

COMPULSORY ARBITRATION AND ILO PRINCIPLES CONCERNING LABOUR DISPUTES

Burhan ÖZDEMİR

*(Asst. Prof. at Hacettepe University, Department of Public Administration, ANKARA
TURKEY)*

Abstract:

Compulsory arbitration is one of the peaceful methods applied for the settlement of a collective labour dispute which arises between a trade union and an employer.

Compulsory arbitration is a process in which a third party takes place to function in lieu of the will of the parties to the dispute. However this is not generally approved by the unions, because compulsory arbitration usually appears when the right to strike is denied to workers within the branch of industry.

In this article we will examine the views and principles of ILO concerning compulsory arbitration.

Özet:

İş Uyuşmazlıklarında Zorunlu Tahkim Ve ILO İlkeleri

İşçilerle işverenler arasında çıkan toplu iş uyuşmazlıklarının çözümünde zorunlu tahkime başvurulması, uygulanan barışçı yollardan biridir. Ancak tarafların iradesi yerine bir üçüncü unsurun geçtiği bu yol, grevin yasak olduğu durumlarda ortaya çıkması nedeniyle işçi kuruluşlarınca genellikle tasvip görmez.

Bu incelemede Uluslararası Çalışma Örgütü'nün zorunlu tahkim hakkındaki görüş ve ilkeleri saptanacak ve nedenleri yönünden açıklanmaya çalışılacaktır.

Keywords: Labour disputes; ILO; compulsory arbitration

Anahtar Sözcükler: İş uyuşmazlıkları; ILO; zorunlu tahkim

I. THE PRESENTATION OF THE SUBJECT

It is inevitable that a labour dispute arises between employers and employees whenever a conflict of interest occurs between the parties. Therefore a labour dispute concerning conditions of work is as old as employment relations.¹

Different instruments may be employed for the settlement of a collective labour dispute which is a certain kind of a labour dispute. These instruments may be classified into two main groups: First one is peaceful settlement of a labour dispute which include conciliation, mediation and arbitration. Second one is industrial action such as strikes and lockouts.²

Today it is necessary that both parties be granted with the rights to strike and to declare lockout respectively so that the expected results may be derived from the system of free collective bargaining. Without a right to strike and lockout, it is not easy to reach an amicable agreement due to absence of any instrument which would enforce the parties to do so. In the event that industrial actions are legally recognized, the parties should seriously consider the proposal made by the other party before rejecting it. The other alternative is to go on strike or declare lockout. In conclusion, today, right to strike and lockout is deemed to be an essential element of a free collective bargaining system. However, resorting to an industrial action is not actually the ultimate goal for the parties to the dispute, as it hurts workers due to lost wages and employers because of lost productions.

Therefore, strikes and lockouts are prohibited in certain countries, at least in some branches of industry. In the event that right to strike and to recourse to lockout is prohibited, compulsory arbitration appears as the only rational method of settlement for labour disputes.

Compulsory arbitration may be defined as "the submission of a dispute to arbitration without the agreement or consent of all parties involved in it, with a legally binding award."³

What is the view of ILO regarding compulsory arbitration?

As it is known, ILO (International Labour Organization) is a specialized agency of the United Nations which deals with social and labor matters.⁴ Here it is necessary to give some more information about ILO, its functions and activities so that the importance of this question will be more clearly understood.

According to the provisions of its Constitution, the ultimate goal of the ILO is to provide a "lasting peace through social justice."⁵ This aim is to be attained through improving the standards of living, particularly the working conditions in the world. In order to accomplish this aim, ILO has been furnished with two main functions: to establish international labor standards and to collect and distribute information on work conditions.⁶ These international standards are adopted by the International Labor Conference as conventions and recommendations. All member states should submit conventions and recommendations to their competent national authorities. When a convention is ratified, it becomes binding for the ratifying country. On the other hand, recommendations only provide guidance for national legislation and other labour matters, therefore they need not take place at any ratification procedure.

In this brief research we will try to find out what the view of ILO is and its approach to compulsory arbitration, and also what criteria are used, if any. In doing so, first we shall review the conventions and recommendations adopted by ILO. Since ILO has not adopted any convention or recommendation directly related with the compulsory arbitration, we will examine the views of ILO on the right to strike. It is because right to strike is inversely related with compulsory arbitration. Generally, compulsory arbitration is used to prevent the right to strike and is deemed as an alternative method to right to strike in settlement of labor disputes.⁷ Therefore, more often than not compulsory arbitration appears when the right to strike is denied.

II. RIGHT TO STRIKE AND ILO

A. ILO Documents In Which The Right To Strike Is Mentioned

Although none of the international labor convention or recommendation explicitly recognizes the right to strike,⁸ it is clearly recognized by some international conventions as a right,⁹ while the word "strike" only appears in some ILO documents.

The word "strike" appears only incidentally in paragraphs 4,6 and 7 of the Voluntary Conciliation and Arbitration Recommendation 1951 (No.92)¹⁰ for the first time in any ILO document. Later we see it again in the Abolition of Forced Labor Convention, 1967 (No. 105).¹¹

B. Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)¹²

The General Conference of the ILO held in 1948 in San Francisco adopted "Freedom of Association and Protection of Right to Organize Convention" (No. 87).

This is one of the most important conventions of the ILO since its scope consists of the right to organize and freedom of association. In fact, a special procedure is designed to examine the application of Convention No. 87 and other conventions and recommendations on freedom of association. Two committees of the ILO, the Committee of Experts on the Application of Conventions and Recommendations and the Committee of Freedom of Association examine the application of Convention 87 regularly.¹³

The former has the task to prepare a report regarding the applications in different countries of conventions and recommendations on freedom of association to be submitted to the Conference Committee (Application Committee) every year. The latter examines the formal complaints submitted to the ILO regarding trade union rights.¹⁴

It is important to remember that this procedure covers all complaints against member states of the ILO, whether they had ratified the Conventions on freedom of association or not. The legal basis for this is quite clear. The principle of freedom of association is written into the Constitution of the ILO and is a part of it. Therefore, every member state that accepted the Constitution of the ILO, is bound to uphold the principle of freedom of association.¹⁵

Now, the importance of these two supervisory bodies will be explained, particularly the Committee on Freedom of Association regarding our subject about the right to strike and the ILO.

Although that Article 3 of the Convention No. 87 accepts and gives a right to workers' organizations "to organize their administration and activities and to formulate their programmes", the strike is not specified as a right in the said article. However, the Committee on Freedom of Association adopted a basic principle in its second meeting in 1952 concerning the right to strike. This principle may be expressed as "the right to strike is an intrinsic corollary of the right of association protected by convention No.87" and therefore the right to strike is one of the essential elements of trade unions through which workers and unions may exercise to provide and further their social and economic interests.¹⁶ The above mentioned two supervisory bodies have consistently

reaffirmed the principle of the right to strike, although some reasonable restrictions imposed by national laws were also accepted by these two bodies.

Decisions of Committee on Freedom of Association have been published systematically in a digest. Among those, important for us are as follows:

"In referring to its recommendation that restrictions on the right to strike would be acceptable if accompanied by conciliation and arbitration procedures, the Committee has made it clear, that the recommendation in question refers not to the absolute prohibition of the right to strike as such but to the restriction of that right in essential services or in the public service, in relation to which the Committee has stated that adequate guarantees should be provided to safeguard the workers' interests."¹⁷

"The Committee has taken the view that strikes of a purely political nature and strikes decided systematically long before the negotiations take place, do not fall within the scope of the principles of freedom of association."¹⁸

"While the Committee has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has regarded it as such, only in so far it is utilised as a means of defending their economic interests."¹⁹

"The Committee has taken the view that the prohibition of strikes by reason of their non-occupational character or where they have been designed to coerce a government with respect to a political matter, or where the strike was directed against the government's policy and was not in furtherance of a trade dispute does not constitute an infringement of freedom of association."²⁰

"The Committee has agreed that the right to strike could be restricted or even prohibited in the civil service or in essential services, because a strike there could cause serious hardship to the national community. It has also considered that it appears impossible for large strikes to take place in undertakings constituting key sectors in the life of a country without such hardships arising."²¹

"The Committee has pointed out that it would not appear to be appropriate for all publicly owned undertakings to be treated on the same basis in respect of limitations of the right to strike, without distinguishing in the relevant legislation between those which are genuinely essential because their interruption may cause public hardship, and those which are not essential according to this criterion."²²

"The Committee considered that it was not established in a satisfactory way that the Mint, the government printing service and the state alcohol, salt and tobacco monopolies constituted genuinely essential services according to the criterion expressed above. Although it might be said that stoppages of work by the workers concerned could cause public inconvenience, it does not appear possible to consider that they could bring about serious public hardship."²³

"The Committee has acknowledged that the right to strike can be restricted or even prohibited in the civil service or in essential services, in so far as a strike there could cause serious hardship to the national community, and provided that the limitations are accompanied by certain compensatory guarantees."²⁴

"The reservation of budgetary powers to the legislative authority should not have the effect of preventing compliance with the terms of awards handed down by the compulsory arbitration tribunal. Any departure from this practice would detract from the effective application of the principle that, where strikes by workers in essential services are prohibited, such prohibition should be accompanied by the existence of conciliation procedures and of impartial arbitration machinery, the awards of which are binding on both parties"²⁵

"The principle regarding the prohibition of strikes in essential services might lose its meaning if a strike were declared illegal in one or more undertakings which were not performing an "essential service" in the strict sense of the term, i.e. services whose interruption would endanger the life, personal safety or health of the whole or part of the population."²⁶

"To determine situations in which a strike could be prohibited, the criteria which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population."²⁷

The conclusion reached as a result of the review of either the synopsis of the above mentioned decisions or the other decisions is as follows: The strikes organised by the workers to defend their economic interests are within the scope of the freedom of association. However, restrictions on the right to strike, within certain measures, are considered to be acceptable. The systems, in which all of the disputes are referred to compulsory arbitration, in other words whenever strikes are totally prohibited or the compulsory arbitration is a general practice, are in violation of the above mentioned guarantees. In the alternative, the systems where compulsory arbitration encompassing restrictions and limitations, which are only imposed on the services related to the civil services or the essential services, (unless not to be construed in a very broad meaning), and the restrictions to be brought upon the areas considered to be the key

sectors (which are furthermore considered as an exceptional avenue to be pursued related to the areas enumerated above) are accepted not to be in contravention of the guarantees in question.²⁸ However, in all of these situations where the right to strike is prevented, appropriate guarantees must be maintained in order to secure the interests of the workers. Especially, an impartial and fast operating mediation and arbitration mechanism of due diligence must be established and the parties to the dispute especially on the workers side must take place in this mechanism in all stages and the decisions of these boards.

The "essential services" concept taking place in various decisions of the Committee on Freedom of Association should be pondered upon and its meaning should be further explored. This is an important issue, because restrictions imposed on the right to strike would be considered feasible/non feasible, or implemented in a large or narrow sense depending on the different meanings attributed to this concept.

There are two main systems which may be utilised to determine what the essential services are. These types of services are either enumerated one by one or a general definition would be provided and the characteristics of the job would be announced. Review of the regulations in various countries reveals that both systems are being utilised. Stating the types of services one by one is largely favoured in Asian, African, the Latin American Countries and in the Caribbeans.²⁹ However, U.S.A., the West European countries, and francophone African countries prefer to provide a general definition. For example, in the U.S.A. Taft-Hartley Act accepts implementation of a special procedure in the event that there is a "national emergency" situation in all of the actions taken for the resolution of labor disputes except for agriculture, railways and air transportation. This special procedure is to be implemented in cases where the dispute unfavorably impacts an industry or a substantial part of it, and if this situation constitutes a hazard for national health and security. In some other countries the general definition is based on concepts such as the social importance of the dispute, public benefit, general benefit.³⁰ In essence however, it is obvious that these criteria do not thoroughly clarify the essential services concept. In cases where the concept is determined through a general expression practical implementation becomes very important. A wide interpretation of the "essential services" will widen the scope of the restrictions to be placed on the right to strike.

In general when we take a look at the situations in the countries, it is to be observed that, in the beginning the determinations were only made in the direction of encompassing issues related to national health and security, protection of the worksites only, whereby later on and especially in the

developing countries issues harmful to the national economy is added as another ingredient.

As a consequence of our short explanation we could briefly state the following. Each country shapes the concept and gives it a meaning in accordance with its own conditions and due to this reason it is impossible to come up with a uniform definition. It should also be accepted that a flexibility should be recognized as regards this subject.³¹

When we take a look at the decisions of the Committee on Freedom of Association, it is to be observed that the Committee has provided a more restrictive definition as time goes by.³² As it is to be followed from the decisions summarised above, the Committee later on changed the previous definitions such as "cessation of services which would result in damages to the public" or "strikes regarding services which would inflict serious damages to the society in the country" into "services, cessation of which could endanger life, personal security or health of the whole or a part of the population."³³

The committee has made decisions for some branches of industry or services³⁴ which are constituting "essential services" while some others are not.³⁵

III. EVALUATION

If we are to make an evaluation regarding compulsory arbitration and the ILO principles, we could say the following:

The ILO principles are for free collective bargaining and peaceful resolutions of labour disputes to be based on voluntary rules. However, in the event this is not possible, it is accepted that the trade union which represents the labor party to the collective labor relations has the right to resorting to a strike. Strike, is one of the very fundamental rights of the workers which is safeguarded by Convention No. 87. Hence, it is under the guarantee of the said Convention. Compulsory arbitration can only be taken into consideration in a limited extent, only for the common good of the country, and can be applicable only for certain essential services and key industries. Arrangements regarding this issue will be made through legislations in concordance with the national conditions.

Beyond any doubt, a government may wish and expect from the parties to take the economic policies implemented in the country into consideration. However, as a rule, this should not be done as a direct intervention to the

collective negotiations, but, rather in an indirect manner as to entice the parties to adopt the desired results.

REFERENCES

- Gernigon, B.; Otero de Dios, A.; Guido, H. "ILO principles concerning the the right to strike" in *International Labour Review*, Vol.137 (1998), No.4, pp.441-481.
- Gladstone, A. *Voluntary Arbitration of Interest Disputes, A Practical Guide*, Geneva 1984.
- Gülmez, M. *Sendikal Hakların Uluslararası Kuralları ve Türkiye*, Ankara 1998.
- Hodges-Aeberhard, J.; Otero de Dios, A. "Principles of the Committee on Freedom of Association concerning strikes" in *International Labour Review*, Vol. 126 (1987), No.5 (Sep. - Oct.). pp. 543-563.
- Işık, R. "Introduction" in *Türk-İş (Pub.) Toplu İş Uyuşmazlıkları ve Barışçı Çözüm Yolları*, Ankara 1970, pp. i-vii.
- ILO *Conciliation and Arbitration Procedures in Labour Disputes, A Comparative Study*, Geneva 1980.
- ILO *Conventions and Recommendations 1919-1966*, Geneva 1966.
- ILO *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Second edition, Geneva 1976.
- ILO *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Third edition, Geneva 1985.
- ILO *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fourth (revised) edition, Geneva 1996.
- ILO *International Labour Standards*, Geneva 1978.
- Morse, D.A. *The Origin and Evaluation of the I.L.O. and its Role in the World Community*. Ithaca. New York 1969.
- Oğuzman, K. 2821 sayılı Sendikalar Kanunu ile 2822 sayılı Toplu İş Sözleşmesi, Grev ve Lokavt Kanunu Hükümlerinin Milletlerarası Çalışma Teşkilatı (ILO) İlke ve Sözleşmelerine Aykırılığı İddiaları Konusunda Bir İnceleme, TİSK (yay.), 2821 sayılı Sendikalar Kanunu ile 2822 sayılı Toplu İş Sözleşmesi, Grev ve Lokavt Kanununun Uluslararası Normlara Uygunluğu, Ankara 1986.

Pankert, A. "Settlement of Labour disputes in essential services" in *International Labour Review*, Vol. 119 (1980), No.6 (Nov.-Dec.), pp. 723-738.

Süzek, S. *İş Hukukunun Genel Esasları*, Ankara 1998.

Sweepston, L. "Human rights law and freedom of association: Development through ILO supervision", in *International Labour Review*, Vol. 137 (1998), No. 2, pp. 169-194.

Valticos, N. "The ILO: A retrospective and future view", in *International Labour Review*, Vol. 135 (1996), No. 3-4, pp. 473-480.

NOTES

¹ Gladstone, A. *Voluntary Arbitration of Interest Disputes, A Practical Guide*, Geneva 1984, p.1.

² See R. Işık, "Giriş" in, *Türk-İş (Pub.), Toplu İş Uyuşmazlıkları ve Barışçı Çözüm Yolları*, Ankara 1970.

³ ILO, *Conciliation and Arbitration Procedures in Labour Disputes, A Comparative Study*, Geneva 1980, p. 159 (hereinafter cited as ILO Conciliation and Arbitration).

⁴ ILO, *International Labour Standards*, Geneva 1978, pp. 6-7.

⁵ D.A. Morse, *The Origin and Evolution of the I.L.O. and Its Role in the World Community*. Ithaca, New York, 1969, p.9.

⁶ Morse, p.9.

⁷ See ILO, *Conciliation and Arbitration*, pp. 28-29, 160.

⁸ J.Hodges-Aeberhard and A.Odero de Dios, "Principles of the Committee on Freedom of Association concerning strikes", in *International Labour Review*, Vol. 126 (1987), No. 5 (Sep.-Oct.), p. 543; B.Gernigon; A. Odero de Dios and H. Guido, "ILO principles concerning the right to strike" in *International Labour Review*, Vol. 137 (1998). No.4, p.441; L. Sweepston, "Human rights law and freedom of association: Development through ILO supervision", in *International Labour Review*, Vol. 137 (1998), No.2, p.187.

⁹ The international documents which clearly recognize the right to strike are as follows: European Social Charter (1961); International Covenant on Economic, Social and Cultural Rights (1966); Inter-American Charter of Social Guaranties (1948). See Hodges- Aeberhard and Odero de Dios, p. 543; Sweepston, pp. 186-187.

¹⁰ For the text of this Recommendation, see ILO, *Conventions and Recommendations 1919-1966*, Geneva 1966, p. 804 (hereinafter cited as ILO, Conventions).

¹¹ For the text of Convention No. 105, see ILO, *Conventions*, pp. 891-893.

¹² For the text of Convention No. 87, see ILO, *Conventions*, pp. 663- 667. Turkey ratified Convention No. 87 through the Law No. 3847, dated 25.11.1992 (Off.Gaz.: No. 21432 extra issue, dated 22.12.1992) and Government's decree, No. 93/3967, dated 8.1.1993 (Off Gaz. No: 21507, dated 25.2.1993).

¹³ ILO, *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fourth (revised) Edition, Geneva 1996 (hereinafter cited as ILO, Digest IV),1.

¹⁴ For further information on ILO's supervisory system , see N.Valticos, "The ILO: A retrospective and a future view", in International Labour Review, Vol. 135 (1996), No.3-4, pp.473-480; S. Süzek, İş Hukukunun Genel Esasları, Ankara 1998 pp. 103-105; M. Gülmez, Sendikal Hakların Uluslararası Kuralları ve Türkiye, Ankara 1988 (International Rules of Trade Union Rights and Turkey), pp.377-422.

¹⁵ Hodges-Aeberhard and Odero de Dios, p. 546. For a contrary view, see K. Oğuzman, 2821 sayılı Sendikalar Kanunu ile 2822 sayılı Toplu İş Sözleşmesi, Grev ve Lokavt Kanunu Hükümlerinin Milletlerarası Çalışma Teşkilatı (ILO) İlke ve Sözleşmelerine Aykırılığı İddiaları Konusunda Bir İnceleme, TİSK (yay.), 2821 sayılı Sendikalar Kanunu ile 2822 sayılı Toplu İş Sözleşmesi, Grev ve Lokavt Kanununun Uluslararası Normlara Uygunluğu, Ankara 1986, p.11-12.

¹⁶ See Hodges-Aeberhard and Odero de Dios, pp. 546-547; Swepston, p. 187.

¹⁷ ILO, Freedom of Association, Digest of Decisions and Principles of the Association Committee of the Governing Body of the ILO. Second Ed. Geneva 1976 (hereinafter cited as Digest II), p. 111, para.299.

¹⁸ Digest II, p. 112. para.300.

¹⁹ Digest II, p. 112. para.301.

²⁰ Digest II, p. 112. para.302.

²¹ Digest II, p. 116-117. para.314.

²² Digest II, p. 116-117. para.315.

²³ Digest II, p. 116-117. para.316.

²⁴ ILO, Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Third Edition, Geneva 1985 (hereinafter cited as Digest III) p.78, para.393.

²⁵ Digest III, p. 79. para.398.

²⁶ Digest III, p. 79. para.400

²⁷ Digest IV, p. 111. para.540.

²⁸ ILO. Conciliation and Arbitration, p.163.

²⁹ A.Pankert, "Settlement of labour disputes in essential services" in International Labour Review. Vol. 119 (1980) No.6 (Nov.-Dec.), p.727.

³⁰ Pankert, p. 729.

³¹ See Pankert, p. 730.

³² Hodges - Aeberhard and Odero de Dios. p.551; Gülmez, p. 237.

³³ Hodges - Aeberhard and Odero de Dios. p.551; Gülmez, p. 23.

³⁴ See Digest IV, p. 112, para. 544.

³⁵ See Digest IV, p. 112, para. 545.