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The Effect of the European Court of Human Rights Judgements Changing in Turkish Constitutional Court's Approach to Collective Actions

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Abstract

Collective action constitutes the most effective and progressive power of workers to promote their economic and social interests. The collective action lies at the heart of the collective bargaining systems, illustrated by a common saying, "*The right to collective bargaining without the right to take collective action is collective begging*." Türkiye, which is one of the member states of Council of Europe, has significantly influenced the development of European Court of Human Rights interpretation of the Article 11 of the European Convention of Human Rights and transformed the discourse on right to strike and collective action. This article focuses on deepening the understanding of how local disputes in Türkiye turn into regional and international case law, which returns to the national level and affects the national collective labour law system. Türkiye has one of the most restricted regulations on the right to strike, and there is no positive right to take collective action. This article tries to answer the question of how the European Court of Human Rights judgements has affected the Turkish Constitutional Court's approach to collective actions, by using two recent cases.

Keywords: Collective Labour Law; Collective Action; European Court of Human Rights; Right to Strike

1. Introduction.

'Collective action'[1] is a broader term that exerts pressure on the other party (employee or employer) to force the concession of a claim or the acceptance of the subjective requisite.[2] Collective action is a powerful weapon of employees which has still an important effect on

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[1] Depending on the country's regulations, collective action also been referred to as industrial actions. This article uses the term "collective action". It is also acknowledged that depending on countries collective labor law system right to strike can be a only lawful form of collective action.

[2] Barnard C., *Employment Law,* Oxford University Press, Oxford, 2006, 796; Adlercreutz A., Nyström B., *Labor Law in Sweden*, Kluwer Law International, Alphen aan den Rijn, 2024, 224.

collective bargaining.[3] Collective action[4] is a broad term that encompasses many actions. It includes actions from more traditional actions such as strikes, lockouts to blockades, and bans on overtime work, mass dismissal, slowing down work, laying down tools, sit-ins, boycotting, flash mobs, workplace occupation, flooding, and mail bombing.[5]

The recognition and the regulation of the right to collective action differ in many international and regional instruments, and there is a close tie with the right to strike since it is the most traditional and common type of collective action. To start with the International Labour Organisation (ILO), the right to freedom of association and collective bargaining is one of the core rights, and member states have to recognize and effectively protect them.[6] The right to take collective action is not explicitly expressed in any ILO conventions; however, the right to strike is recognized by the ILO supervisory bodies as an intrinsic corollary to the right to organize, protected by Convention No. 87.[7] The right to strike is derived from Convention No. 87 from "the right of workers' organizations to formulate their programs of activities and defend their members' economic and social interests".[8] The Convention has been interpreted by supervisory bodies of the ILO; Committee on Freedom of Association (CFA), and Committee of Experts on the Application of Conventions and Recommendations (CEACR).[9] These supervisory bodies differ in mandate however they always considered the right to collective action and right to strike as a fundamental right of workers to be able to defend their economic and social interests.[10]

The European Social Charter (ESC) of 1961 is the first binding treaty to explicitly recognize the right to collective action. The principle of freedom for the parties to choose the collective action is enshrined in Article 6 of the ESC,[11] which states that employees and employers have the right to take collective action, including the right to strike, in case of a conflict of interests. The Article 6.4 ESC embraces a broader concept of collective action, including strikes and other forms of action. Unlike the ILO, the ESC contains textual

[3] Novitz T., *International and European Protection of Right to Strike,* Oxford University Press, Oxford, 2003, 5.
[4] This article is limited to evaluate the right to collective action of private sector workers in Türkiye.
[5] Dulay-Yangın D., *İş Mücadelesine Hakim Olan Temel İlkeler*, Onikilevha Yayıncılık, İstanbul, 2021, 166. ILO, Compilation of decisions of the Committee on Freedom of Association, 784, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID%2CP70002_HIER_LEVEL:3945366%2C1 (accessed 11 December 2024)
[6] ILO, *ILO Declaration on Fundamental Principles and Rights at Work,* available at: https://www.ilo.org/ilo-declaration-fundamental-principles-and-rights-work (accessed 30 October 2024).
[7] *See*: ILO, Freedom of Association: Digest of décisions and principies of the Freedom of Association Committee of the Governing Body of the ILO (Fifth (revised édition), 2006, 109.
[8] ILC, *ILO Principles Concerning Right to Strike*, 1994, available at: https://www.ilo.org/publications/ilo-principles-concerning-right-strike-0 (accessed 23 October 2024).
[9] ILO, *ILO supervisory system/mechanism*, available at: https://www.ilo.org/about-ilo/how-ilo-works/ilo-supervisory-systemmechanism (accessed 23 October 2024).
[10] ILO, *Freedom of Association. Compilation of decisions of the Committee on Freedom of Association*, International Labour Office, Geneva, 6th edition, 2018, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf (accessed 30 October 2024); ILO, *Importance of the right to strike and its legitimate exercise*, available at: https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945366,1 (accessed 30 October 2024).
[11] The Committee of Ministers adopted the text entitled the Revised European Social Charter on 3 April 1996 and opened it for signature on 3 May 1996. In this article, when the term ESC used, it refers to the Revised Charter.

protection for the right to strike in articles 6.4. and the right to collective action is recognized as an intrinsic corollary of freedom of association.[12]

The rights in the ESC can be restricted according to Part III, the Article G of the Charter. According to Article G restrictions should be prescribed by law and be necessary in a democratic society for the protection of the rights and freedoms of others or the protection of public interest, national security, public health, or morals. The supervision of the Charter is operated by The European Committee of Social Rights (ECSR), which adopts conclusions based on the reports of the Contracting Parties and the decisions emanating from the collective complaints' procedure. ESCR has provided a detailed set of principles to define the content and the limits of the right to collective action in the light of the ESC. The Committee has pointed out that Article 6.4 encompasses other actions taken by employees and trade unions, "including blockades or picketing".[13] In the case of LO and TCO v Sweden ESCR stated that national legislation which prevents *a priori* the exercise of the right to collective action is an infringement of the fundamental right of workers and trade unions to engage in collective action for the protection of their economic and social interests and would not be in conformity with the Article 6.4 of the Charter.[14]

2. Overview of ECHR and the Collective Action.

European Convention on Human Rights (ECHR) does not pay tribute in any explicit recognition of the right to collective action. In view of the absence of explicit recognition, the only possibility is judicial recognition of the right to collective action and right to strike stems from the freedom of association in Article 11 of the ECHR by the European Court of Human Rights (ECtHR). Article 11 of the ECHR starts to guarantee freedom of association generically. The provision starts with freedom of association with others and then includes "the right to form and to join trade unions for the protection of his interests". The question arises whether the existence of a specific right to form and join trade unions provides scope for the development of several corollary rights which are not considered to be inherent aspects of freedom of association.[15] In the very first case of National Union of Belgian Police v Belgium[16] ECtHR decided that trade unions should have means to protect the interest of their members has been reiterated ever since in constant case law. As a principle, the

[12] Dorssemont F., *The Right to Take Collective Action under Article 11 ECHR*, in Dorssemont F., Lörcher K., Schömann I. (eds.), *The European Convention on Human Rights and the Employment Relation*, Hart Publishing, London, 2013, 345; Evju S., *Right to Collective Action under the European Social Charter,* in *European Labour Law Journal,* 3, 2011, 199.
[13] *See*: ESCR, LO and TCO v. Sweden (85/2012) 19 July 2013, para. 117; ETUC/CGSLB/CSC/FGTB v. Belgium (59/200), para. 29.
[14] *See*: LO and TCO v. Sweden para. 120.
[15] Dorssemont F., *The Right to Take Collective Action in the Council of Europe: A Tale of One City, Two Instruments and Two Bodies*, in *King's Law Journal*, 27, 1, 2016, 68; Çetin E., *İnsan Hakları Avrupa Sözleşmesi'nin 8-11. Maddeleri Bağlamında Çalışanların Hakları*, Oniki Levha Yayıncılık, İstanbul, 2015, 490; Engin E.M., *İnsan Haklarına İlişkin Uluslararası Hukuk ve Türk Hukuku, Anayasa m.90 Son Cümle Hükmü ve Toplu Eylemler Üzerine*, in *Sosyal Güvenlik Dergisi*, 5, 2, 2015, 22.
[16] National Union of Belgian Police v Belgium (4464/70) 27 October 1975.

judgements show that right to organise could be used to develop corollary rights which are inherent to the right.[17]

The milestone judgement of the ECtHR, The Demir and Baykara decision,[18] in which Court had to decide whether a ban on municipal workers founding a trade union and order setting aside with retroactive effect a collective bargaining agreement is a violation of article 11 of the ECHR. With the Demir and Baykara decision, the ECtHR accepted that the right to collective bargaining constitutes an essential feature of Article 11 ECHR.[19] In addition, the Convention was interpreted as a "living instrument" by the Strasbourg Court, and the integrated approach, as common practices from contracting states, related international labour and human rights instruments, and the approach of their supervisory bodies, was taken.[20] The Court observes that the right of public officials to join trade unions has been confirmed on a number of occasions by the CEACR. Court also emphasised that the Committee, in its Individual Observation of the Turkish Government concerning ILO Convention No. 87, considered that the only admissible exception to the right to organise as contemplated by that instrument concerned the armed forces and the police.[21] The Court further notes that the ILO Committee on Freedom of Association adopted the same line of reasoning as regards municipal civil servants. As to European practice, the Court reiterates that the right of public servants to join trade unions is now recognised by all Contracting States.[22] The Court concludes from this that "members of the administration of the State" cannot be excluded from the scope of Article 11 of the Convention.[23] Accordingly, there has been a violation of Article 11 of the Convention on account of the failure to recognise the right of the applicants, as municipal civil servants, to form a trade union.

The case law of ECtHR mainly deals with on species of collective action, *i.e.* strike action. One of the ECtHR prominent cases Dilek and others v. Turkey[24] provides guidance on whether the Courts' protection could be extended to more comprehensive right to take collective action. In this case, applicants, public-sector workers on fixed-term contracts, who had taken part in union actions allowing motorists to drive past toll barriers without paying, had been ordered to pay damages in civil proceedings. The Court held that the right to take collective action is an essential feature of article 11, and there had been a violation of Article 11 of the Convention.[25] It particularly noted that the Turkish Government had not indicated whether there were other means for public servants to defend their rights. However, only "convincing and compelling reasons" could justify restrictions on trade union rights in the public sector.[26] The Court did not take the discussion of whether such action constitutes a strike but accepted and recognise more comprehensive right to take collective action.[27]

[17] Dorssemont F., nt. (15).
[18] ECtHR, Demir and Baykara v. Turkey, (34503/97) 12 November 2008.
[19] ECtHR, *ibidem*, para. 144-145.
[20] ECtHR, *ibidem*, para. 147-152.
[21] ECtHR, *ibidem*, para. 148.
[22] ECtHR, *ibidem*, para. 165.
[23] ECtHR, *ibidem*, para. 107, 168.
[24] ECtHR, Dilek and others v. Turkey, (74611/01, 26876/02 and 27628/02) 28 April 2008.
[25] ECtHR, *ibidem*, para. 65.
[26] ECtHR, *ibidem*, para. 61, 66.
[27] *See*: Dorssemont F., nt. (15).

Once again, the ECtHR in Enerji Yapi-Yol Sen v. Turkey[28] was challenged to answer their approach concerning the right to strike. In a particular case, the Court confirmed that the right to strike is a crucial element of collective bargaining, and it should be protected under Article 11 of the ECHR. Similarly, to the Baykara case, the Court adopted an "integrated approach". The judgement explicitly refers to the interpretation developed in Demir and Baykara decision. Thus, it examines the relationship between the right to strike and the right to bargain collectively. This examination Court primarily refers to the ILO Convention No. 87. Even though Convention No. 87 does not explicitly recognize on right to strike the Court considers the interpretation given to this instrument by ILO Supervisory bodies. The Court had implicitly recognised right to strike as an essential element of the right to trade union association. However, it is important to emphasize that the Court stated in its judgement "*right to strike was not absolute and could be subject to certain conditions and made the object of certain restrictions",* so that "*certain categories of civil servant could be prohibited from taking strike action*".[29]

The right to collective action, particularly the strike action, was also discussed in the subsequent case Saime Özcan v. Turkey.[30] The ECtHR noted that the applicant was initially sentenced to imprisonment, which was later converted to a fine, and temporarily suspended from duty as a teacher for participating in the strike organized by a trade union (Eğitim-Sen) to improve the conditions of civil servants. In this case, an integrated approach was implemented, and the Court with the same reasoning as previous cases found a violation of Article 11. However similar to the Enerji Yapi-Yol Sen, the Court stressed that the Government has not provided any convincing facts or arguments which could lead to a different conclusion in the present case and so the sanction imposed on the applicant was not "necessary in a democratic society".[31] The Court was very careful on the interpretation of article 11 on the right to collective action and gave signals that the further cases brought before the Court might have had different results.

Since 2014, there has been an important shift in the Courts' interpretation of Article 11 on the right to collective action. In 2014, The case of National Union of Rail, Maritime and Transport Workers v. United Kingdom.[32] The ECtHR had to answer the question of whether secondary action (sympathy action) is covered by Article 11 (1) Even though the Court affirmed that the right to secondary strike was protected under Article 11, it was ruled that the UK's ban on secondary strikes did not violate the article at issue. The Court gave a wide margin of appreciation to the respondent State as to how trade union freedom may be secured.[33] In the RMT case, the ECtHR refuted the argument that the Enerji Yapi Yol Sen to ILO standards could be interpreted since the right to strike is corollaries indissociable with

[28] ECtHR, Enerji Yapi-Yol Sen v. Turkey, (68959/01) 21 April 2009.
[29] Citing Pellegrin v. France, (28541/95), 08 December 1999.
[30] ECtHR, Saime Özcan v. Turkey, (22943/04) 15 September 2009. The court stressed that the fact that for five and a half years she had had a criminal conviction and had been barred from exercising her profession made her victim.
[31] ECtHR, *ibidem*, para. 23.
[32] The ECtHR, National Union of Rail, Maritime and Transport Workers v. United Kingdom (31045/10) 08 April 2014.
[33] See the criticism in: Ewing K.D., Hendy Q.C. J., *The Trade Union Act 2016 and the Failure of Human Rights*, in *Industrial Law Journal*, 45, 3, 2016, 416.

the right to organise. With RMT case raised a significant issue where the Court classified a secondary act as an "*accessory rather than a core aspect of trade union freedom*".[34] RMT case created indignation among labour law scholars in the light of Demir and Baykara and other prominent cases concerning Article 11. With the RMT case it is clear the Court appeared to change its approach significantly towards the scope of protection of the right to strike which is rightly referred to as "*the ECHR gives with one hand and takes backs with another*".[35]

The judgement of the Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway[36] in 2019, by the ECtHRs is also essential for the future interpretation of the Court concerning the protection of collective labour rights. In the wake of the RMT case, there is ambiguity regarding whether Article 11 also encompasses non-traditional collective actions like boycotts.[37] The Court stated that "*Boycott may be the only means available to a trade union to put pressure on an employer in defense of workers' rights*".[38] The Court also gave reference to other supranational bodies as the CJEU that it highlighted the right to collective action constitutes a fundamental right under the EU law. Even though the Court accepted that the boycott aimed to ensure safe working conditions,[39] the ECtHR found that there had been no violation of the Article 11 One of the reasons for this was the large margin of appreciation the ECtHR granted the national authorities in line with the RMT case.

Recently, the ECtHR has given an important decision in the Humpert and Others v. Germany,[40] on the right to strike and the Court had to answer the question of whether a prohibition on strikes affects an essential element of trade-union freedom under Article 11 of the Convention. Germany, similar to Türkiye, applies a strike ban on civil servants that prohibits them, including teachers, from taking collective action. The ECtHR stated that civil servant status is thus more advantageous than contractual State employee status in several ways, both legally and in terms of resulting material conditions.[41] The Court thus concludes that the measures taken against the applicants did not exceed the margin of appreciation afforded to the respondent State in the circumstances of the present case and were shown to be proportionate to the important legitimate aims pursued. Accordingly, the prohibition on strikes did not violate Article 11 of the Convention. It is very interesting that in Demir and Baykara case the Turkish Government objected that civil servants covered by a specific set of rules and status is more advantageous than contractual State employee status in several ways such as, job security, pay and working conditions, the restriction should be deemed in

[34] National Union of Rail, Maritime and Transport Workers v. United Kingdom, para. 77, 87.
[35] Bogg A., Ewing K.D., *The Implications of the RMT Case*, in *Industrial Law Journal*, 43, 3, 2014, 221.
[36] ECtHR, Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway, App. No. 45487/17, 10.06.2021.
[37] Stylogiannis C., *The 'Back And Forth' In The Protection Of (Collective) Labor Rights Under The ECHR Continues: The Holship Case*, in *Comparative Labor Law & Policy Journal*, 38, 2021, 6; Graver H.P., *The Holship ruling of the ECtHR and the protection of fundamental rights in Europe,* in *ERA Forum,* 23, 2022, 27-28.
[38] Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway, para. 84.
[39] Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v. Norway, para. 86.
[40] Humpert and Others v. Germany, (59433/18, 59477/18, 59481/18, and 59494/18) 14 December 2023.
[41] Humpert and Others v. Germany, para. 138.

the margin of appreciation of the State. The ECtHR did not accept this argument in Demir and Baykara using an integrated approach and more importantly accepting collective bargaining as a fundamental right of workers, whereas the same argument is accepted in Humpert and others' decision.

It is clear there has been an important change in The Court's interpretation of Article 11 and recently it would not be wrong to say that the Court has been interpreting Article 11 very narrowly on the right to collective action and right to strike since the RMT case and the Humpert decision reaffirms this conclusion. It is very disappointing that the ECtHR, the leading supervisory body changed the discourse in both human rights and labour law and has great importance for the development of the labour rights in the future. It is our expectation that the ECtHR should take up the challenge to take a more progressive stand and very carefully assess the margin of appreciation afforded to the respondent State when the conflict is about core labour rights.

3. Right to Collective Action and Turkish Collective Labour Law.

3.1. General overview.

Türkiye has significantly influenced the development of ECtHR case law on article 11 of the ECHR and transformed the discourse on the right to strike and collective action since the famous case of Demir and Baykara. With 3,820 rulings pronounced from 1959 to 2021, statistically, Türkiye is at the top of the list of countries in terms of the number of rulings. With 418 violations of freedom of expression and 111 violations of the freedom to assembly and association, Türkiye also ranks first in that regard.[42] After an overview of the ECtHR interpretation of article 11, it has to be articulated how the ECtHR case law, which returns to the national level and affects the national collective labour law system in particular on the right to collective action. To do so, it first should be articulated that the general overview of the Turkish collective labour law and regulation on the right to collective action and the right to strike.

The industrial relations system in Türkiye can be characterized as detailed regulations relating to collective labour rights -particularly strikes and lockouts. Whereas right to collective action is not guaranteed explicitly in any legal instrument in the Turkish law, the right to strike is a fundamental right[43] and is protected by the Constitution.[44] Pursuant to Article 54 of the Constitution that workers

[42] *See*: https://www.echr.coe.int/statistical-reports ; https://bianet.org/haber/turkey-ranks-first-in-violations-of-freedom-of-expression-show-annual-ecthr-statistics-25679 (accessed 30 October 2024).
[43] Due to this explanation on collective action that sometimes overlap with right to strike, since it is only form accepted by the Law.
[44] The Constitution of the Republic of Türkiye, 1982, available at: https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf (accessed 02 November 2024).

have the right to strike in the event of a labour dispute arising during negotiations for the conclusion of a collective labour agreement while the procedure and conditions for its exercise, as well as its scope and exceptions, are regulated under an Act.[45]

It is also important to evaluate the right to take collective action in the light of the Constitutional article 90/the last sentence which regulates the conflict between international agreements concerning fundamental law and positive law. The Constitutional article 90/the last sentence states that in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. Even though there are different interpretations,[46] in our view article 90/the last sentence is a legal base for recognising the right to collective action[47] since Türkiye is a part of the ILO Convention No. 87 and 91 and the ECHR.[48]

Since there is no explicit recognition and regulation on the right to collective action, we should articulate the right to strike in Türkiye. Even though the right to strike is fundamental and constitutionally protected, there are many restrictions on the right to strike in terms of procedural requirements, implementation, and the scope of the application. The Law on Trade Unions and Collective Labour Agreements No. 6356[49] is the primary legislation regulating collective labour law in Türkiye. In the regulation, there is a distinction that if the action cannot meet the criteria by Act No. 6356, it is considered unlawful strike by Law and by Court practices. In Turkish law, the right to strike can only be used by employees when there is a collective dispute with their own employer. The scope of the application of the right to strike is also restricted in that it can only be used by employees and all civil servant

[45] Constitution also protects right to organize union in the Article 51/1 as "*Employees and employers have the right to form unions and higher organizations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labor relations. No one shall be forced to become a member of a union or to withdraw from membership".*

[46] On the contrary, according to the view that does not agree with the conclusion that the international norms in question have become domestic law rules in accordance with the Article 90 of the Constitution; that the right to collective action is not mentioned in the documents in question and that the interpretations of the ILO and the ECHR regarding these documents have not become domestic law norms, collective actions cannot be carried out against the current legislation. *See*: Ekmekçi Ö., *Toplu İş Hukuku Dersleri*, On İki Levha Yayıncılık, İstanbul, 2022, 676-684. For us, an approach that characterizes peaceful collective actions outside the legal definition of strike as unlawful will contradict the international norms to which Türkiye is a party.

[47] Türkiye ratified the Revised European Social Charter on 27/06/2007 and has accepted 91 of the revised Charter's 98 paragraphs. It has ratified the Amending Protocol of 1991 on 10/06/2009. However, the provisions on right to organize at the Article 5 and right to the collective action article 6.4. is not accepted. *See*: https://www.coe.int/en/web/european-social-charter/turkey (accessed 02 November 2024).

[48] Çelik N., Caniklioğlu N., Canbolat T. and Özkaraca E., *İş Hukuku Dersleri*, Beta, İstanbul, 2023, 1110; Güzel A., Ugan Çatalkaya D., *Uluslararası İnsan Hakları Sözleşmelerinin İç Hukuka Doğrudan (Self Executıng) Etkisi ve Örnek Bir Yargıtay Kararı Üzerine*, in *Çalışma ve Toplum*, 2, 81, 2024, 433; Güzel A., *ILO Normlarının İç Hukuka Etkisi ve Türk İş Hukukunun Gelişimine Katkısı ILO Normları ve Türk İş Hukuku*, *İş Hukuku ve Sosyal Güvenlik Hukuku Türk Milli Komitesi,* Ankara, 1997, 20; Sur M., *İş Hukuku Toplu İlişkiler*, Turhan, Ankara, 2024, 434; Ekinci A., Uçar A., *Anayasa Mahkemesi ve Yargıtay Kararları Çerçevesinde Türk Hukukunda Toplu Eylem Hakkı: Kapsam v Sınırlarına İlişkin Bir İnceleme,* in *Çankaya Üniversitesi Hukuk Fakültesi Dergisi*, 5, 1, 2020, 3348; Öktem Songu S., *Anayasa Mahkemesi'nin Bireysel Başvuru Kararlarında Sendika Hakkı*, Beta, İstanbul, 2020; Öztürk B., *Karşılaştırmalı Hukuk ve Türk Hukukunda Grev (Toplu Eylem) Hakkının Değerlendirilmesi: Üç Farklı Yargıtay Kararı Işığında Toplu Eylem Hakkı,* in *Çalışma ve Toplum*, 51, 2016, 1819.

[49] The Law on Trade Unions and Collective Labor Agreements, No. 6356, 7/11/2012.

has no right to take collective action or right to strike. To be considered legal, strikes must meet three criteria; called by the competent parties and conducted in conformity with the Law; their purpose must be solely work-related. Lawful strikes are defined as the cessation of work by employees to address interest disputes that arise during collective negotiations for a collective agreement.

According to Article 58(1) of Act No. 6356, a *strike* is defined as:

any concerted cessation by employees of their work to halt the activities of an establishment or paralyzing activities to a considerable extent, or any abandonment by employees of their work by a decision taken to that effect by an organization.

Lawful strike means:

any strike called by employees to safeguard or improve their economic and social position and working conditions in the event of a dispute during negotiations to conclude a collective agreement (The Article 58(2)).

In addition, the definition of the strike indicates that the purpose should be safeguarding or improving their economic and social position and working conditions.[50]

All the conditions required by law must have been met to be considered a lawful strike. The conditions for the strike to be accepted as lawful should be that the strike must have an occupational objective related to an interest dispute, the strike decision must have been taken by a labour union which is the party to collective bargaining and employees must leave the establishment (workplace) after stopping work. The last requirement of an action considered strike lawful is that the strike must be implemented by a series of requirements stipulated by Act No. 6356. As mentioned above, the strike is permissible only in the event of a collective interest dispute, and all the formal requirements, including the mediation process, must have been exhausted before the strike can lawfully begin. General strikes, sympathy strikes, political strikes, work slowdowns, sit-ins, and other forms of collective action are all considered unlawful according to the Law and Court practices. The ILO had long criticized the bans on political strikes, general strikes, sympathy strikes, and other forms of industrial action in Türkiye. In 2010, there was a constitutional referendum and amendment, and the explicit ban on political strikes, general strikes, sympathy strikes, and other industrial action was removed from the Constitution. Similarly, Act No. 6356 does not refer to such forms of industrial action. However, despite the removal of the Constitution political strikes, general strikes, sympathy strikes, and other forms of industrial action are still not considered lawful, due to Act No. 6356 limiting what constitutes a lawful strike. The term "unlawful strike" refers to any strike that does not meet the necessary conditions. Unlawful strikes have severe consequences. In case of an unlawful strike, the employer reserves the right to terminate the

[50] Tuncay A.C., Savaş Kutsal B., and Bozkurt Gümrükçüoğlu Y., *Toplu İş Hukuku*, Beta, İstanbul, 2023, 382, 437. See, for a general overview on trade union protection and Türkiye: Astarlı M., *Avrupa İnsan Hakları Mahkemesinin Sendika Hakkının Etkili Korunmasına İlişkin Tek Gıda İş Sendikası/Türkiye Kararı ve Türk Hukuku Bakımından Çıkarımlar*, in *Çalışma ve Toplum*, 2, 61, 2019, 1237-1258; Çelik A., *Trade Union Rights in Turkey: A Gloomy Picture,* in *Journal of the International Centre for Trade Union Rights*, 22, 3, 2016, 5.

employment contract of any employee who has supported the decision to call that strike, participated in it, urged others to join it, or sustained it. This contract will terminate without any liability to provide notice or compensation. (Article 70 of Law No. 6356).

Even there is a lawful strike, it can be postponed by the President. According to Article 63 of Act No. 6356, a lawful strike or lock-out that has been called or commenced may be suspended by the President for sixty days with a decree, if it is prejudicial to public health or national security. After a suspension decree has entered into force, a mediator is designated and shall make every effort for the settlement of the dispute during the suspension period. During the suspension period, the parties may also agree to refer the dispute to a private arbitrator. After a mediation process, if an agreement is not reached before the expiry date of the suspension period, the High Board of Arbitration settles the dispute upon the application of either party within six working days. In this article, the term used as "postponement", the strike actually is cancelled, and there is no legal way to restart the strike.[51] In the end, the dispute is settled by composing of collective agreement by the High Board of Arbitration. The postponement of a strike is another hindrance to the effective protection of the right to collective action and the right to strike.

It is important to assess the Supreme Court's interpretation of the right to collective action. We believe that it is appropriate to include here one of the decisions of the Supreme Court that we have seen addressing the issue in the most detail and where the right to collective action is accepted as a democratic right in the case law. In the decision of the 9th Civil Chamber of the Supreme Court[52] although the action was found to be disproportionate the Supreme Court, referred to Article 5 of the Revised European Social Charter, Article 11 of ILO Convention No. 87 and the first article of Convention No. 98. The Supreme Court stated:

according to the international norms, short-term, collective actions that affect the economic and social situation of workers or workplace practices are included in the right to collective action. Such actions cannot be prohibited unless they are purely political in nature.

Since the short-term, peaceful protest action in question was unlawful under Act 6356 contrary to the international and regional instruments, conflict was solved by the direct implementation of Article 90/5, by giving supremacy to the international instruments. The

[51] Ekmekçi Ö., Korkusuz M.R., and Uğur Ö., *Turkish Collective Labour Law*, Oniki Levha Yayıncılık, İstanbul, 2021, 197-198.

[52] The Judgment 9th Civil Chamber of the Supreme Court numbered E. 2017/28281, K. 2018/3771. See also the 7th Civil Chamber of the Supreme Court numbered E. 2014/7643, K. 2014/12368. This case is about termination of employment contract due to the collective action including blocking of entrance to the workplace for five hours by approximately hundred workers. The Supreme Court stated that "*Both the ILO, the European Convention on Human Rights and Court decisions, and again within the scope of the European Social Charter, the right to collective action, which also includes strike, is accepted as a fundamental human right. In this context, the right to collective action has been adopted as a broad concept, and in addition to strikes, actions such as strike-like protest actions and slowing down work have been included in this regard… Another important regulation in terms of the right to strike is the European Social Charter and the European Committee of Social Rights, which is its supervisory body. The Article 6/4 of the European Social Charter regulates the "right to collective action, including the right to strike"… "It should be noted that Turkey has not ratified the Articles 5 and 6 of the European Social Charter. However, the European Court of Human Rights has applied the relevant provisions of the Charter in its decisions regarding Turkey". See*: Gülmez M., *Toplu Eylem Hakkına Dahil Protesto Grevleri, Yasa Dışı Grev Değildir Yargıtay 7. Hukuk Dairesi Kararı Karar Eleştirisi,* in *Çalışma ve Toplum*, 4, 2014, 233.

decision is very welcomed and seen as a positive step towards to recognition of collective action.[53] It is also worth mentioning that despite the fact that Türkiye did not accept Article 5 and Article 6.4 of ESC, the Supreme Court had a specific reference to the Charter and other instruments, it is a very positive step to judicial recognition of the right to collective action.

However, it should be pointed out there are limited judgements on acceptance of the collective action by referencing international and regional instruments at the Supreme Court, despite the judgements that we evaluate. Except for the limited judgements which refer to international instruments; there is a regressive approach in the Supreme Court decisions on the protection of the right to collective action.[54] Besides, in these judgements even though the Supreme Court accepted the action taken for a legitimate purpose, in most of the decisions, it is concluded that the action taken was disproportionate and that the termination of the workers' employment contracts was based on a just cause or valid reason.[55] In determining that the actions were not proportionate, it is noteworthy that the decisions do not include sufficient justification, but it is generally stated that the action is disproportionate according to its duration, and sometimes together with the duration of the action, its timing and number of participants; while actions lasting 3 to 4 days were found disproportionate; it is noted that a 10-hour action is deemed proportionate, for another example 9-hour action can also be found disproportionate.[56] It would not be correct to base the assessment of proportionality solely on the duration, but even if a determination is made based on the duration, it would not be appropriate if the decision did not include its justification. Such reluctance on the Supreme Court's recognition and effective protection of the right to collective action results from ambiguity on which collective actions are protected. It makes also it very hard for workers and trade unions to use the right to collective action since it could result in the action deemed unlawful strike and workers can face the termination of their employment contracts without any notice period or compensation.

[53] Uncular S., *The right to collective action under European law and Turkish law: What kind of present and future?,* in *European Labour Law Journal*, 9, 2, 2018, 168.

[54] Uncular S., *ibidem*. It is also criticized as supernational and international aspects are ignored and labor law as seen "law of national regulations and court decisions due to judicial conservatism".

[55] In a very famous case of 22nd Civil Chamber of the Supreme Court in 2013, employees taking an collective action with a call of the *Hava İş Trade Union*, whose aim was to protest for nine hours against a legislative amendment proposal on the prohibition of strike in the air industry, the termination of their employment contracts of strikers by Turkish Airlines, was found by the Supreme Court on valid reasoning. Despite the Supreme Court referred to internation, supranational bodies, long duration and potential loss violated the principle of proportionality, the termination of the employment contracts was justified. The 22nd Civil Chamber of the Supreme Court numbered 2013/7515E. and 2013/10949K. These judgements also continued in 2016-2017 decision of 9th Civil Chamber of the Supreme Court where there are many protests in metal industry with very broad participation. *See*: Doğan S., *Toplu Eylem Hakkı ve Siyasi Grev Bağlamında Bir Yargıtay Kararı İncelemesi*, in *Çalışma ve Toplum*, 40, 2024, 315-316; Ugan Çatalkaya D., *Demokratik ve Barışçıl Toplu Eylem Hakkının Kullanılması İş Sözleşmesini Fesih Nedeni Olabilir mi Sorusuna Yanıt Arayışı: Yargıtayın Zorlu Görevi*, in *Çalışma ve Toplum*, 3, 78, 2023, 2102.

[56] See the cases: from 22nd Civil Chamber of the Supreme Court numbered 2013/7515E. and 2013/10949K.; numbered E. 2017/42988 E., 2017/23380 K.; numbered 2017/42994 E., 2017/23386 K.; numbered 2018/7413 E., 2018/12421 K. *See*: https://karararama.yargitay.gov.tr/ (accessed 02 November 2024). Also see the criticism: Ugan Çatalkaya D., nt. (55).

3.2. Constitutional Courts' Judgements on the Right to Collective Action and the Effect of the ECtHR Judgements.

As was explained in detail in the previous section, there is no positive right in the legislation to protect right to collective action. Besides, the right to strike is only a protected form of collective action that has many substantive and procedural requirements by Act No. 6356 and can be postponed by the President on the ground of prejudicial to public health or national security. In this regard, the Supreme Court's reluctance to protect right to collective action has been challenged in the Constitutional Court. The most recent two cases of Constitutional Courts on collective action is a very important, and the Court had to answer the question of the implementation of Article 90/last sentence which in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights, and freedoms, and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. In these two cases, the Constitutional Court has used the same approach taken by the ECtHR, and they are referencing the ECtHRs' prominent cases.

In the cases of Ahmet Sefa Topuz and Others,[57] the Constitutional Court had to answer once the collective labour agreement is concluded and put into effect whether workers can take collective action. In the facts of this case, there was a four-month time difference between the collective bargaining agreement signed with other employers and the collective bargaining agreement signed with Bosch, which all employees are represented by the same union. Some employees working in the same sector took collective action demanding that their wages were lower than those of Bosch employees and that their collective agreements should be brought to the same status (pay rise) as the collective agreement at Bosch since they have been represented by the same union. The first strikes started in May 2015 employees were demanding a wage increase at the same level as Bosch employees and the actions grew and spread to workplaces in the metal sector. As a result of this situation, many employees collectively resigned from the Türk Metal, claiming that the Union did not represent them properly and did not protect their interests. Applicants and other workers took a three-day collective action, and their employment contracts were terminated on the grounds of joining an unlawful strike. The Constitutional Court stated:

Once the collective labour agreement is concluded, it cannot be said that workers do not have the opportunity to express their demands for solutions to economic and social policy issues that directly concern them and the problems they encounter at the workplace during their work.[58]

The Court, however, emphasizes that the focal point of the applicants' actions was the collective bargaining agreement signed by the Union that they were a member of at the other workplace under better conditions. According to the Court, the applicants made these objections by striking work for 3 days at the workplace and as a result, their employment contracts were terminated. The Court found that "considering the timing, number of

[57] The Constitutional Court of the Republic of Türkiye, Ahmet Sefa Topuz and the Others (2016/16056) 21.04.2021.
[58] The Constitutional Court of the Republic of Türkiy, *ibidem*, para 52.

participants, and duration of the applicants' actions, it cannot be said that such an action, which is not considered to have the aim of seeking rights against the employer, is proportionate".[59] Finally, the Constitutional Court concluded that the action was not proportionate and ruled that there was no violation of applicants' trade union rights. It cannot be understood from the decision whether the aim of the action was found legitimate by the Constitutional Court. The Constitutional Court should have determined first whether the aim was legitimate or not, and if found legitimate then should assess the proportionality in the previous stage. If the Court believes that the aim is not legitimate, then there was no need to assess the proportionality of the collective action.

After the decision of Ahmet Sefa Topuz and the Others, the Constitutional Court once again challenged many complex issues on collective action in the application of Muharrem Çimen.[60] In this very recent case, the Constitutional Court had to determine collective action such as a slowdown of work is protected by the Constitutional Articles 51 and 54. It is further had to assess the collective action was against the decision of postponement of the strike could be a legitimate aim and benefit the protection in the Constitution. In this case, The United Metal Workers Union decided to stage a strike involving approximately fifteen thousand workers and thirty-eight workplaces in Türkiye. On 29 January 2015, before the strike began, the Council of Ministers postponed it for sixty days. Because their right to strike had been nullified by the postponement, all employees at the workplace began to slow down in their work. These actions lasted for twenty to twenty-five minutes for eleven days (between 2 February and 12 February 2015). On 16 February 2015, the employer terminated the employment contracts of thirty employees with just cause on the grounds that they had slowed down their work and conducted unlawful strikes. The applicant, one of these employees, filed a lawsuit demanding reemployment and trade union compensation. The first instance (labour) court decided to reinstate the applicant because the actions had not caused irreparable harm and were democratic but rejected the compensation demand. The Supreme Court overturned the Labour Court's decision and dismissed the case, holding that it was illegal that workers had slowed down their work after the Council of Ministers postponed the strike. It ruled that the grounds for the termination were valid and there was an unlawful strike. The worker Muharrem Çimen then made an individual application to the Turkish Constitutional Court. The Constitutional Court, before it is evaluation, had reference to the international and regional instruments and specifically to the ECtHR case law. The Constitutional Court stated that according to the ECtHR, the fundamental aspects of trade union freedom under Article 11 of the Convention is characterized by two guiding principles. Firstly, the ECtHR has stated that it will consider the measures taken by the relevant State to protect trade union freedom -within the margin of appreciation. Secondly, the ECtHR has stated that restrictions on the fundamental elements of trade union freedom which would deprive the essence of this freedom will not be accepted.[61]

The Constitutional Court emphasised that the right of a union to demand that the employer be heard on behalf of its members and, in principle, the right to bargain collectively

[59] The Constitutional Court of the Republic of Türkiy, *ibidem*, para 64-65.
[60] The Constitutional Court of the Republic of Türkiye, Muharrem Çimen (2016/5002) 23 March 2023.
[61] The Constitutional Court of the Republic of Türkiy, *ibidem*, para 27, 28.

with the employer is a fundamental element of Article 11. The Court continued on collective action:

The ECtHR has underlined that; within the framework of the fundamental principle of the right to collective bargaining, it must be possible for a union that is not recognised by the employer to take steps, including collective action if necessary, to persuade the employer to enter into collective bargaining on issues that it considers necessary for the interests of its members.[62]

The Constitutional Court referred to the RMT case of ECtHR and stated that although the right to collective action is not considered a fundamental element of freedom of association, the right to strike is clearly protected by Article 11 as part of trade union activity and the Convention requires is to ensure that the unions make efforts to protect the interests of their members under national the law and under the conditions that are not contrary to the Article 11.[63]

The Constitutional Court emphasized that workers have the right to strike in case of disagreement during collective bargaining negotiations protected by the Constitution. Therefore, the right to strike is one of the most powerful means of a labour struggle that enables workers to voice their economic and social demands. Considering the importance of the constitutionally guaranteed right to strike, the Court states that the compelling reason limiting the right should be convincingly and clearly put forward. Otherwise, exercising the right to strike and collective bargaining, which is a constitutional right, becomes meaningless.[64]

In this respect, the Court also emphasised that "*short-term protest actions, which is considered a democratic right, should be tolerated against practices that affect workers' economic, social, and working conditions*".[65] In the judgement question, the Constitutional Court found that Supreme Court only stated that the applicant committed an unlawful act because of the existence of the decision to postpone the strike, and his employment contract was terminated for a valid reason and did not make a further assessment.[66] The Constitutional Court concluded that the action in which the applicant participated was short-lived and peaceful, intending to voice the disputes regarding the collective bargaining agreement, the aforementioned action should be evaluated within the scope of the trade union rights. Within the scope of all these explanations, it concluded that the intervention by the employer in the applicant's trade union right in the concrete application would have a deterrent effect on the exercise of trade union rights. Besides, it is also stated that the state could not fulfil its positive obligations due to the lack of an effective judicial review required by the constitutional right.[67] With the justification explained, the Constitutional Court found that Article 51 of the Constitution, which protects trade union rights, has been violated.

[62] The Constitutional Court of the Republic of Türkiy, para 28.
[63] The Constitutional Court of the Republic of Türkiy, *ibidem.*
[64] The Constitutional Court of the Republic of Türkiy, *ibidem*, para. 46.
[65] The Constitutional Court of the Republic of Türkiy, *ibidem*, para.47.
[66] The Constitutional Court of the Republic of Türkiy, *ibidem*, para. 47, 48.
[67] The Constitutional Court of the Republic of Türkiy, *ibidem*, para. 39, 40 and 51.

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4. Evaluation and Conclusion.

For over a decade, the interpretation of Article 11 of the ECHR has been a source of intense discussion on labour rights. Article 11, a cornerstone of the ECHR, not only safeguards the freedom to protect the interests of trade union members by industrial action but also the right to bargain collectively and to enter into collective agreements. This crucial interpretation of Article 11 was first articulated in the landmark case of Demir and Baykara in 2008 by the Grand Chamber, a ruling that has been widely praised for its progressive stance and changed the discourse on collective labour rights. Since then, the ECtHR has faced the challenge of determining the scope of application of Article 11 on the right to take collective action. It is clear there has been a change in the Courts' interpretation of Article 11 since the RMT case and the very recent case of Humpert and others' decision reaffirms this conclusion. Türkiye, one of the member states of the Council of Europe and has significantly influenced the development of the ECtHR interpretation of the 11 of the ECHR. In Turkish collective labour law, the right to collective action is not guaranteed explicitly in any legal instrument. On the other hand, the right to strike is a fundamental right and protected by the Constitution that is regulated too restricted.

According to Act No. 6356, any strike called without fulfilling the criteria of a lawful strike is prescribed as an unlawful strike. Besides a very narrowly and perhaps reluctant interpretation of the collective action of the Supreme Court, it has been challenged in the recent cases on collective action on the Constitutional Court. In 2023, the Constitutional Court, in the Muharrem Çimens' application, had to determine whether the termination of the applicant's employment contract due to their participation in a slowdown action was lawful or not and can such a form of collective action benefit the same level of protection as the right to strike. In these cases, the Turkish Constitutional Courts departed from the Supreme Court's restrictive application of collective actions, as per Law No. 6356. Here this research aimed to demonstrate that the Turkish Constitutional Courts have reinterpreted freedom of association and the right to collective bargaining and that ECtHR cases have significantly influenced and paved the way for their rulings. It is important to note that the Turkish Constitutional Court's re-interpretation will not only affect the current Supreme Court decision and the application of Law No. 6356 but will also set a precedent for future cases.

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