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Tarandığı Indeksler/ Indexes

IMPACT OF ILO CONVENTION CONCERNING THE PROTECTION OF WAGES NO. 95 ON THE TURKISH LABOUR LAW

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ÖZET

Ücret ve ücretin ödenmesi işverenin işçinin işi ifasına karşı ödemekle yükümlü olduğu bir borçtur.Bu temel espriye uygun olarak ILO'nun 95 No'lu sözleşmesinde ücret tabiri,yapılan veya yapılacak olan bir iş veyahut görülen veya görülecek olan bir hizmet için yazılı veya sözlü bir iş akdi gereğince bir iş veren tarafından bir işçiye, her ne nam altında ve hangi hesaplama şekliyle olursa olsun ödenmesi gereken ve nakden değerlendirilmesi kabil olup karşılıklı anlaşma veya milli mevzuatla tespit edilecek bedel veya kazançları ifade eder.Ücretin bu kavramsallaştırmasına uygun olarak ücret ve ücretin ödenmesi Türk İş Hukukunda geniş ve ayrıntılı düzenlemelerle yer almıştır.Türk İş Hukukunda,kimi düzenlemeler ücretin tanımı ve ödeme zamanıyla ilgili olmakta,kimi düzenlemeler ise doğrudan ücret ve ücretin ödenmesini güvence altına almaktadır.Ne var ki ücrete ilişkin Türk İş Hukukundaki düzenlemeler ILO'nun normlarından etkilenmiştir. Bunların başında ücret ve ücretin korunmasına ilişkin 95 Nolu sözleşme gelmektedir. Elbette ücrete ilişkin olarak ILO'nun diğer sözleşmeleri de Türk İş Hukukunda ifadesini bulmuştur.Ancak bu çalışma 95 Nolu sözleşmenin Türk İş Hukukuna etkisiyle sınırlandırılmıştır.

Bu niyet temelinde bu çalışma 95 Nolu sözleşmenin Türk İş Hukukuna etkisini incelemek gayesiyle ele alınmıştır.Bu çerçevede ücret kavramı ve ücretin ödemesindeki gelişmeler ücretin ödeme yeri ve zamanı ve ücretin korunmasıyla ilgili olarak Türk İş Hukukunda yer alan düzenlemeler 95 Nolu sözleşme ile mukayeseli olarak incelenmiştir.

Anahtar Kelimeler: Ücretin korunması hakkında 95 Nolu ILO sözleşmesi, ILO sözleşmeleri, Türk İş Hukuku, Türk İş Kanunları, Ücret

ABSTRACT

The wage and its remuneration constitudus one of the main duties of employer. It is the counter part of the employees duty to work. In sprit of this character. According to ILO convention concerning the protection of wages no 95 ;"the term,"wages" means remuneration or earnings however designated or calculated, capable of being expressed in term of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten conventioned of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered. In virtue of this regulations, wages and remuneration defined in Turkish labour with whitely regulations. In Turkish labour law, there are some regulations about meaning of wages and paying of its time, the other ones are about protection of wages and remunerations. As we know, the regulations about wages in Turkish labour law are effected by ILO norm, such as 95 no convention and the other conventions about wages and remunerations. In this paper, study is based on impact of no. 95 convention concerning the practises of wages on Turkish Labour Acts. Such as on evaluation of definition of wages and remunerations, time of pay wages and remunerations, the place of pay remunerations and protection of wages in Turkish labour law.

Key Words: Convention Concerning Protection of Wages NO 95, ILO Convention, Turkish labour law, Turkish labour Act., Wages

INTRODUCTION:

ILO Norms influence the labour regulations in many countries regardless of their membership to ILO, since they are effective at international level. Turkey is an ILO member since 1932. Even though the relationship between the country and ILO turns to an undesirable aspect at times, Turkey is one of the few countries to make use of relationship with the organisation. From 1932 to our day, Turkey has carried out remarkable amendments in the framework of ILO norms. The Labour Act no. 3008, Labour Act no. 1475 and Labour Act no. 4857, as well as other related codes, are under apparent influence of ILO norms. In this respect, ILO Convention "no. 95 on "Protection of Wages" played a decisive part on the wage regulations within Turkish Labour Legislation. The effects are especially visible in articles 32, 35, 36 and 38 of the latest Labour Act no. 4857, accepted in 2003. The norms have notably influenced the laws on individual vocational relations, especially Marine Labour Act no. 854 and Press Labour Act no. 5553.

Hereby study seeks analysing the influence of Convention no. 95 about Protection of Wages on Turkish Labour Law, by virtue of Labour Act no. 4857. In this context, the regulations within Turkish Labour Legislation are compared with the regulations in ILO Convention no. 95 about definition and elements of wages, determination of wage amount, payment type, place and time of payment, and wage guarantee, in order to determine common provisions in both. Evidently, such a study enables an analysis on the influence of other conventions (for example: Convention no. 26 on Determination of Minimum Wage or Convention no. 94 regarding Labour Conditions to be included in agreements by a public institution) accepted by ILO. Since hereby study is restricted with the content of a single paper, effects of Convention no. 95 on Labour Law are exclusively analysed. The abovementioned other conventions may be handled in another study.

1. REGARDING THE DEFINITION AND ELEMENTS OF WAGE

The article 1 of Convention no. 95 reads as follows: "In this Convention, the term wages means remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered" (Centel, 2004, p.249). Thereupon, the wage is principally a fee paid to the worker in cash against a work. According to the first clause under article 32 of Labour Act no. 4857, "in general terms, wage is the amount provided and paid in cash to a person against a work by employer and third parties" (Labour Act Art.32/1). Pursuant to hereby definition by Labour Act, the wage is a sum paid to worker in exchange for a work (Eyrenci, Taşkent, Ulucan, 2004, pp.98-99; Terzi, Kılıç, 2009, pp.1037-1038). In both regulations, as well as in Labour Law, 3 elements of de facto wage definition are in place: a) Wage is in exchange for a work, b) Wage is paid by employer, c) Wage is paid in cash. Therefore, a payment, which does not correspond to any work whatsoever, shall not be considered as wage. Nevertheless, even though this basic principle is maintained, the fact that wage is in exchange for a work does not literally mean any production or actual performance of any work whatsoever. Evidently, in some cases, wage payments may be in question regardless of direct performance of the work. For example, weekend wage, vacation pay and annual leave wage are paid in this respect. These wages do not correspond to performance of any

work; however, in a broader sense, they correspond to a labour for a certain period (Mollamahmutoğlu, 2005, p.370;Demir, 2009, p.135 – 136; Eyrenci, Taşkent, Ulucan, 2004 p.99-100; Süzek, 2013, p.364).

The expression that wage is paid by employer means that the responsibility of wage payment belongs to employer. The wage may be paid directly by employer; or it may be paid by accounting director or personnel manager who represents the employer (Demir, 2009, p.136; Sümer, 2008, p.72; Çelik, 2013, p.151).

It is worth mentioning that in Turkish Labour Law, the concept "employer representative" and "third parties" takes place regarding wage payment, unlike Convention no. 95. The identity of third parties is materialised by means of doctrines and legal practices. As for restaurants, casinos and similar places, these persons are clients who pay service charges or gratuities. The rules on allocation of collected fees are indicated in "Directive on Distribution of Collected Fee Percentages to Workers" (RG:28.02.2004, No:25389). Besides, since article 67 of Code of Obligations reads "in case the creditor has no interest for payment of the debt in person by the debtor, the latter does not have to discharge the debt in person", the payment of such debt by any third party does not breach the regulations unless the worker has any interest regarding the payment of wages by employer. According to Supreme Court, employer and worker may agree in labour contract that the wages of worker will be met by service charges and gratuity paid by clients. However, in case the service charges and gratuities are lower than minimum wage, the employer shall compensate the remaining amount (Demir, 2009, p.136; Eyrenci, Taşkent, Ulucan, 2004, p.100).

The payment of wage as money (in cash) is directly relevant to the performance of the work. The earning of a worker in any job should be spendable. Thereupon, the wage should be paid as a certain amount of money in exchange for the work by worker. Hence, the payments in kind are principally not included in wage concept. Employer, who discharges the debt of wage through allowance in kind, is considered not to have performed the obligation (Mollamahmutoğlu and Astarlı, 2011, p.546; Sümer, 2008, p.72; Demir, 2009, p.137; Şakar, 2006, p.141). In this respect, the regulation, expressed as "remuneration or earnings ... in terms of money" (Conv no. 95, art. 1) in the convention no. 95, is arranged as "wages, premiums, gratifications and any remuneration of this kind are paid in Turkish lira, at the workplace or to a private bank account" by clause 2 under article 32 of Labour Act no. 4857. Both regulations emphasise on payment of the remuneration in money. This fundamental rule apart, both Convention no. 95 and regulations in Turkish Labour Law enable allowances in kind regarding certain payments other than base pay. Article 4 of Convention no. 95 reads as follows: "National laws or regulations, collective agreements or arbitration awards may authorise the partial payment of wages in the form of allowances in kind in industries or occupations in which payment in the form of such allowances is customary or desirable because of the nature of the industry or occupation concerned; the payment of wages in the form of liquor of high alcoholic content or of noxious drugs shall not be permitted in any circumstances. In cases in which partial payment of wages in the form of allowances in kind is authorised, appropriate measures shall be taken to ensure that a) such allowances are appropriate for the personal use and benefit of the worker and his family; and b) the value attributed to such allowances is fair and reasonable" (Conv. no. 95 Art.4).

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Accordingly, the Labour Code includes allowances in kind within the concept of wage, in case they arise from laws or contract and they are evaluable in monetary terms. According to clause 11 under article 14 of the current Labour Act no. 1475 on severance pay, in case the wage, which is taken into consideration during calculation for severance pay, and the wage mentioned in last clause under article 17 of Labour Act no. 4857 are paid in advance, the allowance in kind is implicitly included in wage concept, by means of giving a place for "money and interests evaluable through money" regarding the calculation of compensation for warning and bad faith damages (Mollamahmutoğlu, 2005, p.370; Sümer, 2008, p.72-73; Eyrenci, Taşkent, Ulucan, 2004, p.102; Demir, 2009, p.137; Şakar, 2006, p.142).

2- REGARDING DETERMINATION OF WAGE AMOUNT

In modern Labour Law practice, wage is the basic element of labour contract and is decided by the parties of contract. The parties are authorised to determine the amount and payment type of the wage through the contract (labour contract or collective labour agreement). In article 1 of Convention no. 95, the wage is defined as a fee "payable in virtue of a written or unwritten contract ... for work done or to be done or for services rendered or to be rendered" (Conv. no. 95 Art.1). This provision in the Convention explicitly indicates that wage is an element of labour contract. Besides, the expression "however designated or calculated" means the amount and payment type of wages can be freely decided by the parties (Centel, 2004, p.249; Akyiğit, 2013, pp.181-182). Similarly, according to Turkish Labour Law, labour contract serves as the basis for determination of wage amount. However, unless there is a provision in the labour contract about wage amount, the personal attributes and the nature of the job are taken into consideration before the wages are determined pursuant to workplace practices, traditions or collective labour agreement, respectively (CO. Art.323/1). Due to the normative influence of Collective Labour Agreement, this latter shall have priority over labour contract and other practices in terms of fulfilment of Labour Law (Mollamahmutoğlu, 2005, p.381; Eyrenci, Taşkent, Ulucan, 2004, p.101;Sümer, 2008, p.76;Süzek, 2005, p.286). Besides, the freedom of contract parties concerning the determination of wage amount is not limitless. Evidently, any wage under minimum wage (Minimum wage: the wage paid to workers for a regular workday so as to meet at minimum level the obligatory requirements of worker such as food, domicile, clothing, health, transport and culture according to current prices of such items (Minimum Wage Directive art. 6/d)) cannot be in question pursuant to the principle of worker protection (Labour Act art.39/1). Even if the wage of worker is determined under minimum wage, the worker shall have the right to claim the minimum wage (Sümer, 2008, p.77; Ercan, Güven, Aydın, 2007, p.97). Moreover, pursuant to 24/2, the worker undoubtedly has the right to terminate the labour contract for justifiable reasons in this respect (Çelik, 2009, p.167; Tunçomağ, Centel, 2005, p.115). There is comprehensive jurisprudence regarding the determination of wage amount. In previous lawsuits on dispute with worker about wage amount, or when the worker signs the payrolls without appealing records, or when there is no written document about wage amount, Supreme Court has taken many decisions in consideration of the actual job of the worker, the capacity of workplace, the quality of worker and the current wages of workers by similar businesses for similar jobs.(Y.9.H.D,E.2006/4886,K.2006/26692, E.2005/36455,K.2006/15939,E.2005/37442,K.2006/16193; Yenisey, 2009, p.59–60)

3- REGARDING MANNER OF PAYMENT

As indicated above with respect to elements of wages, it is a fundamental principle that the wage should be paid in cash or as money; this approach also settles the payment type. Articles 1 and 2 of Convention no. 95 put forth the principles of payment in money. The expression lays stress on payment in money, saying "... calculated, ... being expressed in terms of money and fixed by mutual agreement, ... which are payable...". Whereas the first clause of article 3 indicates " Wages payable in money shall be paid only in legal tender, and payment in the form of promissory notes, vouchers or coupons, or in any other form alleged to represent legal tender, shall be prohibited," and the second clause of the same article reads "The competent authority may permit or prescribe the payment of wages by bank cheque or postal cheque or money order in cases in which payment in this manner is customary or is necessary because of special circumstances, or where a collective agreement or arbitration award so provides, or, where not so provided, with the consent of the worker concerned". As is clearly seen in article 3 of Convention no. 95, it is obligatory to pay the wage in legal tender, and it is forbidden to pay in vouchers, coupons etc. alleged to represent legal tender (Terzi, Kılıç, 2009, p.1039;Süzek, 2005, p.292;Çelik, 2009, p.151;Güven, Aydın, 2007, p.99). Moreover, the second clause reveals that in case the payment is customary or necessary due to special circumstances, or the worker consents, the competent authority may permit payment of wages through bank cheque or postal cheque or money order (Mollamahmutoğlu, 2005, p.389).

The second clause under article 32 of Labour Act no. 4857 reads as follows: "As a rule the wage shall be paid in Turkish money (legal tender) at the establishment or shall be deposited into a specially opened bank account. If the wage has been decided in terms of a foreign currency, it may be paid in Turkish money according to the currency rate on the date of payment. Regarding the payment of any kind of remunerations of a worker such as wage, premium, gratification etc. through transfer to bank account, Ministry of Labour and Social Security, Ministry of Finance and Ministry of State in charge of Undersecretariat of Treasury are jointly responsible for imposing obligations on employer or third parties in consideration of tax obligation type, business size, number of employees, the city of employer etc., and for concluding whether the wage, premium, gratification or any similar remuneration whatsoever will be gross or the net amount after the legal deductions. Employers or third parties, who are obliged to pay the wage, premium, gratification or any such remuneration of their employed workers by means of opened bank accounts, cannot pay such remuneration in any other manner than via these bank accounts." The second clause states that a directive will come into effect with respect to the payment of wages via transfer to bank account. Accordingly, the "Directive on Payment of Wages, Premium, Gratifications and Similar Remunerations by means of Banks" came into effect on 01.01.2009, following publication in Official Gazette on 18.11.2008 (O.G. No:27058). According to article 10 of the directive, the workplaces subject to Labour Act no. 4857 are "responsible for paying via banks the due net amount following legal deductions as monthly payment to the worker, in case the number of their employees all around Turkey is at least 10.

The third clause under article 32 of Labour Act no. 4857 comprises the expression "Wage payment must not be made in bonds, coupons or another paper claimed to represent the national currency valid in the country or by any other means whatsoever", thus forbids wage payment through securities or such papers. The determination of wage in any foreign currency is put into question in

the first clause under article 32 of Labour Act; and this clause bears resemblance with the term "legal current tender" in first clause under article 3 of Convention no. 95. Similarly, the payment of wages through bank may be construed as a regulation in parallel with second clause under article 3 of Convention no. 95. On the other hand, the third clause under article 32 of Labour Act and the first clause under article 3 of Convention no. 95 have literally identical normative value without any distinction (Eyrenci, Taşkent, Ulucan, 2004, p.102; Mollamahmutoğlu, 2005, p.389;Terzi, Kılıç, 2009, p.1039; Süzek, 2003, p.293). It is possible to say that the legislator made direct use of Convention no. 95 in arranging article 32 of Act no. 4857 (Tankut, Centel, 1986, p.86;Terzi, Kılıç, 2009, p.1039). In the justification of article 32, it is stated that "pursuant to Convention no. 95 of International Labour Organisation, of which Turkey is a party, the means and places of wage payment are bound via legal provisions"; thus, the symmetry between Convention no. 95 and article 32 of Labour Act is clearly revealed (Kaya, 2013, p.350 and other pages; Kutal, 1989, p.256).

4. REGARDING PLACE OF PAYMENT

Wages and any remuneration as an annex to wage is principally paid individually at the workplace or deposited in a bank account (Tunçomağ, Centel, 2005, p.115;Süzek, 2005, p.294;Çelik, 2009, p.150;Eyrenci, Taşkent, Ulucan, 2004, p.103). Pursuant to first clause under article 13 of Convention no. 95, that is, "The payment of wages where made in cash shall be made on working days only and at or near the workplace, except as may be otherwise provided by national laws or regulations, collective agreement or arbitration award, or where other arrangements known to the workers concerned are considered more appropriate", in case any place of payment is decided under national legislation, collective labour agreement and arbitration award or information of concerned worker, the payment will be made in cash at or near the workplace and on working days. Even though hereby clauses does not mention the word "bank", the article 13 permits payments via bank when the first and second clauses are evaluated together. The second clause of article 13 of the Convention says "Payment of wages in taverns or other similar establishments and, where necessary to prevent abuse, in shops or stores for the retail sale of merchandise and in places of amusement shall be prohibited except in the case of persons employed therein." (Conv. no. 95 Art. 13/2); thereupon, it is forbidden to pay the wage in shops or stores of retail sale or places of amusements for that the wage is not oriented to direct consumption" (Kutal, 1970, s. 192;Demir, 2009, p.145;Güven, Aydın, 2007, p.101; Şakar, 2006, p.149),

Due to second clause under article 32 of Labour Act no. 4857, any remuneration including premiums, gratifications and similar wages is paid in Turkish currency at the workplace or in a private bank account. In case such wages are designated in foreign currency, the payment may be made in Turkish currency pursuant to then-current rate. Nevertheless, according to seventh clause under article 32, "No wage payments may be made to employees in bars and similar entertainment areas where alcoholic beverages are served as well as in retail stores, with the exception of employees working in such establishments." The provision in second clause under article 32 of Labour Act no. 4857 on personal or bank account payment of wages at workplace is not mandatory; however, if the circumstances (tax obligation type of employer, business size, number of employees, city of workplace etc.) for the payment of wages via bank are in place by means of the amendment on article 85 of the Act no. 5754 on 17.04.2008, it has become obligatory to pay the wages by means of banks. Therefore,

non-mandatory rule in the first clause becomes mandatory by virtue of the term “obligatory” in the following phrase. Notwithstanding, the seventh clause under article 32, which is a repetition of second clause under article 13 of Convention no.95, reads “No wage payments may be made to employees in bars and similar entertainment areas where alcoholic beverages are served as well as in retail stores…” Pursuant to this provision, the payment may be carried out at any place other than those mentioned in the law (Mollamahmutoğlu, 2005, p.395;Terzi, Kılıç, 2009, p.1043;Süzek, 2005, p.294;Sümer, 2008, p.77-78;Demir, 2009, p.145). Any interpretation of this provision regardless of second clause under article 32 may lead to controversy. It is worth noting that the article 32 of Labour Act is elaborated in parallel with Convention no. 95, with respect to place of payment and exceptional situations concerning the wages.

5. REGARDING TIME OF PAYMENT

In principle, the wage is paid after the performance of the work; in case a party does not fulfil due performance, the counterparty earns the right for plea of non-performance (Terzi, Kılıç, 2009, p.1045; Süzek, 2013, p.383). Wage payment is naturally a periodical payment (Sümer, 2009, p.78). The first clause under article 13 of Convention no. 95 emphasises that the wage should be paid on workdays, while the first clause under article 12 lays stress on its payment in regular intervals. According to article 12 of Convention no. 95, “Wages shall be paid regularly. Except where other appropriate arrangements exist which ensure the payment of wages at regular intervals, the intervals for the payment of wages shall be prescribed by national laws or regulations or fixed by collective agreement or arbitration award” (Conv. No. 95 Art.12/1). Thanks to hereby regulation, the worker will know when he will receive the money to live on for himself of his family, or how he can discharge any debts if he is to enter a debt relationship.

Moreover, the second clause under article 12 of Convention no. 95 states “Upon the termination of a contract of employment, a final settlement of all wages due shall be effected in accordance with national laws or regulations, collective agreement or arbitration award or, in the absence of any applicable law, regulation, agreement or award, within a reasonable period of time having regard to the terms of the contract” so that the receivables of worker upon termination of labour contract should be paid in a reasonable time pursuant to national legislation.

According to fourth clause under article 32 of Labour Act no. 4857, “Wage may be paid on a monthly basis at the latest. The time of remuneration may be reduced down to one week by employment contract or by collective agreement” (Lab. Act art.32/4). Press Labour Act indicates that the “prescribed wage for journalists is paid monthly in advance”(P.L.A.art.14/1). The parties cannot decide on the time of payment, other than the term indicated in the law. The provision “on a month basis at the latest” in fourth clause under article 32 of Labour Act stipulates the wage is paid after the performance of the work. In case the parties have prescribed advance payment of the wage pursuant to employment contract or collective labour agreement, such regulation shall be deemed valid” (Çelik, 2009, p.151;Süzek, 2005, p.209;Güven, Aydın, 2007, p.101). In article 32 of Labour Act, the provision “Wage may be paid on a monthly basis at the latest. The time of remuneration may be reduced down to one week by employment contract or by collective agreement” (L.A.artc32/4) complies with the provision “wages shall be paid regularly” in the first clause under article 12 of Convention no. 95.

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Accordingly, the provision "the intervals for the payment of wages shall be prescribed by national laws or regulations or fixed by collective agreement or arbitration award" under the same clause authorises national legislation or applications for determination of payment time of the wage. The payment time of the wage according to article 32 of Labour Act is based on a regular payment period (Terzi, Kılıç, 2009, p.1044-1045;Demir, 2009, p.145-146;Süzek, 2005, p.296). On the other hand, Labour Act no. 4857 comprises no explicit rule that the wage is paid on workdays. However, according to the dominant view in the doctrine, it should be paid on workdays in consideration of objectives of legislation regarding weekend, national holiday and general holidays. In this view, it is also possible to base the payment of wage on workdays on Convention no. 95 and its relevant 95, without any additional interpretation (Mollamahmutoğlu, 2005, p.393; Demir, 2009, p.145). Moreover, the wage should be paid on workdays and within working hours pursuant to articles 77 and 78 of Code of Obligations (Mollamahmutoğlu, 2005, p.393; Süzek, 2005, p.295-296).

The fifth clause under article 32 of Labour Act no. 4857 stipulates reads "Upon the expiration of the employment contract, employee's wage claims as well as all the benefits based on the employment contract and law must be paid in full" (Lab. Act art.32/5). Hereby regulation stipulates that the wages and other receivables of a worker are paid promptly and in full in case the worker or the employer terminates the employment contract (Güven, Aydın, 2007, p.101;Eyrenci, Taşkent, Ulucan, 2004, p.104;Şakar, 2006, p.150). The fifth clause under article 32 of Labour Act no. 4857 is parallel with the expression "Upon the termination of a contract of employment, a final settlement of all wages due shall be effected…within a reasonable period of time having regard to the terms of the contract" within second clause under article 12 of Convention no. 95.

Another important regulation in Labour Act no. 4857 regarding wage payment is the article 34, which organises the right of refraining of worker from the work, unless his wage is paid within 20 days following the due date for any reason except force majeure. The article reads as follows: "The employee whose wage has not been paid within twenty days of the day it was due, except for force majeure, may refrain from fulfilling his obligation to work. Even if refraining from work by employees based on their personal decisions takes on the character of a concerted action in quantifiable terms, it shall not qualify as a strike. The highest interest rate charged to bank deposits shall be levied on wage debts not paid on the day they were due" (art34/1). "Employment contracts of such employees shall not be terminated solely because they have refrained from working for this reason; no replacements shall be hired, nor may such work be performed by others" (art34/2). Pursuant to abovementioned provision under article 34 of Labour Act, the worker may refrain from working in case the wage is not paid on time, and such deed cannot be construed as strike if it does not become a collective act (Demir, 2009, p.147;Süzek, 2005, p.299). Besides, in case there is delay in wage payment regardless of any force majeure situation, the highest deposit rate will be levied on unpaid wages (Süzek, 2005, p.299; Yenisey, 2009, p.66).

The employment contract of the labour cannot be terminated even if the worker exercises the right to refrain from work; in addition, the employer cannot employ any replacements nor have others to perform the same work. Nonetheless, the worker, who refrains from work, cannot behave against duty of loyalty. At the worker's sole discretion, however, the worker may terminate

employment contract on justifiable reasons pursuant to clause 24/II(e) of Labour Act (Sümer, 2008, p.78;Süzek, 2005, p.301).

6. REGARDING PROTECTION OF WAGE

The wage is the principal source of living of the worker and his family. The wage is not an act due to debt relationship, but an element to be protected. In this respect, some guarantees about the wage protect the worker before employer, some before the third parties, and the remaining before the worker himself (Süzek, 2005, p.302; Eyrenci, Taşkent, Ulucan, 2004, p.113; Demir, 2009, p.151; Çelik, 2013, p.164 and other pages; Mollamahmutoğlu and Astarlı, 2011, p.615 and other pages). Within the scope of this basic approach, ILO Convention no. 95 brings along certain regulations about wage protection. Turkish Labour Legislation possesses the normative grounds in parallel with ILO regulation. The parallel regulations are given below:

a) The non-attachable portion of the wage: The first clause under article 10 of Convention no. 95 indicates that “Wages may be attached or assigned only in a manner and within limits prescribed by national laws or regulations,” whereas the second clause puts forth that “Wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family.” Even though the first clause stipulates that attachment and assignment can be carried out within the framework prescribed by national legislation, the second clause settles no principle measure. This means the protection of the portion that will enable a living to the worker and his family. To be more precise, the wage to ensure a living to the worker and his family shall be preserved. In parallel with Convention no. 95, the Labour Act no. 4857 and Code of Obligations no. 818 have relevant regulations. According to article 35 of Labour Act no. 4857, “Not more than one - fourth of the wages in a month may be seized, transferred or assigned to a third party, provided that any maintenance allowances awarded by a judge to members of the employee’s family whom he is required to support shall not be included in this sum. This provision shall apply without prejudice to the rights of persons entitled to alimony” (Lab. Actart.35). Pursuant to hereby regulation, the title of creditor and debt amount are of no importance. Any attachment on debt arising from private law, as well as on those from public law such as tax liability is subject to same restriction. There is an exception exclusively for those with right to alimony. No attachment restriction is in question regarding the payment of alimony over the wage of worker. Similar regulation are valid for transfer and assignment. In all three circumstances, not only the worker, but his family members are protected (Mollamahmutoğlu, 2005, p.420; Süzek, 2005, p.303; Eyrenci, Taşkent, Ulucan, 2004, p.113). Besides, according to Code of Obligations no. 818, the portion of the wage necessary for ensuring the living of worker and his family cannot be exchanged or deducted without his consent (C.O.art.123/b.337/I) (Çelik, 2009, p.153; Süzek, 2005, p.303; Demir, 2009, p.153).

The regulations in Turkish labour law on wage protection more than meet the protection foreseen under article 10 of Convention no. 95. Indeed, the exclusion of alimony receivables from attachment or assignment, as well as that maximum one fourth of the wage can be attached, transferred or assigned, are both proper and well-elaborated regulations.

b) Wage as privileged claim: Wage as privileged claim means that in case any attachment process is started in the wake of bankruptcy or enforcement of employer, the wage and other claims of the

worker are construed as privileged claims during liquidation period (Süzek, 2005, p.304; Eyrenci, Taşkent, Ulucan, 2004, p.114; Demir, 2009, p.152; Çelik, 2009, p.153). According to article 11 of Convention no. 95, "1. In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations. 2. Wages constituting a privileged debt shall be paid in full before ordinary creditors may establish any claim to a share of the assets. 3. The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations (Convention no. 95 art.11).

By virtue of hereby regulation, the first clause under article 11 of Convention no. 95 explicitly stipulates that a certain amount of the wage and other claims of worker is classified as privileged claim in case the undertaking goes bankrupt or is liquidated by court decision. The second clause secures that such debt should be paid before other ordinary claims. Finally, the third clause authorises the national legislation with respect to determination of priority of wages within privileged debts. In essence, Turkish labour legislation comprises similar regulations on the status of wage as privileged debt. Both Bankruptcy and Enforcement Law and Labour Act bring along direct regulations about the matter. However, among all, the fourth clause under article 36 of Labour Act seems symmetrical with article 11 of Convention no. 95.

According to articles 206 and 207 of Bankruptcy and Enforcement Law, the claims of worker, including severance and notice pays arising from the employment contract that have accrued within one year before bankruptcy, as well as the severance and notice pays deserved following termination due to bankruptcy, are of highest priority following public claims and receivables secured under pledge. Once such claims of workers are paid in full, payments may be made to other remaining creditors (B.E.L.art.206- 207). The same is valid for attachment process as well (B.E.L.art.140) (Mollamahmutoğlu, 2005, p.421; Süzek, 2005, p.304; Eyrenci, Taşkent, Ulucan, 2004, p.114). Besides, according to fourth clause under article 36 of Labour Act no. 4857, "Any sequestration and enforced sale on the equipment, materials, raw, semi-finished and finished products and other assets in the establishment of an employer for his debts to a third party may be implemented on the sum obtained only after apportioning the wage claims of the employees for the three months' period preceding the date on which the decision for forced sale was taken" (Lab. Act art36/4), whereupon, the enforcement and attachment decision can be exercised only over the remaining portion after the 3 month wage of worker, accrued prior to sequestration or attachment verdict on the equipment, materials, and other assets. Pursuant to hereby regulation, the 3-month wage of the worker has priority over public debts (Çelik, 2009, p.155; Mollamahmutoğlu, 2005, p.421; Süzek, 2005, p.304; Demir, 2009, p.152 – 153; Sümer, 2008, p.81). This fourth clause under article 36 of Labour Act no. 4857 complies with article 11 of ILO Convention no. 95. As is indicated in the first clause under article 11 of Convention, a certain portion of the wage is classified as privileged debt. Similarly, in line with the provision "The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations" (Convention no. 95 art.11/3), the fourth clause under article 36 of Labour Act determines the classification of wage among privileged debts.

c) Protection of wage against penal deductions: Pursuant to the right to govern, the employer may fine the worker with wage deduction as disciplinary action, or may exercise “deduction for damages” over the wage in order to compensate damages due to worker’s deeds. The wage deductions, regardless of their quality as fine or compensation, can be carried out under certain circumstances and within a limit of amount. Otherwise, the employer may abuse such right (Y. 9. H.D., E: 2007/24006, K: 2007/28122, T: 25.09.2007). The regulations about wage deduction take place in Turkish labour legislation in line with article 8 of ILO Convention no. 95. According to the first clause under article 8 of Convention, “1. Deductions from wages shall be permitted only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreement or arbitration award.” Moreover, the second clause reads as follows: “2. Workers shall be informed, in the manner deemed most appropriate by the competent authority, of the conditions under which and the extent to which such deductions may be made.” The first clause stipulates that the wage deduction can be possible only through national legislation, collective labour agreement or arbitration award, and it will be limited by certain terms and conditions. On the other hand, the second clause fixes the prerequisite that the worker is informed about such deduction.

Article 38 of Labour Act no. 4857 bears notable regulations in parallel with Convention no. 95. The first clause of article 38 says “No employer may impose a fine on an employee’s wage for reasons other than those indicated in the collective agreement or the employment contract”. This clause is explicitly compatible with the first clause under article 8 of Convention no. 95. The disciplinary wage penalties against the worker are based on the reasons prescribed in the contract (employment contract or collective labour agreement). Therefore, the wage deduction penalty is restricted via laws (Süzek, 2005, p.308; Çelik, 2009, p.155; Demir, 2009, p.155; Mollamahmutoğlu, 2005, p.422, Sümer, 2008, p.83). Nonetheless, the article 38 of Labour Act differs from Convention no. 95 by accepting the terms in employment contract. However, it does not allow for arbitration awards. Besides, Labour Act limits the field of application of disciplinary wage deductions, in a manner more restrictive than convention no. 95.

According to clause 2 under 38 of Labour Act, “The employee must be notified at once, together with the reason, of any wage deductions as fines. Deductions made in this way must not exceed three days’ wages in any one month, or in the case of piece work or amount of work to be done, the wages earned by the employee in two days.” Hereby clause imposes the obligation on employer concerning immediate informing of worker about the wage deduction, and it limits the deduction amount with a prescribed proportion of the wage.

Another notable provision in article 38 of Labour Act is that such penal deductions on worker wage cannot remain in the hand of employer. According to the third clause under article 38, the penal deductions from wages are credited within 1 month as of deduction date, to a bank account of Ministry of Labour and Social Security in a bank established in Turkey with the authority of deposit acceptance that is designed by the Ministry in order to be used for training and social services in favour of workers. Each employer has to maintain a separate account his establishment for such deductions. A committee presided over by the Minister of Labour and Social Security and including employees’ representatives shall decide where and in what amounts the fines thus collected are to be used. (Molamahmutoğlu, 2005, p.422-423; Süzek, 2005, p.309; Demir, 2009, p.155-156; Çelik, 2009,

p.155-156; Sümer, 2008, p.83). Rules for the establishment and working methods of this committee are given in a regulation (Directive on Organisation and Working Principles of the Authorised Committee regarding Usage of Deductions from Worker Wages, (OG: 05.03.2004, No: 25393)).

CONCLUSION

Convention no. 95 on Wage Protection, which was accepted by ILO back in 1949, came into effect in Turkey via the Code no. 109 on 24.10.1960. Besides, Turkey has approved in 1973 via Code no. 1769 the 1928 dated ILO Convention no. 26 on Minimum Wage-Fixing Machinery, and 1949 dated ILO Convention no. 94 on Labour Clauses in Public Contracts via Code no. 161 in 1960. All three conventions have had direct influence on Turkish Labour Law. Nevertheless, Convention no. 95 stands out among others, thanks to its more comprehensive content. Indeed, this convention brings along extensive regulations and guarantees concerning wage protection.

In Turkish Labour Law, the rules regarding wage payment in cash, determination of wage amount, as well as place and time of payment and wage protection are elaborated in line with Convention no. 95. The provisions on definition of wage, the manner, place and time of payment in article 32, on wage protection in article 35, on priority of wage claims in fourth clause under article 36 and on wage deduction penalty in article 38 in Turkish Labour Law are the most apparent regulations inspired by Convention no. 95.

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