requirement of the “husband’s consent to establish an employment relationship” (Blanpain, 2012, p. 153), to full freedom in the choice of profession and in entering into employment relationships.

Legal theory also underlines the view that “the position of women in the field of work and employment in Serbia remains unfavorable” (Vilić & Beker, 2021, p. 5). The authors note that the “gender gap in the employment rate is constant, and the labour market is characterized by gender segregation by sectors and occupations” (Urdarević et al., 2019, p. 22). Inspire of the fact that “a long historical period elapsed from legal, *de jure* equality to actual political equality between men and women” (Žunić, 2017, p. 170), Sineau (2003) notes in this context that even today “the right to equal participation of women in various fields remains, for many women, merely a right in theory and in legal norms” (p. 12). Domestic literature “rightly points out that the double work engagement of women, which in addition to paid employment also includes unpaid work at home. In the household, represents a challenge not only for female workers, but also for employers, and underestimates the value that the work of women and mothers has for raising children” (Kovačević, 2018, p. 99). On the other hand, “gender inequality of women in the educational system and in the labour market is reinforced by traditionally rooted stereotypes about the role of women to devote most of their time to unpaid household work and child raising” (Misailović, 2020, p. 240). This is all the more true given that “the culture of capitalism underestimates the economic value of raising children, and often overestimates the social benefits of women’s participation in the labour market” (Grgurev, 2014, p. 136; Pantović, 2017, p. 11).

Here we arrive at the definition of a key concept, namely the right to work, which “by its legal nature lies somewhere between a program ‘based principle, a constitutional order addressed to the legislator, and a subjective right’” (Radovanović, 2020, p. 88). Namely, the right to work is “one of the economic and social rights, that is, the rights enjoyed by the citizens of a state as members of a social community which are aimed at ensuring a minimum of living conditions worthy of a human being in material sense” (Stojanović, 2005, p. 446). The right to work is “an equal and unique right, under equal conditions guaranteed permanent employment by the social community for every citizen capable of work, in accordance with his or her professional and physical abilities, the employment freely chosen by the individual and representing the basic and main source of material means and other rights for a decent and secure life and for the development of the individual and his or her family” (Jovanović, 2003, p. 116).

Bearing in mind that the primary principle of human rights “rests on the assumption that all human beings are born free and equal in dignity and rights, and that rights and freedoms belong to everyone without any distinctions, including distinctions based on sex” (Drobnjak, Kočić Mitaček, Gajin & Resanović, 2008, p. 7), the principle of the prohibition of any form of discrimination has been accepted in domestic legislation as well, and is certainly based on the fundamental universal international document in this field – the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1981), which “establishes the obligation of the states, parties to this Convention, to pursue, by all appropriate means, a policy of eliminating discrimination against women” (Drobnjak et al., 2008, p. 7). In the said Convention on the Elimination of All Forms of Discrimination against Women (1981), the term *discrimination* against women is defined as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of obstructing, or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms by women in political, economic, social, cultural, civil or any other field, regardless of their marital status and on the basis of equality of women and men.”

The prohibition of discrimination on the basis of sex in the sphere of work “must be viewed through the prism of special protection at work and special working conditions. Such protection and working conditions lead to different treatment of employees, but this is not considered discriminatory since it is justified by biological and physiological reasons and by the need to enable the exercise of the parental role by providing support for all roles that women (and men) have in a democratic society, without being marginalized in the sphere of work” (Radovanović, 2020, p. 95). Genuine equality for employees of both sexes “can be achieved only if special protection is truly aimed at providing support and assistance” (Radovanović, 2014, p. 231).

3. Legal standards for the protection of maternity, maternity leave and leave from work for child care, special care of a child or another person

Legal standards for the protection of maternity, maternity leave and leave from work for child care, special care of a child or another person are contained in the Labour Law (2005), which represents *lex generalis* in the field of labour. Special protection of women in labour law “is reflected in a woman’s right to be exempt from performing certain tasks under specific conditions, as well as in the right not to get lay off during pregnancy, maternity

leave and leave for child care, and to keep her job upon returning to work after the expiry of such leave” (Rajić Čalić, 2019, p. 338).

Maternity protection is regulated by the provisions of Articles 89-93a, in such a way that an employee during pregnancy and an employee who is breastfeeding may not perform work which, according to the findings of the competent health authority, is harmful to her health, or the health of the child, in particular work that involves lifting heavy loads, or work involving harmful radiation, or exposure to extreme temperatures and vibrations. The employer is obligated to provide the employee with other suitable work, and if no such work is available, to send her to paid leave. Furthermore, an employee during pregnancy and an employee who is breastfeeding may not work overtime, or at night if such work would be harmful to her health, or the health of the child, based on the opinion of the competent health authority. An employee during pregnancy is entitled to paid leave during the working day for the purpose of undergoing health examinations related to pregnancy, as determined by the chosen physician in accordance with the law, and is obligated to duly notify the employer thereof. The Law also regulates the situation whereby one of the parents of a child up to three years of age may work overtime, or at night only with his or her written consent. Likewise, a single parent with a child up to seven years of age or a child with a severe disability may work overtime, or at night, only with his or her written consent. The employer may redistribute working hours for a female employee during pregnancy and for an employed parent with a child under three years of age, or a child with a more severe degree of psychophysical disability, only with the employee’s written consent.

All of the aforementioned rights, in accordance with statutory provisions, also apply to adoptive parents, foster parents, and guardians of a child.

Finally, the employer is obligated to provide a female employee who returns to work before the child reaches one year of age, with the right to one or more daily breaks during the working day, 90 minutes in total, or with a reduction of daily working time by 90 minutes, in order to allow her to breastfeed her child, provided that the employee’s daily working time amounts to six hours or more. The break or reduced working time is counted as working time, and compensation on this basis is paid in the amount of the basic salary, increased for years of service.

Maternity leave and leave from work for child care are regulated by Articles 94-95 of the Labour Law (2005). Namely, a female employee is entitled to leave from work due to pregnancy and childbirth (maternity leave), as well as leave from work for child care, in a total duration of 365 days. A female employee may commence maternity leave, on the basis of the findings

of the competent health authority, no earlier than 45 days, and by rule 28 days, before the expected date of childbirth. Maternity leave lasts until three months from the date of childbirth. The Law also regulates the situation in which the father of the child may exercise this right in cases where the mother abandons the child, dies, or is for other justified reasons prevented from exercising this right (serving a prison sentence, serious illness, etc.). The father of the child is also entitled to this right when the mother is not employed.

Upon the expiry of maternity leave, a female employee is entitled to leave from work for child care until the expiry of 365 days from the date of commencement of maternity leave referred to in paragraph 2 of this Article. The father of the child may also exercise this right. During maternity leave and leave from work for child care, the female employee, or the father of the child, is entitled to salary compensation in accordance with the law.

A female employee is entitled to maternity leave and leave from work for child care for the third and each subsequent newborn child in a total duration of two years. The right to maternity leave and leave from work for child care in a total duration of two years also belongs to a female employee who gives birth to three or more children in her first childbirth, as well as a female employee who has given birth to one, two or three children and in a subsequent childbirth gives birth to two or more children. The father of the child may also exercise these rights. Finally, a female employee is entitled to maternity leave until three months from the date of childbirth if the child is stillborn, or dies before the expiry of maternity leave.

Leave from work for special care of a child or another person is regulated by Articles 96-100 of the Labour Law (2005). In accordance with these provisions, one of the parents of a child who requires special care due to a severe degree of psychophysical disability, except in cases provided for by health insurance regulations, is entitled, after the expiry of maternity leave and leave from work for child care, to be absent from work, or to work half of full-time working hours, for a maximum period until the child reaches five years of age. Likewise, a foster parent or guardian of a child under five years of age is entitled, for the purpose of child care, to be absent from work for eight consecutive months from the day the child is placed in a foster or guardianship family, and at the latest until the child reaches five years of age. If the placement in a foster or guardianship family occurred before the child reached three months of age, the foster parent, or guardian is entitled to be absent from work for the purpose of child care until the child reaches 11 months of age. These rights also belong to a person to whom a child has been referred for adjustment, prior to the establishment of adoption, in accordance

with adoption regulations, and after the establishment of adoption – to one of the adoptive parents.

The Law also regulates the situation in which a parent or guardian, or a person caring for an individual with cerebral palsy, poliomyelitis, a form of plegia, or suffering from muscular dystrophy or other serious illnesses, may, on the basis of the opinion of the competent health authority, and at their own request, work part-time, but not for fewer than half of full-time working hours. The right to leave for special care of a child also belongs to one of the adoptive parents, foster parents or guardians of a child if, given the degree of psychophysical disability, the child requires special care. In addition, one of the parents, adoptive parents, foster parents or guardians is entitled to be absent from work until the child reaches three years of age.

In addition to the aforementioned provisions of the Labour Law (2005), the Rulebook on detailed conditions, procedure and manner of exercising the right to leave from work, or to work half of full-time working hours for the purpose of special care of a child (2018) lays down the detailed conditions, procedure and manner of exercising the right to leave from work, or to work half of full-time working hours for the purpose of special care of a child, as well as the right to other benefits related to special care of a child; it also regulates the composition, jurisdiction and manner of operation of the commission that issues opinions on the degree of impairments in the psychophysical development and disability of a child and on the level of functionality of children with developmental disabilities and disabilities, as well as other issues of importance for the exercise of these rights. Furthermore, it is necessary to emphasize the importance of the provisions of the Law on financial support to families with children (2017), which regulates financial support to families with children, granted for the purposes of: improving conditions for meeting children's basic needs; balancing work and parenthood; providing special incentives and support to parents to achieve the desired number of children; and improving the material position of families with children, families with children with developmental disabilities and disabilities, and families with children without parental care.

4. Criminal-law treatment of violations of rights arising from employment and social insurance

Criminal offences against rights arising from employment are foreseen in Chapter Sixteen of the Criminal Code (2005), in Articles 163-169. The group object of criminal-law protection consists of certain rights of persons in an employment relationship. The criminal-law treatment of offences directed

against rights arising from employment in Serbia includes laying down and regulation of a total of seven criminal offences. The offences in this group may be divided into: “criminal offences by which employees are obstructed or prevented from exercising their rights; criminal offences related to work that endanger the life and health of employees; and the criminal offence of abuse of right – the abuse of rights arising from social insurance” (Mrvić Petrović, 2019, p. 113). The offence of violation of rights arising from employment and social insurance under Article 163 falls into the first group of criminal offences.

Stojanović (2020) emphasizes that criminal law is “usually not closely linked to labour law, so in criminal offences against rights arising from employment the accessory nature of criminal law is clearly evident, in the sense that the rights protected by these criminal offences are not created by criminal law, either substantively or terminologically, which results in the blank nature of these criminal offences” (p. 556). As a rule, legal theory points out that criminal legislation is “the last mechanism we should resort to only in exceptional situations when it is obvious that no other legal remedy can protect the worker and stop the violations of regulations, or rectify the damage caused” (Jovanović & Reljanović, 2023, p. 10).

The prescribing of the criminal offence of violation of rights arising from employment and social insurance “aims to protect, in a general manner, the system of employment relations as a whole” (Stevanović, 2021, p. 168). In accordance with this approach, this criminal offence is considered the basic incrimination in the entire chapter.

The Criminal Code (2005) regulates the criminal offence of violation of rights arising from employment and social insurance in Article 163 as follows: “Whoever knowingly fails to comply with the law or other regulations, collective agreements, or other general acts concerning rights arising from employment and special protection at work of youth, women and persons with disabilities, or rights arising from social insurance, and thereby deprives another persons of, or restricts a right to which they are entitled, shall be punished by a fine or imprisonment of up to two years.”

The object of criminal-law protection and the object of the act of the criminal offence are the rights that belong to the worker on the basis of work and the employment relationship, as well as rights arising from social insurance. The act of committing an offence consists of any form of conscious non-compliance with the law and other regulations. The very disposition of the offence is “divided into three segments: rights arising from employment; special protection of youth, women and persons with disabilities; and rights

arising from social insurance” (Jovanović & Reljanović, 2023, p. 29). The blanket nature of the criminal offence “refers to the application of both labour-law and social-law statutory and by-law acts, as well as regulations of an autonomous nature (work regulations, collective agreements) that regulate rights arising from employment” (Stevanović, 2021, p. 169).

By the offender’s act, “it is necessary that the consequence of the criminal offence is achieved, manifesting itself in the non-exercise or partial exercise of a certain right of employees” (Mrvić Petrović, 2019, p. 115). Accordingly, it may be concluded that the object of the criminal act are the workers’ rights. The criminal offence may be committed exclusively knowingly and with intent, and with regard to who may be the offender, Mrvić Petrović (2019) states that “in practice, the offender will be by rule an official, or responsible person, who decides on the rights arising from an employment relationship, or a private employer” (p. 115). The offenders may also include “the officials of social insurance funds, as well as other institutions that directly or indirectly decide on the rights arising from social insurance” (Reljanović, 2024, p. 264). Starting from the thesis that the “employer is the dominant party in relation to the worker, particularly in the economic and organizational aspects, there is an indisputable tendency of the legislator to provide protection primarily to workers through this criminal provision. Nevertheless, since the performance of work is, in both legal and sociological-economic terms, a bilateral relationship, it is important to bear in mind that the rights arising from employment also include rights that, on that very basis, belong to the employer as well” (Stevanović, 2021, p. 171).

If statistical indicators relating to this criminal offence are examined, it can be noted that this offence is “by far the most prevalent in practice when it comes to criminal offences in the field of labour, accounting for approximately 85% of all filed criminal complaints, or about 82% of all accused persons, for the period 2012-2021. In the period 2013-2022, a total number of 238 persons were convicted for committing this criminal offence (including ancillary penalties), which also constitutes a convincing majority among criminal offences in the field of labour (for all other offences, a total number of 39 persons were convicted)” (Reljanović, 2024, p. 264). However, as Reljanović (2024) further points out, “such a situation does not indicate the efficiency of the judiciary, but rather the complete neglect of the prosecution of other criminal offences in this field. Furthermore, there is a number of criminal offences for which no one has been convicted for years, or for which an extremely small number of persons have been convicted, even though many of them have been clearly documented by the media, civil society organizations, legal clinics,

as well as through the reports of the labour inspectors. For example, in the period 2016-2021 there was no a single judgment for the criminal offence under Article 166 – violation of the right to strike, although several cases are documented each year in which employers unlawfully restrict the right to strike. The same applies to the criminal offence under Article 169 – failure to undertake occupational safety measures, for which a total of three persons were convicted in the period 2012-2021 (no one in the period 2015-2020)” (p. 265).

5. Conclusion

The rights to special protection of maternity, maternity leave and leave from work for child care, as well as for special care of a child or another person, are regulated by the provisions of labour law and are grounded in constitutional provisions. The essence of the existence of these provisions lies in the protection of the best interests not only of the mother, and not only of the child, but of the family as a whole.

The Labour Law (2005), as well as the provisions of other laws and by-laws referred to in this paper, are aligned with the provisions of ratified international sources and provide protection of maternity, as well as the right of an employed woman to maternity leave and leave for child care, including special care of a child or another person. Through its provisions, the Law also protects the rights of the father of the child, the guardian, the foster parent and the adoptive parent in situations that are precisely defined in this field. The purpose of protecting an employed woman during pregnancy and after childbirth is, in fact, to contribute to the elimination of any discriminatory effects on the part of employers based on the reproductive role that women have in society. The protection of the mother, or the parent, and in certain situations the guardian, foster parent or adoptive parent, is essentially the protection of the family and children during the most vulnerable period of life, or during periods when care is most needed. From all of the above, it can be concluded that the essence of the right to maternity protection is, in fact, the protection of the best interests of the mother and the child, as well as of the family as a community that most fully and effectively cares for all of its members.

In addition to the theoretical analysis of the protection of women at work and in connection with work and the right to work, this paper, through the application of a normative methodological approach, also presents the statutory standards of protection of maternity, maternity leave and leave from

work for child care, special care of a child or another person, as well as the basic issues related to the criminal-law treatment of violations of rights arising from employment and social insurance. Namely, although criminal legislation is considered *ultima ratio*, that is, a mechanism to be resorted to last among various available options, the prescribing of criminal offences in this area is certainly necessary in every national legal system. In the Criminal Code (2005), in the chapter entitled “Criminal offences against Rights arising from employment,” a total of seven criminal offences are prescribed and regulated. The paper places special emphasis on the criminal offence under Article 163 – violation of rights arising from employment and social insurance, which is considered the basic incrimination within the entire chapter.

Conflict of Interest

The authors declare no conflict of interest.

Author Contributions

Conceptualization, D.L., R.M. and V.M.; methodology, D.L. and M.R.; resources, D.L. and V.M.; formal analysis, D.L., R.M. and V.M.; writing – original draft preparation, D.L.; writing – review and editing, D.L. All authors have read and agreed to the published version of the manuscript.

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RADNOPRAVNO UREĐENJE ZAŠTITE MATERINSTVA U SRBIJI I KRIVIČNOPRAVNI TRETMAN POVREDE PRAVA PO OSNOVU RADA I PRAVA IZ SOCIJALNOG OSIGURANJA

APSTRAKT: Prava na posebnu zaštitu materinstva, na porodijsko odsustvo i odsustvo sa rada radi nege deteta, te radi posebne nege deteta ili druge osobe uređena su odredbama radnog prava, a utemeljena su u ustavnim odredbama. Suština postojanja ovih odredaba ogleda se u zaštiti najboljeg interesa ne samo majke, i ne samo deteta, već celokupne porodice. U radu su pored teorijske analize zaštite žene na radu i u vezi sa radom i prava na rad, primenom normativnog metodološkog pristupa, predstavljeni i zakonski standardi zaštite materinstva, porodijskog odsustva i odsustva sa rada radi nege deteta, posebne nege deteta ili druge osobe, kao i osnovna pitanja u vezi sa krivičnopравnim tretmanom povrede prava po osnovu rada i prava iz socijalnog osiguranja, koja se smatraju osnovnom inkriminacijom u celom poglavlju.

Ključne reči: zaštita materinstva, zaštita žene na radu i u vezi sa radom, pravo na rad, radno zakonodavstvo, krivično zakonodavstvo.

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