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Features of Labor Right Protection in Ukraine

ABSTRACT

The article is focused upon the particular issues of labor protection rights of the citizens. The purpose of the article is to highlight the mechanism of the labour rights protection of the citizens of Ukraine. It was realized by characterizing the current sources of guaranteeing the rights mentioned, by defining the parties to the labour law relations and establishing their role in these relations. Among the parties of the labour law relations the special attention is devoted to the workers' association which is considered to be an "auxiliary" subject of labor law of Ukraine. It is noted that workers' associations are able to solve problems that are collective in nature to ensure the interests of each individual employee. An accent is made at specifics of the labor relations. In this regard it is recommended for the parties to a compromise solution of labor disputes, encouraging their out-of-court settlement in a contractual manner.

The method of the social naturalism was used in defining the need to initiate legal actions by workers' association and in determination of the status of workers' association as a party to labor legal relations. The comparative legal method was used when analyzing the provisions of the separate foreign countries

and international organisations as to the rights of “unorganized” and “organized” workers’ associations to appeal to the court on individual basis. The method of legal logic was used during the formulation of proposals to create the theoretical basis and practical recommendations for acting of a new system of labour dispute resolution in Ukraine. The results of the study of the current situation with consideration of the labour disputes in Ukraine allowed to conclude, that workers’ associations are able to solve problems that are collective in nature and taking into consideration the challenges of the modern world, the legislation of Ukraine should be amended.

KEYWORDS: *labor relations, protection, human right system, European integration, legal capacity.*

The constitutional recognition of the rule, according to which an individual, his or her life and health, honor and dignity, inviolability and security are the highest social values, and human rights and freedoms and their guarantees determine the scope and focus of state activities (Article 3), has necessitated the finding of such a remedy for human right infringements that would guarantee and ensure the protection of the right to work, since ensuring the exercise of social and economic rights of the individual requires due and priority consideration on the part of state, in case of their violation – protection.

While implementing labor relations, each employee expects that in the event of a conflict or any contradictions he or she will be able to appeal to the competent authority and resolve such questionable matter in the manner prescribed by law. If it turns out that the right to work of such employee is violated, he or she is entitled to expect the restoration of the violated right. The state, represented by the legislative, executive and judicial branches, provides an effective and accessible mechanism for the exercise of the right to defence. The progression of events in this perspective is not only a desirable, but also essential way to develop relations in a democratic and social state, which Ukraine has declared itself.

The human right system related to the protection of the right to work requires the continuous improvement of a procedural form through the development and improvement of existing forms of protection and the introduction of new procedural rules that are able to provide the most

effective way to resolve a social conflict with the existing material and procedural features of the disputed legal relations. The transformation of power, including the protection of the right to work, necessitates further scientific research intended to make changes constructive and effective.

In addition, Ukraine's proclaimed policy of European integration, active public discussion of the possibility of signing an Association Agreement with the European Union provide for finding such remedies for human rights infringements that could ensure the exercise of human rights and freedoms, taking into account the global best practices, the analysis and unification of which are a secondary objective of this monographic study. The Association Agreement may not be concluded unless and until a comprehensive reform of the political, economic, judicial branches of state power in Ukraine is carried out since the candidate country for future membership of the European Union shall meet certain criteria, which, among other things, require that the state observe such democratic principles as the principles of freedom and human dignity, as well as the principle of rule-of-law state.

The right to work in Ukraine is protected in or out of court. If disputes are of an individual nature, they are resolved by the council of conciliation under the extrajudicial procedure. Any disputes between unions and corporate management are resolved by conciliation bodies through the public authority – the National Mediation and Conciliation Service. Disputes between unions and corporate management are resolved by conciliation commissions and labour arbitration. If the dispute is not resolved out of court, the parties are entitled to appeal to the court. Labor disputes in Ukraine are resolved in the courts of general jurisdiction under the standard procedure.

According to the current procedural legislation, each person is entitled to appeal to the court for protection of his or her violated, unrecognized or disputed rights, freedoms or interests in accordance with the procedure established by the Code of Civil Procedure of Ukraine [1] (hereafter – CCPU). Each such recourse to a court requires an appropriate judicial response in the form of judicial proceedings, judicial examination and judgment adopted. Taking a legal action, the person concerned seeks to obtain judicial protection of his/her own legal rights or interests. In turn, while disputing the claim, the

defendant is trying to find a procedural way to refuse to satisfy any claims of the plaintiff or terminate the proceedings. One of the first issues that the court finds out is the establishment of legal rights to apply to the court and judicial protection of the procedural parties to the dispute.

Parties to the labour law relations and, therefore, potential plaintiffs and defendants in court are *the employee, employer, labor union, workers' association, government agency and public organization that are related to social and labor relations*.

In the protection of labor rights, such a party to labor relations as the workers' association faces most of challenges. The workers' association is referred to the so-called "auxiliary" subjects of labor law. It should be emphasized that auxiliary subjects of labor law, firstly, are usually formed under the influence of employees and employers or the state; secondly, have legal personality on labour issues, which performs a job-providing role in relation to the employment legal personality of the employee and employer; thirdly, ensure the formation of a wide range of legal relations on labour issues. Auxiliary subjects of labor law are the subjects formed under the effect of the exercise of the right of employees and employers to association [2]. Employees exercise the right to association by creating a workers' association or labor union. The workers' association is a manifestation of the development of civil society in Ukraine and acts as a form of direct labor democracy [2].

Article 245 of the Labor Code of Ukraine (hereafter – LCU) provides that employees have the right to participate in the management of enterprises, institutions, organizations through general meetings (conferences), workers' association councils, trade unions operating in workers' associations, other bodies authorized by the workers' association to represent, make proposals of improving the operation of the enterprise, institutions, organizations, as well as on the issues of providing socio-cultural and consumer services.

According to Article 65 of the CCU the workers' association of the enterprise is made by all citizens who by their work participate in its operation on the basis of a labor contract (agreement) or other forms regulating labor relations of an employee with the enterprise. The powers of workers'

association regarding its participation in the management of the enterprise are established by the Articles of Association or other constituent documents in accordance with the requirements of the CCPU, the legislation on certain types of enterprises, the law on workers' associations.

A specific law on workers' associations in independent Ukraine has not been adopted, however, the Law of the USSR "On Workers' Associations and Increasing their Role in the Management of Enterprises, Institutions, Organizations" No. 9501-X (v9501400-83) dated June 17, 1983 [3] still remains in force. In addition, the Labour Code has a separate Chapter XVI-A "Workers' Association". Article 252 actually duplicates the content of Article 65 of the CCPU defining the concept of workers' association.

It should be concurred in the view that this definition is vulnerable as it does not give a proper understanding of workers' association as a subject of labor law. In addition, it is doubtful to determine the workers' association as a formal arithmetic number of employees. At its core, the workers' association should be considered to be a kind of public association of workers, which in legal relations on labor issues acts through the general meeting or authorized body (representative) [2].

The issue on determining the legal status of workers' association still remains controversial since some scientists argue that the workers' association does not have a full legal status, and is a product of socialist ideology [4], others express an opposing opinion. Thus, V. Lazor states that "workers' association is a public organization of employees of the enterprise, institution, organization (or structural unit), which connects them with each other in terms of the regulation of their social and labor functions. The legal capacity and competence of workers' association arises only from the moment of creation of a managing body – general meeting (conference). The workers' association is characterized by a qualitative characteristic – the concerted activities aimed at defending the labor rights and interests of employees; and a quantitative characteristic. A qualitative characteristic is sufficient for the acquisition of legal capacity and competence, and the recognition of the named association as a subject of the labor law" [5]. It is necessary to agree with V. Lazor, who notes that not all workers' associations,

but only those, which have acquired self-organisational features (have elected a representative body, etc.), get the legal status. As of today, representatives of both “unorganized” and “organized” workers’ associations have the right to appeal to the court only on an individual basis.

The right to appeal to the competent authority is also determined by international agreements ratified in Ukraine that makes them binding. Thus, in accordance with paragraph 17 of the International Labor Organisation Recommendation No. 130, in the cases when no attempts to resolve a complaint in an enterprise result in agreement, it should be possible, taking into account the nature of the complaint, to finally resolve it in accordance with one or more of the following procedures: (a) the use of procedures provided for in a collective agreement, such as: the joint consideration of an issue by relevant employers’ and employees’ organizations or voluntary arbitration by a person or persons appointed in coordination with the employers’ and employees’ organizations concerned or their respective organizations; b) conciliation or arbitration by competent government agencies; c) appealing to the labour court or other judicial authority; d) any other procedure that may be acceptable in accordance with the terms and conditions of the count [6]. The above fragment of the International Labor Organisation Recommendation No. 130 emphasizes the need for the “final settlement” of the problematic issue and establishes different ways of its solution, among which the possibility of appealing to court is assumed.

The basis of the legal status of workers’ association is the powers on labor issues. The main powers of workers’ association on labor issues are as follows: 1) participation in the development and discussion of draft long-term and current plans of economic and social development (work plans) of enterprises, institutions, organizations (if provided for by their articles of association); 2) participation in collective bargaining, development and adoption of collective agreements, ensuring their proper performance; 3) hearing the employer’s reports on the performance of collective agreements; 4) initiation of bringing any persons, failing to fulfill their obligations under collective agreements, to responsibility; 5) approval of internal labor rules and regulations, taking measures to ensure their compliance; 6) discussion of the

state of labor discipline and implementation of measures to strengthen it; 7) application of incentives, provision of employees with gratuities, material and moral encouragements for their good performance; 8) imposition of disciplinary measures on workers' association members for violation of labor discipline (unofficial comments relating to any failures, public reprimand); 9) making proposals to apply incentives to employees according to the internal labor rules and regulations; 10) participation in the discussion and approval of comprehensive plans of activities aimed at improving the workplace, labor protection and sanitary and recreation activities, and monitoring the implementation of these plans; 11) exercise of public control over the employer's observance of labor legislative acts, social partnership acts, local regulations, terms and conditions of employment contracts and agreements [2].

Within the meaning of the LCU, taking into account the specifics of the work, opinion of workers' association and in consultation with the local council, a five- or six-day workweek is established by the employer together with the elected body of the primary trade union organization (Article 52); work order at enterprises, institutions, organizations is determined by the internal labor rules and regulations, which are approved by workers' associations on the proposal of the employer and the elected body of the primary trade union organization (trade union representative) on the basis of model regulations (Article 142); consideration of the issue of labor discipline violation (Article 152 of the LCU); any incentives provided for by the internal labor rules and regulations approved by workers' associations may be applied to employees of enterprises, institutions, organizations (Article 143); election of the labour dispute commission (Article 223 of the LCU), etc.

Moreover, international instruments focus on this issue as well. A. M. Sliusar fairly points out that the workers' association as a subject of labor law is considered in many ILO conventions, for example, the Convention "On Employment and Working Conditions of Nursing Staff" (No. 149, 1977), the Convention "On Inspection of Seafarers' Working and Living Conditions" (No.178, 1996), etc.[7] In addition, the 1959 ILO Recommendation No. 94 on consultation and cooperation between entrepreneurs and workers at the enterprise level and the 1967 ILO Recommendation No. 129 [8] on relations

between management and employees at the enterprise provide for some forms of participation in the corporate management. Article 21 of the European Social Charter (revised) [9] enshrines the employee right to be provided with information and advice within enterprises, and Article 22 provides for the employee right to participate in the determination and improvement of working conditions and environment.

In any case, it may be necessary for the workers' association as a party to labor relations to initiate legal actions in order to protect its violated, unresolved or disputed rights, freedoms and interests. And the possibility of workers' association to initiate legal actions has several problems. First of all, this is due to the determination of the status of workers' association as a party to labor legal relations and the substantive distinction between disputes.

The need to protect the violated rights of workers' association may be associated with different judicial jurisdiction (civil, economic and administrative).

Thus, in accordance with Article 5 of the Code of Administrative Procedure of Ukraine (hereinafter – CAPU) [10], each person has the right, in the manner prescribed by this Code, to apply to the administrative court, if such person believes that his or her rights, freedoms or legitimate interests have been violated by any decision, action or inaction of an authority, agency or public officer, and to ask for their protection by:

- 1) recognition of a regulatory legal act or its separate provisions as illegal and invalid;
- 2) recognition of an individual act or its separate provisions as illegal and their cancellation;
- 3) recognition of actions taken by an authority, agency or public officer as illegal and the obligation to refrain from commission of certain actions;
- 4) recognition of inaction taken by an authority, agency or public officer as illegal and the obligation to perform certain actions;
- 5) establishment of the presence or absence of competence (powers) of an authority, agency or public officer;
- 6) the court's adoption of one of the decisions specified in paragraphs 1-4 of this part and recovery of funds from the defendant that is an authority,

agency or public officer to indemnify against damage caused by its illegal decisions, action or inaction. An example of such recovery is the case No. 826/8151/16 upon a cassational appeal of ArcelorMittal Kryvyi Rih PJSC against the judgment of Kyiv District Administrative Court as of August 30, 2017 and the ruling of Kyiv Administrative Court of Appeal as of October 18, 2017 in the case No. 826/8151/17 brought by ArcelorMittal Kryvyi Rih PJSC against the National Mediation and Conciliation Service. The plaintiff considered that the requirements of employees were formed without compliance with the provisions of Articles 2-6 of the Law of Ukraine “On the Procedure for Solving Collective Labor Disputes (Conflicts)”, and the National Mediation and Conciliation Service was to refuse to register a collective labor dispute. The Supreme Court **has dismissed** the Cassation Appeal of ArcelorMittal Kryvyi Rih PJSC against the judgment of Kyiv District Administrative Court as of August 30, 2017 and the ruling of Kyiv Administrative Court of Appeal as of October 18, 2017 in the case No. 826/8151/17[11], and **upheld** the Judgment of of Kyiv District Administrative Court as of August 30, 2017 and the Ruling of Kyiv Administrative Court of Appeal as of October 18, 2017 in case No 826/8151/17. There were trials, confirmed the legitimacy of claims and the absence of violations in the registration of claims of employees.

It should be noted that most of the legal relations the workers’ association has are of a labor law nature. According to Article 19 of the CPCU, the courts consider any cases arising from civil, land, **labor**, family, housing and other legal relations in civil proceedings, except for cases in other proceedings.

According to Article 5 of the CPCU, while carrying out justice, the court protects the rights, freedoms and interests of **individuals**, the rights and interests of **legal entities**, state and public interests in the manner prescribed by law or contract. If the law or contract fails to define an effective way of protection of the violated, unrecognized or disputed right, freedom or interest of the person who has appealed to the court, the court according to the claim of such person may define in its decision

such way of protection which does not contradict the law. In this regard an important question arises since *the workers' association is not a legal entity*. And though, the wording of Article 4 of of the CPCU provides that each person has the right, in accordance with the procedure specified in this Code, to seek legal redress for the violated, unrecognized or disputed rights, freedoms or legitimate interests, the problem isn't resolved, but it is only alleviated. Thus, in cases established by law, *any bodies and persons, entitled to apply to the court for the benefit of other persons or for for the state or public benefit by operation of law*, may initiate a legal action. The waiver of the right to apply to the court for protection is invalid. No person shall be deprived of the right to participate in the consideration of his/her case in the manner prescribed by the CPCU.

We have a similar situation with the Economic Procedure Code of Ukraine (hereinafter – CPCU) [12], which we are interested in primarily from the point of view of the jurisdiction of economic courts defined by Article 20 of the CPCU, namely, economic courts consider cases in disputes arising in connection with the implementation of economic activities (except for cases provided for in Part two of this Article), and other cases as expressly prescribed by law.

As a general rule, the conditions for the acquisition of legal capacity and competence by the workers' association are as follows: 1) organizational; 2) labor legal. The organizational condition is that: a) the formation of a team of employees implies the existence of an employer and labour relations with two or more employees; b) employees shall be properly unified; c) employees shall be legalized by holding a general meeting to elect an appropriate mechanism for participation in legal relations either directly or through the formation of an authorized body (representative). The labor legal condition is that the general meeting shall determine the procedural issues on the functioning of the team of employees (decision-making procedure), including the content and scope of powers of the authorized body (representative) on labor issues [2].

Formally, proper legal capacity and competence in labour legal relations do not require the acquisition of the legal status of a legal entity by the workers'

association. But to represent the interests of the workers' association in court, the absence of the status of a legal entity may have legal consequences.

Thus, the example is the case No. 910/9010/17 (No. in the Unified State Register of Court Decisions 74376380 dated May 23, 2018), the proceedings No. 12-82gs18 [13] of the Economic Court in Kyiv are initiated on the claim of the Primary Trade Union Organization of Electronmash State Scientific and Production Enterprise represented by the Trade Union Committee against the Ministry of Economic Development and Trade of Ukraine [14] and the State Property Fund of Ukraine [15] regarding the obligation of the defendant to take action to determine the share of the workers' association in the property of Electronmash State Enterprise and the invalidation of the order of the Ministry of Economic Development and Trade of Ukraine dated September 28, 2016 No. 1621 in terms of increasing the authorized capital. The claims under the lawsuit are motivated by the following. On September 28, 2016, the Ministry of Economic Development and Trade of Ukraine issued the order No. 1621 (hereinafter – the Order No. 1621, the disputed order), by which it was decided: – to increase the authorized capital of Electronmash State Scientific and Production Enterprise by UAH 65,065,000.00, – to rename Electronmash State Scientific and Production Enterprise as Electronmash State Enterprise, – to approve the articles of association of Electronmash State Enterprise (hereinafter – Electronmash SE). At the same time, the State Property Fund of Ukraine denied the dispute's belonging to the jurisdiction of economic courts and justified the requirements of the cassation appeal by the fact that the acquisition of the status of the subject of collective property right by the workers' association of the state enterprise in accordance with the Law of Ukraine "On Property" was associated solely with its acquisition of the status of a legal entity, while **the workers' association of Electronmash SE was not received the status of a legal entity**. From the above reasoning, the Fund concludes that **the workers' association is not an independent party** to the property and legal relations of ownership, and only employees of the state enterprise, but not the primary trade union organization, may lodge the claim for determination of the share of the workers' association in civil proceedings.

According to the position of the Grand Chamber of the Supreme Court of Ukraine [16], assessing the arguments of the parties and conclusions of the lower courts on the jurisdiction of the case, it has been decided that **the case is subordinated to the economic court**, given the following:

- According to Article 1 of the CCPU (as in force on the date of lodging the claim), enterprises, institutions, organizations, other legal entities (including foreign), citizens, which carry out business activities without creating a legal entity and have acquired the status of a business entity in accordance with the established procedure, shall be entitled to apply to the economic court in accordance with the established jurisdiction of economic cases for the protection of their violated or disputed rights and interests protected by law, as well as for the implementation of measures provided for in this Code and aimed at preventing offenses;
- According to Part 2 of Article 21 of the CCPU (as in force on the date of lodging the claim), plaintiffs are the enterprises and organizations specified in Article 1 of this Code, which have lodged the claim, or for the benefits of which the claim for protection of the violated or disputed right or the interest protected by the law has been filed. The case was initiated on the claim of the Trade Union for the benefits of the workers' association of Electronmash SE. Taking into consideration the relief or remedy sought, the subject-matter of the dispute is private property relations (the determination of the share in the state enterprise assets).
- **The workers' association is not a legal entity and may not participate in property relations.** In a certain period of time, the legislation, in particular article 25 of the USSR Law "On Property of the USSR", article 20 of the Law of Ukraine "On Property", actually recognized the workers' associations of the state enterprises as subjects of the collective property right. But at the same time, members of workers' associations could jointly acquire the ownership of the state enterprise assets exclusively by creating legal entities, namely, enterprises or companies participating in the processes of leasing or privatization of

- the state enterprises' assets (buyers' association, tenants' association, employee-owned enterprise, lease enterprise, business entity, etc.);
- **in the absence of the status of a legal entity, the workers' association has no legal standing.** Accordingly, the Trade Union may not act as a representative of the workers' association in relation to claims for recognition of ownership since it is impossible to represent in court the principal, which has no legal standing;
 - the Trade Union may not be considered as a representative of individuals – members of the workers' association of Electronmash SE. Article 25 of the Law "On Trade Unions, Their Rights and Guarantees of Their Activity" [17] provides that trade unions shall represent rights and interests of employees in relations with the employer in the management of enterprises, institutions, organizations, as well as in the course of privatization of state and communal property items, participate in the work of the privatization commissions, represent the interests of employees of a corporate debtor in the creditor's committee in the bankruptcy proceedings. However, **the trade union may represent a member of the workers' association – an individual in civil proceedings subject to the availability of documents confirming the powers of the representative (power of attorney).** No documents, confirming the representation of individuals – members of the workers' association of Electronmash SE by the Trade Union, have been submitted to the court.

In addition, the profit of Electronmash SE, transferred to the ownership of members of the workers' association, was personalized, and each member of the workers' association had its own individual account in the accounting system, on which his/her share in the enterprise property was recognised. The court of first instance has come to the right conclusion that only those members of the workers' association, who worked at the enterprise in the relevant period and were specified in the extracts from ledger accounts of the employees of Electronmash State Scientific and Production Enterprise, and who worked in the conditions of full-scale cost accounting and self-financing,

and received a share in the profit for the period from January 01, 1989 to April 01, 1994 provided by the plaintiff, may have the right to a share in the property of the state enterprise in accordance with the requirements of the law. They do not lose the right to such a share after dismissal. Consequently, it is these individuals – employees or former employees, not all members of the workers’ association working at the enterprise at the moment, who have the right to apply to the court to determine the share in the property of the state enterprise.

Accordingly, if the Trade Union is not a representative of the workers’ association or an individual member of the workers’ association, it shall be considered as acting on its own behalf as a plaintiff. The defendant in this case is a legal entity – Electronmash SE. Therefore, due to parties involved in the dispute, it shall not be considered in the courts of general jurisdiction and shall be settled in the courts.

Thus, the Grand Chamber of the Supreme Court, assessing the arguments of the parties and the conclusions of the courts of previous instances, has come to the following conclusion regarding the application of the rules of law.

Article 25 of the Law “On Trade Unions, Their Rights and Guarantees of Their Activity” [17] provides that trade unions shall represent the rights and interests of employees in relations with the employer in the management of enterprises, institutions, organizations, as well as in the course of privatization of state and communal property items, participate in the work of the privatization commissions, represent the interests of employees of a corporate debtor in the creditor’s committee in the bankruptcy proceedings. However, **the trade union may represent an individual** – a member of the workers’ association in civil proceedings subject to the availability of documents confirming the powers of the representative (power of attorney).

The workers’ association neither has the status of legal entity nor may act as the participant of economic or civil process. Accordingly, the trade union may not act as a representative of the workers’ association in the economic or civil process, and when filing a claim for the benefit of the workers’ association it shall be considered acting on its own behalf.

The last position of the Grand Chamber, in our opinion, is somewhat contrary to the meaning of paragraph 14 of the Resolution of the Plenum of the Supreme Court of Ukraine dated November 6, 1992 No. 9 “On the Practice of Consideration of Labor Disputes by the Courts”, namely, when considering cases related to the requirements of the trade union or other body authorized to represent the workers’ association for the termination of an employment contract (agreement) with the director or his/her removal from the post, it should be assumed that according to article 45 of the LCU (as amended on January 19, 1995) such requirement may be **declared by a trade union or other body authorized to represent the workers’ association, which on behalf of the workers’ association has signed a collective bargaining agreement.**

It is important to note that in order to have the legal status of legal entity the workers’ association may use the opportunity to formalize its status in the form provided for by the legislation. Thus, having acquired the status of Umankhle Workers’ Association Additional Liability Company [18] or Energoproekt Kyiv Research and Design Institute Workers’ Association Closed Joint Stock Company [19], or Metalist Balaklava Shipyard Workers’ Association Limited Liability Company [20], the workers’ associations have acquired the status of a legal entity and received a judicial perspective to protect their interests.

Finally, we should note that workers’ associations are able to solve problems that are collective in nature, in which the interests and aspirations of each individual employee are manifested. Therefore, such separate interest being combined is a collective set of interests aimed at solving the problems of the workers’ association.

It should be borne in mind that labor relations have their own specifics, so the legislator would direct the attention of workers’ associations to a compromise solution of labor disputes, encouraging their out-of-court settlement in a contractual manner. This does not limit the right to judicial protection, but on the plus side the efforts of parties are aimed at developing a consensus that would be mutually acceptable in the manner that has a simplified procedure and timing of solution compared to the judicial procedure.

Ukraine is stumbling along the thorny path in the formation of the system of protection of the right to work as its labour legislation has been passed and amended in different historical periods, which is hardly compatible with legal practice. It is obvious that time has come for thorough analysis of the national legal tradition and foreign experience of realization of protection of the right to work and for working out theoretical basis and practical recommendations for creating a new system of labour dispute resolution in Ukraine taking into consideration challenges of the modern world.

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